

THE UNIVERSITY OF MIAMI
NATIONAL SECURITY & ARMED CONFLICT
LAW REVIEW

Volume 2 – Summer 2012

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To look beyond tomorrow, we must often look behind us. In few areas of study is this idea more relevant than in the law and its application to national security issues, armed conflict, and global humanitarian efforts. As in the past, today's developments, such as cyberspace, globalization, and technological advancements, diminish the "distance" between individuals. Yet, as our world shrinks, complicated and new legal frontiers are exposed.

That being said, new theories are constantly tested on the international stage and those that meet the demands of the modern global environment survive. This journal, the National Security and Armed Conflict Law Review ("NSAC"), is a cradle for those ideas. It serves as an opportunity for our authors to study the patterns of the past and as a canvas to propose new concepts and comparative analyses for the future. Fundamental in every article—and the design of the journal itself—is the idea of looking to the trends of the past in an effort to prepare for what lies ahead.

Recognizing changing patterns of how readers access information, NSAC became the first primarily online journal at the University of Miami School of Law last year. This year has shown exponential growth. The online journal is more inclusive, interactive, and vibrant. By sidestepping traditional recruiting methods, our staff is more diverse, devoted, and enthusiastic. Our readership continues to expand and as a result, there has been a school-wide initiative for all other University of Miami law journals to follow suit. It is this innovation that is also reflected in our work.

So I invite you to read on, and—as we have—look forward.

Sincerely,

Justin Levine
Editor-in-Chief

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ARTICLE

The *Ferrini* Doctrine: Abrogating State Immunity from Civil Suit for *Jus Cogens* Violations

Natasha Marusja Saputo*

ABSTRACT

Article 10 of the Italian Constitution incorporates generally recognized principles of international law.¹ Thus, State immunity from civil suit in the domestic courts of another State—a principle generally recognized in international law—would apply in Italy. However, the protection of fundamental human rights is another generally recognized principle in international law and the ostensible conflict between these two principles has resulted in a series of controversial rulings issued by the Italian Court of Cassation. These rulings allow for the abrogation of State immunity from civil suit in the domestic courts of another State for alleged violations of *jus cogens* or peremptory norms²—what this paper will refer to as the *Ferrini* doctrine. Although the central premise behind the Court’s reasoning appeals to the values underlying international law, it is by no means authoritative under the international law regime in which rules and principles are developed through consensus of what is generally recognized. As such, the Italian Court of Cassation’s decisions are not just controversial they are technically unlawful under customary international law. However, such deviation is the sole means through which customary international law changes and evolves. Were the Italian Court of Cassation to make its reasoning logically consistent and, at this initial stage, less sweeping in breadth, the *Ferrini* doctrine arguably has the potential to be effectively exported to other States thereby furthering a change in customary international law on State immunity.

This paper will: (1) provide a brief survey of some of the Italian Court of Cassation’s controversial rulings regarding State immunity from civil suit; (2) examine the responses to the decisions from other States and academia to evaluate the validity of such a rule; (3) propose a revised version of the *Ferrini* doctrine which would enhance its viability and impact on customary international law; and (4) reach a conclusion as to whether such a change is advisable.

* LL.M., with *Distinction* and *Dean’s List Honors*, Georgetown University Law Center, May 2011. Recipient of the Thomas B. Chetwood S.J. Prize. J.D. *Magna Cum Laude*, George Mason University School of Law, May 2010.

¹ See Art. 10 Costituzione [Cost.] (It.), available at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (English) (“The Italian legal system conforms to the generally recognized principles of international law.”).

² *Jus cogens*, also known as a peremptory norm of international law, is a “norm of general international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 50, May 23, 1969, 1155 U.N.T.S. 331, available at <http://untreaty.un.org/cod/diplomatic-conferences/lawoftreaties-1969/vol/english/confdocs.pdf>.

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I. ITALIAN COURT OF CASSATION: DECISIONS ON STATE IMMUNITY FROM CIVIL SUIT

A. FERRINI

Luigi Ferrini filed suit against the Federal Republic of Germany in the Italian Court of Arezzo on September 23, 1998 seeking damages for his 1944 capture in Italy by German armed forces and subsequent deportation and forced labor in Germany.¹ The Court of Arezzo held that the claim was not within the jurisdiction of the Italian courts, finding that Germany was shielded from suit by “the Principle of State immunity” because Ferrini’s claim arose from actions “carried out by a foreign State in the exercise of its sovereign powers.”² The Florence Court of Appeals upheld the lower court’s reasoning and dismissed Ferrini’s appeal.³ However, the Italian Court of Cassation reversed, holding that “the Federal Republic of Germany does not have the right to be declared immune from the jurisdiction of the Italian courts.”⁴

The Court of Cassation began with the premise that while the existence of State immunity was “beyond question . . . the extent of this principle . . . is gradually becoming more limited.”⁵ With this in mind the Court framed the issue facing it as:

[W]hether immunity from jurisdiction is capable of operating even in respect of conduct which . . . is so extremely serious that, in the context of customary international law, it belongs to that category of international crimes which are so prejudicial to universal values that they transcend the interests of individual States.⁶

The Court reasoned that although the “modus operandi” of the exercise of a State’s sovereign powers is “beyond censure . . . this does not prevent investigations from being launched into possible crimes committed during the course of the activities.”⁷ Moreover, under Article 10(1) of the Italian Constitution, violations of fundamental human rights, which constitute international crimes come within the purview of the Italian judiciary.⁸ The Court held that deportation and forced labor were, now and at the time of the acts in question, recognized as war crimes and violations of international law by “all civilized nations.”⁹

The Court of Cassation asserted that it is increasingly recognized that international crimes “threaten the whole of humanity and undermine the foundations of peaceful international relations” and that human rights are “norms, from which no derogation is permitted, which lie at the heart of the international order and prevail over all other conventional and customary norms, including those which relate to State immunity.”¹⁰ Reasoning by analogy, the Court concluded that if grave human rights violations constitute crimes under international law for which universal jurisdiction applies, “there is no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes.”¹¹

¹ Cass., sez. un. 11 marzo 2004, n. 5044, Foro It., 2004, I, ¶ 1 (It.) [hereinafter *Ferrini*].

² *Id.* ¶ 1.1.

³ *Id.* ¶ 1.2.

⁴ *Id.* ¶ 11.

⁵ *Id.* ¶ 5.

⁶ *Id.* ¶ 7.

⁷ *Id.* ¶ 7.1.

⁸ *Id.*

⁹ *Id.* ¶ 7.2.

¹⁰ *Id.* ¶ 9.

¹¹ *Id.*

According to the Court, divesting States of their immunity for grave human rights violations is logically required given that the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”)¹² prohibits States from abetting situations which lead to violations of international law and affirmatively requires States to use reasonable means to stop the violations.¹³ The Court found that recognizing immunity of a State in blatant violation of “inviolable” human rights¹⁴ would undermine the protection of those rights.¹⁵ Fashioning a rule of interpretation the Court held, “[t]here is no doubt that a contradiction between two equally binding legal norms ought to be resolved by giving precedence to the norm with the highest status” and that protection of human rights has a higher status than the principle of State immunity.¹⁶

Seeking to distinguish more recent cases in which courts upheld State immunity, the Court noted that in the case at bar: (1) the act from which the claim arose began in the forum State (Italy); and (2) the act constitutes “an international crime.”¹⁷ However, it does not appear that these two distinguishing characteristics are conjunctive prerequisites to the abrogation of State immunity. At the end of its opinion the Court concluded that the fact the act commenced in the forum was irrelevant because as the act constituted an international crime. As a result universal jurisdiction would apply.¹⁸

The Court further observed that the United States’ amendment of its Foreign Sovereign Immunities Act (“FSIA”) recognized that courts should not uphold State immunity in cases of human rights violations.¹⁹ The Court criticized the fact that the United States only created an exception to State immunity under the FSIA for US State Department-determined “sponsors of terrorism,” finding that such an approach was not in accordance with “the principle of the ‘sovereign equality’ of States.”²⁰ However, the Court also noted the importance of the United States’ acceptance of the primacy of protecting fundamental human rights over the principle of State immunity—the United States had previously been a fierce adherent of “the theory of absolute immunity.”²¹

Finally, the Court reasoned by analogy that since functional immunity of State officials is inapplicable in cases involving international crimes, “there can be no valid reason to maintain the immunity of the State and therefore to deny that its responsibility can be enforced before the judicial authority of a foreign State.”²²

B. MANTELLI

On May 29, 2008 the Italian Court of Cassation issued a series of orders that reiterated and expanded its holding in *Ferrini*. The orders held that States accused of international crimes are not immune from civil jurisdiction in the courts of another State.²³ Specifically, the Court denied the Federal Republic of Germany State immunity from civil suit for the deportation and forced labor of Italian citizens during World War II.²⁴ Despite its citation to a number of State supreme court and international court cases upholding State immunity even in the face of accusations of international crimes, the Court held that these decisions only

¹² Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 113–14, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹³ *Ferrini*, *supra* note 1, ¶ 9 (citing Article 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts).

¹⁴ *Id.* ¶ 9.

¹⁵ *Id.* ¶ 9.1.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 10.

¹⁸ *Id.* ¶ 12.

¹⁹ *Id.* ¶ 10.2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* ¶ 11.

²³ Cass. sez. un., 29 maggio 2008, n. 14201, Foro it. 2008, I, ¶ 11 (It.) [Hereinafter *Mantelli*].

²⁴ *Id.*

demonstrated that a human rights exception to State immunity was not, as yet, a definite international custom but that such an exception was in the process of emerging.²⁵

With regard to jurisdiction, the Court was even more sweeping in its assertion than in *Ferrini*, holding that the fact that the events giving rise to the suit occurred in Italy only further supported Italian jurisdiction over the case, rather than constituting its primary basis.²⁶ Indeed, any ambiguity left behind after *Ferrini* regarding whether the violative conduct had to have occurred within the forum has been dispelled as a result of these orders which clearly indicate that the Court believes there is no such requirement for jurisdiction.

C. LOZANO

In *Italy v. Lozano*, the Italian Court of Cassation addressed whether it had jurisdiction over a U.S. soldier who had killed an Italian civilian and injured two others at a checkpoint in Iraq.²⁷ While ultimately holding that it did not have jurisdiction because the incident did not amount to a war crime, the Court postulated, albeit in *obiter dictum*, that a State agent who commits international crimes while acting in his official capacity may lose immunity for both himself *and* the State for which he was an agent.²⁸ Such a position would be consistent with the logic of State immunity that the Italian Court of Cassation advocated since its decision in *Ferrini*. As one commentator noted, “it makes no sense to remove the immunity from foreign criminal jurisdiction for state agents and then maintain state immunity for the same acts.”²⁹ In concluding that a State agent who commits international crimes loses immunity, the Court based its decision not only on Italian case law but also on the principle that immunity must give way to allow prosecution for violations of *jus cogens*.³⁰ This is the same reasoning the Court used to remove State immunity in cases like *Ferrini*, i.e., in the event of conflict, *jus cogens* principles prevail over other customs or rules of international law such as State immunity.

D. CIVITELLA

In an October 10, 2006 ruling the Military Court of First Instance of La Spezia found the Federal Republic of Germany (FRG) to be jointly and severally liable as a civilly responsible party with criminal defendant Max Joseph Milde for the massacre of the Italian town of *Civitella* on June 29, 1944.³¹ The judgment was subsequently affirmed on appeal and ultimately the Italian Court of Cassation, acting as the court of last resort, rejected the FRG’s appeal on October 21, 2008.³²

Civitella was a procedurally unique case. Italian criminal procedure allows a civil action to be brought within a criminal trial.³³ This civil action may be brought against the criminal defendant himself and/or a

²⁵ *Id.*

²⁶ *Id.* ¶ 12.

²⁷ Two of the Italians were unarmed intelligence officers who had just successfully completed a mission to rescue an Italian journalist was kidnapped and held hostage by Iraqi insurgents. One of the intelligence officers was killed the other was injured along with the rescued journalist. The intelligence officers were regarded as civilians because they were unarmed and not engaged in armed hostilities. Antonio Cassese, *The Italian Court of Cassation Misapprehends the Notion of War Crimes: the Lozano Case*, 6 INT’L CRIM. JUST. 1077, 1078 (2008). Although *Lozano* was a criminal case it involved a civil plaintiff which is allowed under Article 74 of Italian Criminal Procedure.

²⁸ Cass., sez. un. 24 luglio 2008, n. 31171, Foro it. 2008 II, (it.) available at [http://www.cicr.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d972ce6850f24bbbc1257561003a6d58/\\$FILE/Italy%20v.%20Lozano%202008.pdf](http://www.cicr.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/d972ce6850f24bbbc1257561003a6d58/$FILE/Italy%20v.%20Lozano%202008.pdf) [hereinafter *Lozano*].

²⁹ Cassese, *supra* note 27, at 1082.

³⁰ *Lozano*, *supra* note 28, ¶ 14.

³¹ Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction Over Germany in a Criminal Case Relating to the Second World War: The Civitella Case*, 7 J. INT’L CRIM. JUST. 597, 597-98 (2009).

³² *Id.* at 598; Codice di procedura penale [C.p.p.] art. 74 (It.). This was also the procedural posture in *Lozano*. See *Lozano*, *supra* note 28.

³³ Ciampi, *supra* note 31, at 599.

party that may be held civilly liable for the harm the crime caused.³⁴ In *Civitella*, criminal proceedings were brought against the individual defendant and then the FRG was joined as a civil defendant.³⁵ Conversely, in *Ferrini*, the case was entirely civil and only against the FRG.³⁶ Moreover, unlike *Ferrini*, in which the Court of Cassation was only making a ruling on jurisdiction while the case was pending in a court of first instance, in *Civitella*, the Court heard the case as a court of last instance which allowed it a wider scope of review.³⁷ Another interesting procedural facet was that the facts ascertained in the criminal case against the individual defendant were applied to the FRG in the civil portion without its objection thus making the factual finding *res judicata*.³⁸

Regarding the applicability of State immunity, the Court drew on its decision in *Ferrini* which held that immunity for acts *jure imperii*—acts of sovereign power such as actions in wartime—is abrogated if it is so serious a violation of human rights that it constitutes a crime under international law.³⁹ The Court in both cases referred to this principle as a “limitation” on restrictive State immunity.⁴⁰ The Court asserted that this was a trend in Italian case law.⁴¹ In response to the contention that *Ferrini* and other Italian decisions do not establish international consensus on the issue of State immunity and that State immunity has been upheld by the supreme courts of other States, the Court averred that the solution to the apparent conflict between the international principles of State immunity and respect and protection of fundamental human rights will not be decided by a tally of how many cases retained or abrogated immunity.⁴² Rather, the “qualitative consistency” of these rulings with customary rules and hierarchy of values in international law must be considered.⁴³ To some extent it is a balancing test which gives primacy to *jus cogens*.⁴⁴ This approach led the Court to conclude that violations of fundamental human rights constitute a crossing of the Rubicon whereby a State abdicates its sovereign immunity.⁴⁵

II. ANALYSIS OF THE *FERRINI* DOCTRINE

A. HOW FAR AFIELD IS *FERRINI*?

Perhaps the central problem with the Italian Court of Cassation’s assertion that State immunity must be abrogated in cases of fundamental human rights violations is that it is not in conformity with international practice:

All national and international final decisions exclusively based on international law have hitherto invariably affirmed the immunity rule even in cases of alleged international crimes amounting to breaches of *jus cogens*. Certain international rules may be peremptory, but it does not follow that their alleged violation by one state allows courts of another state to deny immunity to the former—especially when practice supporting the non-immunity rule is lacking or uncertain.⁴⁶

However, the Italian Court of Cassation purported to base *Ferrini* and its progeny on international law. In order to evaluate whether a State that has violated *jus cogens* can be subject to civil suit in the courts of

³⁴ Codice penal [C.p.] art. 185 (It.).

³⁵ Ciampi, *supra* note 31, at 600.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 601.

³⁹ *Id.* at 602.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 603.

⁴³ *Id.*

⁴⁴ *Id.* at 603-04.

⁴⁵ *Id.* at 604.

⁴⁶ Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 AM. J. INT’L L. 122, 125-26 (2009).

another State, it is instructive to look to the traditional sources of international law: State practice—including international agreements—and secondary sources.⁴⁷

i. State Practice

The only multilateral treaty regarding State immunity, the European Convention of State Immunity, as well as its Explanatory Report, is devoid of any reference to *jus cogens* violations.⁴⁸ The Inter-American Draft Convention on Jurisdictional Immunity⁴⁹ and the International Law Commission's Draft Articles on Jurisdictional Immunity of States and Their Property⁵⁰ have not yet entered into force. Importantly, neither contains any references to *jus cogens* violations.⁵¹ Indeed, neither the International Law Commission's Draft Convention⁵² nor the United Nations Convention on Jurisdictional Immunities of States and Their Property⁵³ lists loss of sovereign immunity as a legal consequence of committing acts that are wrongful under international law.

There is a dearth of State court decisions directly adopting the *Ferrini* doctrine or following a similar course of reasoning. In addition to the Italian Court of Cassation's decisions, the decisions of national courts in Greece refusing to recognize State immunity for violations of *jus cogens* while notable "do not (yet) support a *jus cogens* exception to the principle of State immunity."⁵⁴

⁴⁷ See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (laying out the sources of international law as: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."); Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987) (providing that "[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal system of the world.").

⁴⁸ See European Convention on State Immunity, opened for signature May 16, 1972, 1495 U.N.T.S. 181, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/074.htm>; EXPLANATORY REPORT: EUROPEAN CONVENTION ON STATE IMMUNITY, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm>.

⁴⁹ Inter-American Draft Convention on Jurisdictional Immunity of States, Jan. 21, 1983, 22 I.L.M. 292 (1983) [hereinafter Inter-American Draft Convention].

⁵⁰ Rep. of the Int'l Law Comm'n: Draft Articles on Jurisdictional Immunities of States and Their Property, 43d Sess., April 29–July 19, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10, pt. 2 (1991) [hereinafter ILC Draft Articles], available at http://untreaty.un.org/ilc/texts/instruments/engl_ish/draft%20articles/4_1_1991.pdf.

⁵¹ See Inter-American Draft Convention, *supra* note 50; ILC Draft Articles, *supra* note 51.

⁵² See ILC Draft Articles, *supra* note 50.

⁵³ U.N. Convention on Jurisdictional Immunity of States and Their Property, adopted on 2 December 2004 by the U.N. GAOR; see also, U.N. GAOR, 59th Sess., U.N. Doc. A/59/49 Vol. I., (Sept. 14–Dec. 23 2004).

⁵⁴ Thomas Giegerich, *Do Damages Claims Arising From Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?* in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* 203, 222 (Christian Tomuschat and Jean-Marc Thouvenin, eds. 2006). (During World War II, German forces massacred a Greek village. Greek survivors and victim's families brought civil suits against Germany in November 1995. On October 30, 1997, the District Court of Livadeia awarded judgment for the plaintiffs, holding that a State, which violated *jus cogens* norms cannot invoke State immunity. Germany appealed this decision to the Areios Pagos (Greek Supreme Court), which affirmed the lower court's judgment, holding that breaches of peremptory norms cannot be *jure imperii* (sovereign acts) and that by violating such norms a State tacitly waives its immunity. [Note, that this reasoning is different from *Ferrini* doctrine which does not rely on tacit waiver of immunity to assert jurisdiction. See *infra* note 252.] However, the plaintiffs were unable to attach any of Germany's assets within Greece because under Article 923 of the Greek Civil Code, the Greek Justice Minister is required to approve such attachment and he refused. Meanwhile, a Special High Court was convened to address the matter and held that Germany was immune from suit because there was not yet a *jus cogens* exception under customary international law to State immunity. The plaintiffs appealed to the European Court of Human Rights claiming, *inter alia*, that the Justice Minister's refusal to authorize attachment of German assets violated Article 6 paragraph 1 of the European Convention by denying them access to the courts. The ECHR held that while the plaintiffs' access to the courts may have been restricted, the restriction was justified to maintain good relations between States, and the restriction was proportional because there was not yet a *jus cogens* recognized exception to State immunity in customary international law.); Kerstin Bartsch & Björn Elberling,

The only State with national legislation that comes close to denying immunity to States for *jus cogens* violations is the United States.⁵⁵ As the Court in *Ferrini* admitted, this example is not entirely instructive given the restrictive and politically motivated conditions placed on this revocation of immunity.⁵⁶ Moreover, the national legislation of a single State does not constitute the uniform and universal practice of States that would be indicative of consensus on the issue.⁵⁷ Although “State practice is insufficient to support” a *jus cogens* exception to State immunity this merely indicates “States do not recognize an *obligation* to make such an exception, and not necessarily that they do not consider themselves entitled to do so.”⁵⁸

ii. Secondary Sources

Secondary sources such as legal opinions and the writings of scholars are mixed on the question of abrogating State immunity for *jus cogens* violations. The European Court of Human Rights’ main dissenting opinion in *Al-Adsani v. United Kingdom*⁵⁹ has received much attention by proponents of the revocation of State immunity for violations of *jus cogens* as the *Al-Adsani* dissenters concluded that in the event of a conflict between *jus cogens* and State immunity, *jus cogens* should predominate and immunity should be superseded.⁶⁰ However, it was only a dissenting opinion. Documents regarding State immunity produced by the Institut de Droit International and the International Law Association do not contain any provisions for violations of *jus cogens*.⁶¹ Finally, academic sources seem to be evenly split on the question.⁶²

From this survey of the traditional sources of international law, the *Ferrini* doctrine does seem far afield of international law as it currently stands. However, international law is not static. If the *Ferrini* doctrine can be shown to have a logical basis, in addition to its strong moral appeal, it is quite possible that *Ferrini* and its progeny constitute the first step in the process of significant changes in international law which will have wide-ranging implications for State immunity especially for actions taken during wartime.

Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision, 4 GERMAN L.J. 478, 478-83 (2003), available at http://www.germanlawjournal.com/pdf/Vol04No05/PDF_vol_04_no_05_477-491_european_bartsch_elberling.pdf.

⁵⁵ See, 28 U.S.C. § 1605A(a)(1) (“A foreign state shall not be immune . . . for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”); Notably, although U.S. courts may have jurisdiction over the State, for the most part the assets of the State are still protected from attachment in execution of any judgment; See generally, 28 U.S.C. §§ 1610, 1611.

⁵⁶ *Ferrini* supra note 1, at ¶ 10.2.

⁵⁷ Giegerich, supra note 54, at 203, 216.

⁵⁸ *Id.*

⁵⁹ *Al-Adsani v. The United Kingdom*, 35763/97 Eur. Ct. H.R. (2001). In *Al-Adsani* a dual British and Kuwaiti citizen alleged he was tortured on orders of the Kuwaiti Government. He brought suit in English court asserting damages. However, when the English courts held that Kuwait was entitled to immunity *Al-Adsani* filed suit against the United Kingdom in the European Court of Human Rights on the grounds that by affording Kuwait immunity the United Kingdom failed to protect his right against being tortured and having access to the courts in violation of the European Human Rights Convention.

⁶⁰ *Id.* Dissent ¶ 3.

⁶¹ Resolution of L’Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction & Enforcement (Basle, September 2, 1991), reprinted in ANDREW DICKINSON ET AL., STATE IMMUNITY 206 (2004), available at http://www.idi-iil.org/idiF/resolutionsF/1991_bal_03_fr.PDF (French); International Law Association Revised Draft Articles for a Convention on State Immunity (Buenos Aires, August 14-20, 1994).

⁶² Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, 18 EUR. J. INT’L L. 955, 964 (2007) (discussing differing views on violations for *jus cogens*).

B. THE NATURE OF STATE IMMUNITY

For the purposes of this paper, it will be assumed that State immunity is a rule of customary international law and not a matter of discretion. However, it is instructive to briefly inquire into the nature of State immunity. Is it really an obligation of customary international law? If so, then there are two propositions involved: (1) State immunity is a rule of law not executive discretion; and (2) State immunity is a universal rule of international law, not subject to municipal variations.⁶³ While State immunity “is generally recognized by States” there is an “alternative school of thought” which holds that State immunity is within the discretionary authority of a State’s executive branch unless such immunity is manifested in legislation.⁶⁴

Recent rulings by the U.S. Supreme Court may indicate that it follows this alternative school of thought—regarding State immunity as purely a matter of executive discretion.⁶⁵ The U.S. Supreme Court’s view is puzzling since the legislative history of the FSIA demonstrates that a primary purpose of the legislation was to adopt a set standard in order to avoid *ad hoc*, case-by-case determinations of immunity.⁶⁶ Nevertheless, in *Republic of Austria v. Altman*,⁶⁷ the Court held that the anti-retroactivity doctrine did not bar the FSIA from applying retroactively because, *inter alia*, such application would not alter the legal rights of States but rather would only alter political protection the United States may, in its discretion extend to other States.⁶⁸ *Altman* is thus, arguably indicative of the U.S. Supreme Court’s current view of State immunity.⁶⁹

The theory of reciprocity may tend to support the discretionary characterization of State immunity.⁷⁰ If a State will only recognize the immunity of those States that afford it immunity then surely this is indicative of a discretionary principle. However, the principle of State immunity is increasingly included in international conventions and national legislation with the consequence that any power of the executive over the recognition of State immunity is greatly curtailed.⁷¹ Additionally, the increasing recognition that access to courts is a human right⁷² also serves to limit courts in their recognition of State immunity if it “has no legitimate aim and is disproportionate.”⁷³

⁶³ HAZEL FOX, *THE LAW OF STATE IMMUNITY* 13 (2008).

⁶⁴ *Id.*

⁶⁵ *Beatty v. Iraq*, 129 S. Ct. 2183, 2194 (2009) (State immunity is a reflection of present political realities and is not something upon which States can rely in their dealings with each other); *Republic of Austria v. Altman*, 541 U.S. 677, 696 (2004) (State immunity is the product of political realities and courts have historically deferred to the decisions of the political branches of government on questions of State immunity); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (State immunity is “a gesture of comity between the United States and other sovereigns”).

⁶⁶ *The Revised State-Justice Bill On Foreign Sovereign Immunity: The Time For Action: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Gov’t. Relations of the H. Comm. on the Judiciary*, 94th Cong. 33–35 (1976) (statement of Monroe Leigh, State Department Legal Adviser, that FSIA would alleviate the burden of having to make decisions of State immunity on a case-by-case basis); *Charles T. Main Int’l Inc., v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 (C.A. Mass. 1981) (“one objective of FSIA... was to end the practice whereby the State Department was expected to file, on a case-by-case basis, ‘suggestions of immunity,’ to which the courts would normally defer.”).

⁶⁷ *Altman*, 541 U.S. at 677.

⁶⁸ *Id.* at 696.

⁶⁹ FOX, *supra* note 63, at 15.

⁷⁰ *Id.*

⁷¹ *Id.* at 16.

⁷² See G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar. 23, 1976) (“Each State Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”); Euro. Consult. Ass., *European Convention on Human Rights*, 6th Sess., art. 6(1) (1950) (“In the determination of his *civil rights* and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”) (Emphasis added).

⁷³ FOX, *supra* note 63, at 16.

Although the absence of protest by a State whose immunity has been abrogated by a national court of another State may support the notion that State immunity is discretionary, such an inference is “questionable.”⁷⁴ This is because a protest is “implicit and is made by a refusal to appear.”⁷⁵ Additionally, “the instances of protest or acquiescence are motivated by considerations too various to support immunity as either a rule of law or a discretionary privilege.”⁷⁶

Aside from the United States, all other civil and common law jurisdictions have rejected State immunity as a mere “gesture of comity.”⁷⁷ Even the controversial *Ferrini* decision acknowledged that State immunity is a rule of international law.⁷⁸ Moreover, it is likely that once the United Nations Convention on Jurisdictional Immunities of States and Their Property comes into force it will further undermine the alternative school of thought which regards State immunity as a matter of executive discretion.⁷⁹ Indeed, the chapeau of the Convention (although non-binding) expressly provides that “the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law.”⁸⁰ Thus, proceeding with the assumption that State immunity is a rule of international law, what is its position with regard to other rules of international law?

C. INTERNATIONAL HIERARCHY

That there is a hierarchy with respect to rules of customary international law has been recognized by international bodies.⁸¹ Moreover, that *jus cogens* or peremptory norms trump those lower in the hierarchical scheme has also been recognized by international bodies. In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia⁸² referring to the prohibition on torture concluded that:

Because of the importance of the values it protects . . . a peremptory norm or *jus cogens*, [] is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.⁸³

Similarly, under Article 41 of the Draft Articles, States are prohibited from recognizing the lawfulness of a situation created by a serious breach of a peremptory norm of general international law and may not “render aid or assistance in maintaining that situation.”⁸⁴ Upholding the immunity of a State that has violated

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 18.

⁷⁷ *Id.*

⁷⁸ Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 AM. J. INT’L 242 (2005).

⁷⁹ FOX, *supra* note 63, at 19.

⁸⁰ G.A. Res. 59/38, U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/38, Annex (Dec. 2, 2004).

⁸¹ *Conclusions of the Work of the Study Group on the Fragmentation of International Law*, Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, ¶ 251(6), U.N. Doc. A/61/10, Supp. No. 10 (2006), available at <http://untreaty.un.org/ilc/reports/2006/2006report.htm>.

⁸² The International Criminal Tribunal for the Former Yugoslavia’s charter contains a mandate that the Tribunal only apply customary international law. The International Criminal Tribunal for Rwanda has the same mandate. Thus, the law underlying the decisions of these tribunals is regarded as an authoritative source of customary international law. See *Doe v. Exxon*, 2011 U.S. App. LEXIS 13934, *60 (D.C. Cir. July 8, 2011) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 739 (9th Cir. 2008); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1293 (11th Cir. 2002)).

⁸³ *Prosecutor v. Furundzija*, Case No. IT-95-17, Judgment, ¶ 153 (Dec. 10, 1998) (footnotes omitted).

⁸⁴ Rep. of the Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 56th Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 41(2), U.N. Doc. A/56/10, Supp. No. 10 (2001) (“No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40 [peremptory norm of general international law], nor render aid or assistance in maintaining that situation.”).

a peremptory norm arguably assists in maintaining the volatile situation since immunity is often a green light for impunity. This would be true even if the recognition of immunity took place years or even decades after the event since during the violation the State would be confident that its actions were immunized. Thus, while upholding State immunity may not itself be a violation of *jus cogens*, it becomes a violation to the extent that recognition of immunity assists in allowing the violation to continue⁸⁵ which, pursuant to Article 41, a State has a duty, in cooperation with other States, to bring to an end.⁸⁶

It would seem that the abrogation of State immunity to allow for civil suits is arguably permitted under the Draft Articles. As discussed above, Article 41 precludes a State from recognizing a situation arising from a serious breach of a peremptory norm and prohibits a State from rendering assistance to the maintenance of such a situation. Upholding State immunity would arguably do both and therefore, is prohibited. Moreover, under Article 48 even a State that has not been directly injured may invoke the responsibility of the offending State if the obligation violated was “owed to the international community as a whole.”⁸⁷ Thus, to the extent that the *Ferrini* doctrine were only to apply to violations of *jus cogens* norms that also constitute *erga omnes* obligations, the doctrine’s application would comport with Article 48 even if the State invoking the doctrine was not the directly injured State. Moreover, under Article 48, the State invoking the violator’s responsibility can demand reparations “in the interest of the injured State or of the beneficiaries of the obligation breached.”⁸⁸ The *Ferrini* doctrine would simply allow the forum for such reparations to be the domestic courts of the vindicating State.

However, there are at least two reasons why reliance on the Draft Articles in support of the *Ferrini* doctrine may be misplaced. First, under both Articles 48 and 54, a non-injured State entitled under to invoke the responsibility of the offending State may only take “lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”⁸⁹ Technically, *Ferrini*’s abrogation of State immunity is not lawful under international law. Second, the Draft Articles may have been intended to apply on a strictly State-to-State level.⁹⁰ Even assuming *arguendo* that abrogation of State immunity for violations of peremptory norms is lawful i.e., in compliance with the hierarchy of norms in international law, it is possible that Article 54 still precludes the Draft Articles from being a source of support for the *Ferrini* doctrine.

Article 54 refers to “reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”⁹¹ But, Article 54 ties back to Article 48, which allows for action by a non-injured State for violations of peremptory norms *owed to all States*, i.e., *erga omnes* obligations.⁹² Thus, the beneficiaries of the reparations sought are States not individuals. Indeed, the examples of such lawful measures contained in the Commentary to Article 54 are all collective actions by States and refer to “the protection of the collective interest.”⁹³ Specifically with respect reparations, the Commentary avers that actions taken under Article 48 are to be done “in the interest of the injured States, if any, or of the

⁸⁵ Orakhelashvili, *supra* note 62, at 964, 967.

⁸⁶ Rep. of the Int’l Law Comm’n, *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, 56th Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 41(1), U.N. Doc. A/56/10, Supp. No. 10 (2001) (“States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [peremptory norm of general international law].”) [Hereinafter *Commentaries*].

⁸⁷ *Id.* art. 48(1)(b).

⁸⁸ *Id.* art. 48(2)(b).

⁸⁹ *Id.* art. 54.

⁹⁰ The failure of the Draft Articles to provide standing to non-governmental organizations or other non-state actors in the context of invoking State responsibility suggests that the Draft Articles were intended to apply strictly State-to-State. *See, e.g.,* Marjan Ajeviski, *Serious Breaches, The Draft Articles on State Responsibility and Universal Jurisdiction*, 1 EUR. J. LEGAL STUD. 12 (2008), available at <http://www.ejls.eu/4/51UK.htm> (arguing that failure to give NGOs and non-state actors standing ignores an important development in the field of international law).

⁹¹ *Commentaries*, *supra* note 86, art. 54.

⁹² *Id.* art. 48.

⁹³ *Id.* art. 54 §§ 3-4, 6-7.

beneficiaries of the obligation breached.”⁹⁴ Once again, the action is justified only insofar as “it provides a means of protecting the community or collective interest at stake.”⁹⁵ This strongly indicates that States rather than individuals are the concern of the Draft Articles. It would be a challenge to explain how abrogating State immunity to permit private civil suits benefits the collective interest of States⁹⁶ because allowing civil suits by individuals against a violator State facilitates reparation in the interest of those individuals rather than the State. Nevertheless, relying on the Draft Articles for direct support of the *Ferrini* doctrine is tenuous at best even though the Draft Articles, like the *Ferrini* doctrine, are premised on a hierarchy of international law.

International legal scholar Hazel Fox has serious concerns about the hierarchical approach to international law whereby *jus cogens* rules prevail over State immunity. In a rhetorical examination of such a proposition, Fox observes:

A *jus cogens* norm is said to invalidate or render ineffective other rules of international law. Is this effect solely with regard to rules, which directly contradict the substantive law contained in the superior norm? [...] State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method settlement.⁹⁷

Fox cites the International Court of Justice (“ICJ”) decision in *Congo v. Rwanda* as well as the House of Lords’ decision in *Jones v. Saudi Arabia* in support of the proposition that such a hierarchy between *jus cogens* and State immunity does not exist.⁹⁸ The ICJ held that:

‘the erga omnes character of a norm and the rule of consent to jurisdiction are two different things’, and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character . . . cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.⁹⁹

Applying this precedent the House of Lords concluded that, “The International Court of Justice has made plain that a breach of a *jus cogens* norm of international law does not suffice to confer jurisdiction.”¹⁰⁰

International legal scholar Andrea Gattini summarizes the argument of scholars who favor the denial of State immunity for violations of *jus cogens* or *erga omnes* obligations as follows: “peremptory norms, such as those protecting human rights, prevail over ‘simple’ customary rules, such as that granting state immunity; no legal effects can be therefore attached to acts which are null and void because of their inconsistency with peremptory norms.”¹⁰¹ Gattini characterizes this argument as an oversimplification of international law, which is neither logically sound nor practicable. That *jus cogens* do not take precedence over State immunity is not an example of incongruity in international law because, Gattini posits, access to

⁹⁴ *Id.* art. 48 § 12(emphasis added).

⁹⁵ *Id.* art. 48 § 12 (emphasis added).

⁹⁶ However, the argument could be made that the possibility of such suit may, in some cases, serve as a deterrent, which arguably benefits the collective interest. See Orakhelashvili, *supra* note 62, at 956.

⁹⁷ FOX, *supra* note 63, at 151.

⁹⁸ *Id.* at 155 (citing *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6 (Feb. 3) and *Jones v. Saudi Arabia*, [2006] UKHL 26, (June 14)).

⁹⁹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6, ¶ 64 (Feb. 3).

¹⁰⁰ FOX, *supra* note 63, at 155 (quoting Lord Bingham in *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 24 (June 14)).

¹⁰¹ Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 J. INT’L CRIM. JUST. 224, 234-235 (2005).

justice is not a *jus cogens* norm nor does a violation of *jus cogens* carry a right to civil redress.¹⁰² According to Gattini, “there is no evidence in international practice, or logical necessity, for the loss of state immunity to ensue” as a result of a State’s violation of a peremptory norm.¹⁰³ Neither does Gattini view Article 41 of the Draft Articles as requiring such an outcome. A State’s duty to not recognize the legality of a situation created by a serious breach of a peremptory norm of international law would, in Gattini’s opinion, refer only to a “continuing violation” and moreover, the refusal to abrogate State immunity is not tantamount to “toleration or condonation of a peremptory international law norm.”¹⁰⁴ Rather, such a refusal is simply the expression of the belief that domestic judiciaries are not the proper forum to address such matters.¹⁰⁵

A problem underlying the Italian Court of Cassation’s cases applying and expanding upon the *Ferrini* doctrine is the Court is not clear as to whether only *jus cogens* norms or some undefined set of fundamental principles are hierarchically superior to other international law rules such as State immunity.¹⁰⁶ International legal scholar Carlo Focarelli contends that the ease with which the Court moves between rules and values demands scrutiny.¹⁰⁷ In order for a value to have legal force, Focarelli wants the Court to demonstrate: (1) the value the Court contends underlies the rule actually does underlie the rule; (2) what makes this value have legal effect; (3) why these legal effects can trump existent legal rules; and (3) why these legal effects alter the “standard operation” of State immunity.¹⁰⁸ Indeed, the fact that in general, States regard the “norms concerning international crimes as peremptory” yet still allow State immunity in the face of allegations of international crimes “may well denote . . . that states do not ascribe the power to deny state immunity to the peremptory character of these norms.”¹⁰⁹ While the Court found it incongruous that State immunity is denied for *jure gestionis* actions under the “commercial exception” but upheld for actions by States that constitute international crimes, Focarelli argues that under international law, what is important is that “the generality of states supports the former exception but not the latter.”¹¹⁰ Furthermore, Focarelli notes that the Court’s values reasoning is a decidedly new innovation given that until the *Ferrini* decision, Italy was part of the generality of States adhering to what the Court now contends is an “incongruous” approach to State immunity.¹¹¹

Perhaps the Italian Court of Cassation simply recognized that a new perspective is required. Courts’ reliance on the old justifications for State immunity artificially elevates the status of such immunity and precludes fresh considerations of the principles that underlie it.¹¹² For example, State immunity is connected with notions of State sovereignty and if this is the case then the concept of State immunity should develop and evolve just as the concept of State sovereignty has.¹¹³ As international legal scholar Lorna McGregor argues, adhering to a concept of State immunity from the 17th century anachronistically places States above the law—a position entirely inconsistent with the current framework of international law.¹¹⁴ Similarly, the principle of *parem non habet jurisdictionem*¹¹⁵ has no place in the context of international crimes which

¹⁰² *Id.* at 236-37; see also Giegerich, *supra* note 54, at 227 (noting that *jus cogens* and State immunity are directly contradictory only if “victims of the *jus cogens* violations are entitled to an effective remedy in the courts of another State,” which is a “dubious” proposition).

¹⁰³ Gattini, *supra* note 101, at 236.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Focarelli, *supra* note 46, at 128.

¹⁰⁷ *Id.*; see also Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT’L L. 89, 100 (2005) (noting the Ferrini Court’s preoccupation with values).

¹⁰⁸ Focarelli, *supra* note 46, at 128-29.

¹⁰⁹ *Id.* at 129.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT’L L. 903, 912 (2008).

¹¹³ *Id.* at 915-16.

¹¹⁴ *Id.* at 916.

¹¹⁵ Concept that a State could not be forced to be a party to in the domestic courts of another State.

have been recognized as impacting all States such that “all States can be held to have a legal interest in their protection.”¹¹⁶ Moreover, McGregor contends, at this point in history, it does not offend the dignity of a State to be subject to the rule of law but rather, submission to the rule of law enhances the dignity of a State.¹¹⁷ Nevertheless, State immunity continues to preclude many suits against States.

i. Dichotomies

In order to explore some of the reasons why States are treated differently imagine a violation of fundamental human rights has occurred, torture for example. Under existing customary international law, State immunity which extends to agents of the State acting in their official capacity and within the scope of their duties, called functional immunity, can be abrogated leaving these officials subject to both criminal prosecution and civil suit.¹¹⁸ However, under existing customary international law, the State itself retains its immunity from suit.¹¹⁹ The retention of State immunity could possibly be justified under at least three different dichotomies.

A. PROCEDURE/SUBSTANCE

Some courts appear to justify recognition of State immunity on the dichotomy between substance (*jus cogens*) and procedure (immunity). Under this reasoning immunity concerns procedure, i.e., what forum is competent to hear the claim, *not* substantive immunity, i.e., whether there is a cause of action at all. Thus, when a court invokes State immunity as the basis for dismissing a claim against a foreign State this is jurisdictional not substantive.

McGregor aims to undermine the justifications for upholding State immunity for States alleged to have engaged in *jus cogens* violations such as torture.¹²⁰ Three seminal cases upholding State immunity in the face of torture allegations from the ICJ,¹²¹ the European Court of Human Rights,¹²² and the British House of Lords¹²³ all employed what McGregor contends is a false distinction between procedure and substance.¹²⁴ In essence, these courts asserted that State immunity from jurisdiction is simply a procedural bar, which does not have any impact on the substance of the legal claim.¹²⁵ If this is the case then, as the House of Lords averred, State immunity “does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement.”¹²⁶ However, as McGregor points out, this incorrectly assumes that there is another viable forum to bring these claims.¹²⁷ Consequently, jurisdictional immunity

¹¹⁶ McGregor, *supra* note 112, at 916 (quoting Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 199, ¶ 155 (Jul. 9) (citing Barcelona Traction, Light and Power Company Limited, Second Phase, Judgment, 1970 I.C.J. 32, ¶ 33 (Feb. 5))).

¹¹⁷ McGregor, *supra* note 112, at 917.

¹¹⁸ Hazel Fox, *State Immunity and the International Crime of Torture*, 2 E.H.R.L.R. 142, 143-44 (2006).

¹¹⁹ *Id.*

¹²⁰ McGregor, *supra* note 112, at 906.

¹²¹ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 14), available at <http://www.icj-cij.org/docket/files/121/8126.pdf> (“Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”).

¹²² Al-Adsani v. United Kingdom, 35763/97 Eur. Ct. H.R. ¶ 48 (2001) (asserting that “[t]he grant of [State] immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right.”).

¹²³ Jones v. Saudi Arabia, [2006] UKHL 26 (June 14).

¹²⁴ McGregor, *supra* note 112, at 906-07.

¹²⁵ *Id.* at 907.

¹²⁶ Jones v. Saudi Arabia, [2006] UKHL 26 ¶ 24 (June 14).

¹²⁷ McGregor, *supra* note 112, at 908; see also Christopher Keith Hall, *The Duty of States Party to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT’L L. 921 (2008), available at <http://www.ejil.org/pdfs/18/5/246.pdf> (regarding the possibility of an affirmative right to redress under Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

becomes substantive immunity because realistically the domestic fora of the offending State are unlikely to either allow the suit or provide a fair hearing.

When redress within the State where the *jus cogens* violation occurred is not available discretionary diplomatic protection is far from promising.¹²⁸ Diplomatic protection, under which a State agrees to pursue an individual's claim, is not a comparable substitute given that the decision to pursue the claim is at the sole discretion of the State and foreign policy concerns monopolize the State's considerations.¹²⁹ Not only does the individual have no right to diplomatic protection but even if diplomatic protection is used to pursue the claim, the individual has no entitlement to any damages collected.¹³⁰ In essence, the individual's claim becomes that of the State and thus, the State is under no obligation to pay the individual from any damages the State is able to collect.

Arguably then, in such a milieu the recognition of State immunity despite allegations of *jus cogens* violations is tantamount to a free pass and likely "contributes to, justifies, and may even constitute the resulting impunity."¹³¹ Moreover, casting State immunity as a procedural rule is a false construct of neutrality which serves only "to steer attention away from the deeper question of the legitimacy of immunity."¹³² Quite simply, "procedural rules cannot be used to evade substantive obligations, as this would defeat the core basis for *jus cogens* norms such as the prohibition of torture, by facilitating unlawful derogation."¹³³

B. STATE/INDIVIDUAL

Arguably, if a norm such as the prohibition on torture has achieved exalted status as a peremptory norm it seems illogical to abrogate traditional rules of State immunity to allow criminal and civil suits to proceed against State officials but disallow the abrogation of traditional rules of State immunity to allow such suits against the State itself. However, a crucial difference may lie in the fact that the functional immunity of State officials is abrogated for criminal suits and such suits proceed against the officials as *individuals* whereas State immunity for the *State* itself is still maintained despite the criminal suit against the State's agents.

International legal scholars Pasquale De Sena and Francesca De Vittor take a critical look at the Italian Court of Cassation's apparent approval of the notion that abrogation of State immunity is a logical extension of the trend toward abrogating the "functional immunity" of State officials who commit international crimes.¹³⁴ De Sena and De Vittor conclude that the Court was far afield of traditional jurisprudence in this perspective since "the question of sovereign immunity tends to be kept well *apart* from the question of individual responsibility for international crimes."¹³⁵ Gattini expands on this point by asserting that the trend toward stripping immunity from State officials who violate international law does not logically lead to stripping the immunity of the States themselves.¹³⁶ This is because the punitive aspect of criminal law is "ill suited for states" which would lead to confusion and uncertainty.¹³⁷

Punishment, Hall argues that such a right to redress exists despite the recent decisions of *Bouzari v. Islamic Republic of Iran* and *Jones v. Saudi Arabia*).

¹²⁸ McGregor, *supra* note 112, at 908.

¹²⁹ *Id.* at 909-10.

¹³⁰ *Id.* at 910-11.

¹³¹ *Id.* at 911; accord Orakhelashvili, *supra* note 62, at 957 ("Impunity is the implication of the deprivation of the only available remedy.").

¹³² *Id.* at 912.

¹³³ *Id.* (citing Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, 18 EUR. J. INT'L L. 955 (2007)).

¹³⁴ De Sena & De Vittor, *supra* note 107, at 104-05.

¹³⁵ *Id.* at 109.

¹³⁶ Gattini, *supra* note 101, at 239.

¹³⁷ *Id.*

Fox asserts that *the* purpose of State immunity is to channel prosecution of claims “to the courts of the state in whose service the officials act or on whose behalf the transaction was performed.”¹³⁸ However, Fox notes that the differentiation between the actions of individual officials acting on behalf of the State and actions of the State itself has facilitated the erosion of the broader concept of State immunity¹³⁹ evidenced by the fact that individuals may be held liable under international law for violations of human rights.¹⁴⁰ Nevertheless, international law does not recognize the capacity of a State to commit crimes.¹⁴¹ Remedy for aberrant State action is through a State-to-State system of “restitution and reparation.”¹⁴²

Nevertheless, while criminal responsibility for States is admittedly problematic the *Ferrini* doctrine addresses *civil* liability not criminal. Indeed, States have already agreed to forgo their immunity and be subject to civil proceedings with resulting damage awards in high-stakes contexts such as investor-State arbitration. Setting aside for a moment the neutral international fora in which such proceedings take place, the practice indicates that the civil legal process is capable of fairly straight-forward transfer and application to suits against States.

Moreover, if the actions, torture or war crimes for example, violate *jus cogens* then the individual/State distinction is arguably dispelled because such violations “cannot constitute acts *jure imperii*, or acts of sovereignty.”¹⁴³ In other words, because violations of *jus cogens* cannot constitute sovereign acts the State does not enjoy immunity for such acts and is thus no different than an individual committing such acts. However, the argument that State immunity in either case “must be rejected as necessarily leading to impunity” since victims “have no other option to vindicate their rights” does not necessarily follow.¹⁴⁴ Even assuming redress is not possible in the fora of the violating State, abrogation of functional immunity of State officials both in the criminal and civil context allows victims to vindicate their rights. Thus, from a logical standpoint if violations of *jus cogens* do not constitute sovereign acts the State itself does not enjoy immunity for such actions. However, as will be discussed *infra*, as a practical matter it is unclear why it would be necessary or even advantageous for the State to be held liable when State officials are subject to both civil and criminal legal processes.

C. CIVIL/CRIMINAL

Nevertheless, the distinction between criminal and civil suits may hold yet another reason for different rules when it comes to State immunity. The civil/criminal distinction is one recognized by the House of Lords in the majority opinion in *Al-Adsani*. In *Al-Adsani* the House of Lords attempted to further distinguish the procedural versus substantive effects of a *jus cogens* violation in terms of whether the proceeding was criminal or civil:

While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not . . . the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.¹⁴⁵

¹³⁸ Fox, *supra* note 118, at 143.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 144.

¹⁴² *Id.*

¹⁴³ Orakhelashvili, *supra* note 62, at 969.

¹⁴⁴ *Id.*

¹⁴⁵ *Al-Adsani v. The United Kingdom*, 35763/97 Eur. Ct. H.R. ¶ 101 (2001).

However, what this purported dichotomy fails to explain is why substance (*jus cogens*) trumps procedure (immunity) in criminal cases but not civil.¹⁴⁶ Indeed, the joint dissent refutes the majority's distinction between criminal and civil proceedings as a false one:

It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition on torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.¹⁴⁷

The *Al-Adsani* dissent's approach appears to be in-line with the reasoning employed by the Court of Cassation in *Ferrini* and its progeny.

Setting aside the practical obstacles to holding a State criminally liable, as a logical matter, that a violation of a *jus cogens* norm, such as the prohibition on torture, would justify the abrogation of traditional rules of State immunity for criminal proceedings makes sense because as a peremptory norm, its violation undermines the safety of all people. Conversely, permitting civil suits against the State for such violations would permit only certain individuals to reap material benefit from a harm that has affected all people.¹⁴⁸ In short, civil suits serve too limited a purpose, whereas criminal prosecution benefits all people.

Criminal prosecution represents condemnation at a State-level, with the State holding the wrongdoer accountable for harm done to society. If, as proposed below, the *Ferrini* doctrine—a civil remedy—would be applicable only to violations of *jus cogens* that also constitute *erga omnes* obligations, since global harm is the reason for abrogating State immunity there should be global benefit. Granted, the existence of a criminal remedy is not mutually exclusive with the existence of a civil one. For example, under the U.S. system, victims of crime are able to pursue civil cases against alleged wrongdoers even if the putative defendants had been found innocent in a criminal case.¹⁴⁹ However, as a practical matter, given existing customary international law against State criminal responsibility, there would only be a civil remedy for *jus cogens* violations meaning that only a select group of individuals would recover for a harm that is regarded as so grave because of its impact on all people. As discussed above, States *qua* States cannot be held criminally liable under international law. Because there is not, as yet, any principled means to impose criminal liability on a State only a limited number of individuals would benefit even though the very basis for the cause of action is due to the universality of the harm. In short, it would be ironic and incongruous to extend a novel cause of action in a novel forum for the exclusive benefit of a select group of people for a harm that has been done to the whole world. However, this is arguably a normative policy consideration. Thus, as a logical matter, there is no reason why the criminal/civil nature of the putative proceedings against a State should be dispositive as to the existence of State immunity for *jus cogens* violations.

ii. Conclusion on Dichotomies

The joint dissent in *Al-Adsani* considered the possible dichotomies discussed above and dismisses them in favor of a straight-forward rule derived from systematic reasoning—State immunity is simply abrogated when it comes to *jus cogens* violations. The joint dissent contended that the failure of the *Al-Adsani* majority to reach this conclusion is the result of faulty reasoning. First, the majority accepted that the prohibition on torture is a *jus cogens* rule.¹⁵⁰ Thus, as any *jus cogens* rule, “it is hierarchically higher than any other rule of

¹⁴⁶ Orakhelashvili, *supra* note 62, at 965.

¹⁴⁷ *Al-Adsani v. The United Kingdom*, 35763/97 Eur. Ct. H.R. ¶113 (2001) (Rozakis, Caflisch, Js., dissenting).

¹⁴⁸ This shortcoming is also present in civil suits against individual State officials. However, the abrogation of State officials' functional immunity both civilly and criminally for international wrongs is already established. This paper seeks to address the propriety of such abrogation for States.

¹⁴⁹ This is possible due to the nature of the lower burden of proof needed for a finding of liability in a civil case.

¹⁵⁰ *Al-Adsani v. The United Kingdom*, 35763/97 Eur. Ct. H.R. ¶111 (2001) (Rozakis, Caflisch, Js, dissenting).

international law” such that in the event a *jus cogens* rule conflicts with a rule that does not have *jus cogens* status, the *jus cogens* rule prevails and renders the conflicting rule “null and void.”¹⁵¹ Second, the majority did not deny that State immunity is not a *jus cogens* rule.¹⁵² Consequently, “the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.”¹⁵³ Without disputing the majority’s characterization of State immunity as a “procedural bar” the dissent averred that in the face of a *jus cogens* rule, “the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.”¹⁵⁴ Quite simply, State immunity is entirely inapplicable in cases of *jus cogens* violations regardless of the variety of dichotomies that could possibly be drawn in an attempt to preclude such a result. Thus, assuming there is a hierarchy of international law, as a matter of logical reasoning there is no principled reason why State immunity should stand in the face of *jus cogens* violations.

Notably, an authoritative statement on just where the state of international law is with respect to this issue has been made. The FRG filed in the ICJ seeking a declaration that the decisions in Italian cases such as *Ferrini* and *Civitella* violate international law and consequently, Italy must take action to ensure such judgments are unenforceable and that such suits will not be entertained in the future.¹⁵⁵ When this article was initially penned the case was still pending. However, on February 3, 2012 the ICJ handed down the perhaps unsurprising decision which concluded that “under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.”¹⁵⁶ Nevertheless, the decision does not render the *Ferrini* Doctrine moot. Indeed, the ICJ’s conclusion itself contains the operative language—“customary international law *as it presently stands*.”¹⁵⁷ As previously discussed, customary international law is not static and *Ferrini* and its progeny may very well continue to influence the contours of this evolving body of law.

D. JURISDICTIONAL QUESTIONS

The Court in *Civitella* was concerned that if sovereign immunity were upheld despite violations by the State of fundamental human rights, individuals would be precluded from bringing suit and human rights would not be effectively protected.¹⁵⁸ Thus, the Court concluded that individuals must be given access to the courts to seek compensation for damages suffered as a result of fundamental human rights violations.¹⁵⁹ But even assuming that State immunity is inapplicable in cases of *jus cogens* violations, a tribunal entertaining a claim must still assert some basis of jurisdiction over the State. However, the Court in *Civitella* was not clear on the basis of jurisdiction for such suits. Like in *Ferrini*, the Court analogized to universal jurisdiction for international criminal cases.¹⁶⁰

¹⁵¹ *Id.* ¶ 111–12.

¹⁵² *Id.* ¶ 112 (arguing that because states may waive their immunity, immunity cannot be a *jus cogens* rule because *jus cogens* rules protect “the basic values of the international community, [and] cannot be subject to unilateral or contractual forms of derogation from their imperative contents.”).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Jurisdictional Immunities of the State (Ger. v. It.), Application, ¶ 14 (Dec. 23, 2008), [http://www.icj-cij.org/docket/files/143/14923.pdf#view=FitH&pagemode=none&search=%22application of the federal republic of germany%22](http://www.icj-cij.org/docket/files/143/14923.pdf#view=FitH&pagemode=none&search=%22application%20of%20the%20federal%20republic%20of%20germany%22).

¹⁵⁶ Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶ 91 (Feb. 3, 2012).

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ Ciampi, *supra* note 31, at 603–04.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 605.

In short, the argument is that *jus cogens* norms take precedence over “the non-mandatory customary international rule” of State immunity.¹⁶¹ The universal jurisdiction argument included in this approach appears to be supported by Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which conspicuously omits any territorial limitation when it declares that States Parties must have a civil remedy for victims of torture.¹⁶² However, the United States explicitly stated upon its ratification of the Convention that it read Article 14 to only require States Parties to have a civil remedy for acts of torture committed in territories under its own jurisdiction.¹⁶³ Such a reading was rejected by the ICJ which held that “[T]he rights and obligations enshrined in the Convention [Against Torture] are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”¹⁶⁴ This supports the proposition that the predominant basis of jurisdiction, i.e., territoriality, might not limit jurisdiction when it comes to *erga omnes* obligations, at least when the applicable convention is silent or ambiguous. However, this holding does not necessarily mean States can exercise universal jurisdiction over *erga omnes* obligations—it is likely that some nexus with the forum State is required. Indeed, even an attempt to analogize and extend universal criminal jurisdiction under the Resolution on Criminal Jurisdiction adopted by the Institut de Droit International is also problematic since such jurisdiction requires several prerequisites including substantial connection with the forum State.¹⁶⁵ Fox asserts that the *Ferrini* Court’s extension of the exception to immunity for extraterritorial acts was based on the gravity of the violation but that the Court’s “reasoning lacks legal precision” and abolishes the traditional distinction between individual official actors and the State “more by reference to moral values than legal concepts.”¹⁶⁶

Ferrini’s assertion of jurisdiction was somewhat shaky given the holding in *Al-Adsani* that the abrogation of State immunity in civil suits based on torture that had occurred outside the forum State was not yet generally accepted in international law.¹⁶⁷ *Ferrini* attempted to distinguish *Al-Adsani* by noting that the harm in *Ferrini* commenced in Italy—the forum State—when Ferrini was abducted from Italy in order to be sent into forced labor in Germany.¹⁶⁸ However, the *Civitella* case was much more straightforward. The massacre that formed the basis for the suit occurred in Italy, the victims bringing suit were Italian citizens, and Italy was the forum for the suit.¹⁶⁹ Thus, the case fit squarely within the classic jurisdictional category of *locus commissi delicti*.¹⁷⁰ However, the Court did not cite such a basis for jurisdiction in its opinion. An argument could be made that the failure to cite this basis for jurisdiction in combination with the analogy to universal criminal jurisdiction indicates that “the Court did not intend to limit the principle of non-immunity to breaches of human rights committed on the territory of the state of the forum.”¹⁷¹ However, as discussed below, reliance on the traditional basis for jurisdiction, especially for such a novel new rule, is advisable.

¹⁶¹ Fox, *supra* note 118, at 152.

¹⁶² 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, ¶ 1, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

¹⁶³ 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

¹⁶⁴ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11).

¹⁶⁵ L’Institut de Droit International, International Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Aug. 25, 2003, in 71-II L’Institut de Droit International, Annuaire de l’Institut de Droit International (2006), available at http://www.idi-iil.org/idiE/navig_chon2003.html.

¹⁶⁶ Fox, *supra* note 118, at 156. See also De Sena & De Vittor, *supra* note 107, at 100 (noting the *Ferrini* Court’s preoccupation with values).

¹⁶⁷ *Al-Adsani v. The United Kingdom*, 35763/97 Eur. Ct. H.R. ¶¶ 61, 66 (2001).

¹⁶⁸ *Ferrini supra* note 1, at ¶ 10.

¹⁶⁹ Ciampi, *supra* note 31, at 601–604.

¹⁷⁰ The place where the wrong occurred.

¹⁷¹ Ciampi, *supra* note 31, at 606.

Pure universal jurisdiction is a powerful tool that when employed unilaterally by a State based on its domestic legislation outside the implementing framework of an international treaty, is frowned upon.¹⁷²

However, the ostensible conflict between jurisdiction and immunity may be the result of a faulty baseline. According to McGregor, State immunity from suit in the domestic courts of another State was historically a much more flexible concept—an exception to the forum’s jurisdiction—especially “in cases of torture and crimes under international law.”¹⁷³ Thus, by beginning an evaluation of a case with an inquiry into whether State immunity precludes suit is erroneous. Rather, the forum needs to establish whether it has jurisdiction and only after this has been established need it address the possible application of State immunity.¹⁷⁴ International legal scholar Thomas Giegerich appears to hold a similar view, citing the *Lotus* Principle¹⁷⁵—under international law what is not prohibited is permitted—to assert that there is a general right of every State to adjudicate claims in its courts, even those involving extraterritorial events, subject to only a few limitations imposed by international law.¹⁷⁶ Traditionally, sovereign immunity has been one such limitation on the territoriality principle.¹⁷⁷ As such, the forum State would ostensibly bear the burden of proof for jurisdiction, the respondent State would then bear of the burden of proof for sovereign immunity, and then the forum State would bear the burden of proof for an exception to sovereign immunity.¹⁷⁸ Giegerich finds this burden of proof construct to be circular given that it rests “on two uncertain premises”—the broad jurisdiction of States over extraterritorial events and broad State immunity subject only to limited exceptions.¹⁷⁹ Since international law is based on consensus, Giegerich points out that despite its weaknesses, the burden of proof construct is a “pragmatic expedient” and absent a showing that a deviation from established international law has gained universal acceptance, the general rules will continue to apply.¹⁸⁰

Although it is not one of those general rules, those who would seek to revoke State immunity for violations of *jus cogens* or *erga omnes* obligations often invoke universal civil jurisdiction.¹⁸¹ Such a concept is not dissimilar from the Alien Tort Statute (“ATS”) in U.S. law.¹⁸² However, even the ATS recognizes State immunity—civil suits cannot be brought against States for violations of international law.¹⁸³ While Gattini does not dispute that an *erga omnes* obligation “endows every state with a legal

¹⁷² See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 15 (Feb. 14) (asserting that “at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute [international] crimes, whoever their authors and victims and irrespective of the place where the offender is to be found.”). See also *id.* ¶ 81 (asserting that a State “has neither any obligation . . . or any entitlement under international law to pose as prosecutor for all mankind, in other words, to claims the right to redeem human suffering across national borders and over generations.”). But see *id.* ¶¶ 45–46 (noting that although there is no established State practice of pure universal jurisdiction this does not prove it would be unlawful since States are not required to legislate up to the full scope of jurisdiction under international law and that the existence of subsidiary universal jurisdiction in international treaties “opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality”).

¹⁷³ McGregor, *supra* note 112, at 915.

¹⁷⁴ *Id.* at 914.

¹⁷⁵ 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

¹⁷⁶ Giegerich, *supra* note 54, at 209.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 210.

¹⁷⁹ *Id.* at 210–11.

¹⁸⁰ *Id.* at 211.

¹⁸¹ Gattini, *supra* note 101, at 237.

¹⁸² 28 U.S.C. § 1350 (2011). The Alien Tort Statute gives U.S. District Court jurisdiction to hear claims for violations of international law or a treaty to which the United States is a party. The only jurisdictional tie to the United States is that the plaintiff must serve process within the United States or its territory. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). The U.S. Supreme Court has held the ATS is a jurisdictional grant only. The substantive cause of action arises from a violation of a norm of customary international law at the time the ATS was enacted in 1780, namely, those recognized by Blackstone: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

¹⁸³ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 442–43 (holding that the “the FSIA provides the sole basis for obtaining jurisdiction over a foreign State” in U.S. courts and consequently, unless an exception allowing suit exists under the FSIA, claims against States under the ATS are not cognizable). Whether corporations are subject to suit under the

interest for its respect” this legal interest is circumscribed to a certain form and content.¹⁸⁴ Even though there is a dearth of “relevant international practice,” Gattini implies that even in international law there may very well need to be “a link between the forum state and the subject-matter.”¹⁸⁵ However, according to De Sena’s and De Vittor’s analysis of *Ferrini*, the fact that at least part of the plaintiff’s injuries were sustained while he was in the forum State was neither dispositive nor controlling as to the question of jurisdiction.¹⁸⁶ Refutation of this type of jurisdictional nexus as a prerequisite was made clear in *Mantelli*. What had greater bearing on jurisdiction was that the alleged wrongdoing constituted “international crimes” and violated the “peremptory rule protecting human rights.”¹⁸⁷

The invocation of international crimes carries with it the concept of universal criminal jurisdiction. Gattini finds fault with the tendency to equate universal *civil* jurisdiction with universal *criminal* jurisdiction. First, Gattini argues, “the principle of universal criminal jurisdiction is far from certain.”¹⁸⁸ Second, with the exception of *forum loci commissi delicti*, the traditional grounds of criminal jurisdiction differ markedly from those of civil jurisdiction.¹⁸⁹ Third, universal criminal jurisdiction applies to *individuals* and is not analogous to a proposed universal civil jurisdiction against *States*.¹⁹⁰ Indeed, as a preface to her discussion of universal jurisdiction, Fox points out that while all *jus cogens* norms are also *erga omnes* obligations, not all *erga omnes* obligations are *jus cogens* norms.¹⁹¹ Although international conventions relating to international crime impose obligations on States Parties to extradite alleged offenders for prosecution in what is known as subsidiary universal jurisdiction or *aut dedere aut judicare* (prosecute or extradite) jurisdiction, Fox asserts that “the existence of a wider universal jurisdiction to exercise an obligation *erga omnes* over acts committed outside the territory of the forum State is of a controversial nature and unsupported by custom.”¹⁹²

However, those who support abrogation of immunity for *jus cogens* violations point to Article 41 of the Draft Articles to assert that the obligation not to recognize the violation of a peremptory norm would be defeated if immunity was afforded the offending State.¹⁹³ Fox suggests the possibility that extraterritorial jurisdiction could be exercised only when remedies within the offending State are refused or unavailable to victims.¹⁹⁴ Moreover, to avoid the “total judicial chaos” which would likely result unless such extraterritorial jurisdiction is properly defined, Fox suggests that the forum State should be required to have a “jurisdictional link” such as both the forum and respondent States being parties to the same international conventions involving respect of human rights.¹⁹⁵ While a jurisdictional link to the forum is not

ATS is subject to a Circuit split. Compare *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that “under the ATS, domestic law, i.e., federal common law, supplies the source of law on the question of corporate liability. The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal system throughout the world.”); with *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (holding that “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.” Consequently, claims against corporations do not allege violations of the law of nations and are thus not cognizable under the ATS.).

¹⁸⁴ Gattini, *supra* note 101, at 237–238.

¹⁸⁵ *Id.* at 238.

¹⁸⁶ De Sena & De Vittor, *supra* note 107, at 95, 97.

¹⁸⁷ *Id.* at 95, 97 (2005); accord *Mantelli*, *supra* note 23, ¶ 11.

¹⁸⁸ Gattini, *supra* note 101, at 238.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 238–239.

¹⁹¹ Fox, *supra* note 118, at 157.

¹⁹² *Id.*; See also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 ¶ 9 (noting that no treaty “has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction in absentia is unknown to international conventional law.”).

¹⁹³ Fox, *supra* note 118, at 158.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

incompatible with a narrow reading of the *Ferrini* doctrine,¹⁹⁶ the type of link suggested by Fox is incompatible for at least two reasons. First, if the *Ferrini* doctrine is applicable for violations of *jus cogens*, by definition these are peremptory norms binding on all States. Thus, whether or not a State is party to a particular convention codifying that norm is irrelevant; the State is still bound. Second, predicated jurisdiction upon adherence to a convention would import language and reasoning which were absent in the decisions of the Court of Cassation. By simply giving *Ferrini* and its progeny a narrow reading a viable principle emerges without artificial additives. As discussed *infra*, with respect to the question of jurisdiction, a narrow reading of these cases results in a conventional approach to jurisdiction based on traditional grounds recognized under international law, most notably territoriality and passive personality.

E. CONSEQUENCES

Allowing civil suits to proceed against a State for *jus cogens* violations is perhaps most problematic from a practical consequences standpoint. Giegerich asserts that under the principle of sovereign immunity, allowing civil suits for *jus cogens* violations would wreak havoc on international relations and “create a judicial chaos of overlapping and contradictory claims to jurisdiction undermining the international rule of law.”¹⁹⁷

According to Giegerich, hierarchical preemption “would have intolerable consequences” not the least of which would be the erosion of protection of diplomatic property from attachment in execution of a judgment.¹⁹⁸ Is this concern that the long-standing rule of immunity for diplomatic property would be swept aside by the *Ferrini* doctrine justified? Even the United States, which under its amendments to the FSIA, allows for civil suits against State sponsors of terrorism, has a clear policy against the attachment of diplomatic property.¹⁹⁹ Indeed, the U.S. Government itself often intervenes in cases to prevent such attachment.²⁰⁰ Of course, the U.S. policy is arguably based not so much on principle rather than practical reciprocity concerns given that the United States owns a considerable amount of prime real estate abroad as part of its diplomatic missions. Logically however, if *jus cogens* violations are serious enough to abrogate the lower rule of State immunity then it would also trump what is arguably a lower rule of immunity for diplomatic property. Given the jealousy with which States guard their diplomatic property, it is likely that even if the *Ferrini* doctrine is accepted, States, out of reciprocity concerns, will continue to uphold immunity of diplomatic property. Aside from diplomatic property, nationalized or majority nationally-owned businesses with assets abroad could also be subject to attachment. If the State has sole or majority interest in a business, it is often considered an instrumentality of the State and consequently would be vulnerable to attachment for any judgments rendered against the State.²⁰¹ Overall, despite these two possible targets of attachment, claimants will be unlikely to recover even if there is a judgment in their favor.²⁰² This angst over a sea change with respect to diplomatic property or other State-owned assets is very likely unnecessary. And moreover, as discussed *infra*, this inability to execute judgments is perhaps one of the most salient reasons why, as a normative matter, the *Ferrini* doctrine is unsound.

The *Ferrini* doctrine is assailed by numerous other arguments citing the potential for negative consequences. For example, it is likely that courts will be hugely disadvantaged in ascertaining the factual

¹⁹⁶ See *infra* Section III Rule Formulation.

¹⁹⁷ Giegerich, *supra* note 54, at 203, 208.

¹⁹⁸ *Id.* at 227.

¹⁹⁹ 28 U.S.C. §§ 1610, 1611 (2006).

²⁰⁰ See, e.g., *Hegna v. Islamic Republic of Iran*, 287 F. Supp. 2d 608 (D. Md. 2003) (describing U.S. Government’s motions to quash writs of attachment in FSIA case against properties located in the U.S. owned by Iran were granted), *aff’d*, 376 F.3d 226 (4th Cir. 2004).

²⁰¹ See, e.g., 28 U.S.C. § 1603 (b) (2006) (defining an “agency or instrumentality of a foreign state” as, *inter alia*, a business “a majority of whose shares . . . is owned by a foreign state or a political subdivision thereof”).

²⁰² Giegerich, *supra* note 54, at 203, 208.

and legal issues involved given that respondent States will more than likely refuse to participate.²⁰³ As noted above, and discussed further *infra*, execution of a judgment will likely be an uphill battle if not a quixotic quest. While judgments can serve other functions such as publicizing atrocities or contributing to the establishment of facts for the historical record these auxiliary goals of suit are not well achieved through a default judgment.

Additionally, Giegerich sees the potential for serious disequilibrium within the system as only wealthy and powerful States would have the resources and clout to serve as fora for such suits which “raises the question of whether a *jus cogens* exception to sovereign immunity really serves the international rule of law or only the interests of powerful States.”²⁰⁴ This consequence would be somewhat limited if, as proposed *infra*, those States adopting the *Ferrini* doctrine were required to apply it to all States equally not just a select few like the United States does under the FSIA.

Finally, the prospect of individual suits with enormous amounts of damages would be an impediment to “a comprehensive diplomatic solution which does justice to all the victims” of a particular *jus cogens* violation.²⁰⁵ Indeed, De Sena and De Vittor aver that the *Ferrini* doctrine’s balancing between State immunity and the protection of human rights in which human rights win²⁰⁶ carries with it two “inherent” conclusions: (1) universal civil jurisdiction; and (2) no statutory limitation on damage.²⁰⁷ Without elaboration they reason that these outcomes are the natural “consequences of the prevailing *value* recognized in the protection of human rights.”²⁰⁸ Nevertheless, even if there is a flood of civil litigants seeking enormous damages, payment of those judgments, absent a radical and unlikely change in the immunity laws surrounding State property, is unlikely to be realized.

Not all scholars have such a negative assessment of the practical consequences of the *Ferrini* doctrine. International legal scholar Annalisa Ciampi acknowledges that a major criticism of the *Ferrini* and *Civitella* cases is that such decisions will open a floodgate of litigation.²⁰⁹ Citing five reasons, Ciampi flatly contends that the risk of such a litigation onslaught occurring is vastly overblown.²¹⁰ First, as noted above, the ability to bring a civil suit against a foreign State and be awarded damages does not mean that recovery will be possible given that the limitation on immunity from suit does not extend to immunity from attachment of assets.²¹¹ Thus, if judgments are unlikely to be satisfied, many potential plaintiffs may simply not file suit unless the moral or emotional victory will be adequate compensation for the time and money invested in such a suit.

Second, the abrogation of State immunity is just one condition precedent of many to establish liability of the State, not the least of which is jurisdiction. Ciampi notes that a jurisdictional nexus between the harm and the forum State will likely be required since universal jurisdiction in civil cases is highly controversial.²¹² Moreover, given the serious nature of the violations alleged the burden of proof even for a civil case will likely be quite onerous.²¹³

Third, an individual or private cause of action for such a suit must exist either at international law or at international law as interpreted and applied in the forum State.²¹⁴ States adopting the *Ferrini* doctrine would

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 208–09.

²⁰⁶ De Sena & De Vittor *supra* note 107, at 89, 102–03.

²⁰⁷ *Id.* at 103.

²⁰⁸ *Id.*

²⁰⁹ Ciampi, *supra* note 31, at 597, 609.

²¹⁰ *Id.*

²¹¹ Indeed, the Greek Government refused to authorize attachment of German property in Greece to satisfy a civil judgment against FRG handed down by the Greek Supreme Court.

²¹² Ciampi, *supra* note 31, at 597, 610.

²¹³ See Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, ¶¶ 209–10 (Feb. 26) (requiring that allegations of grave crimes such as genocide be “clearly established” and “a high level of certainty appropriate to the seriousness of the allegation”).

²¹⁴ Ciampi, *supra* note 31.

have to have domestic legislation creating a private right of action for *jus cogens* violations because international conventions reflective of *jus cogens* norms do not explicitly confer such a right and have not typically been interpreted as doing so.²¹⁵

Fourth, there may be formal agreements between States, which preclude such suits entirely.²¹⁶ However, whether such agreements will be effective at precluding suit is questionable. For example, in *Civitella*, the FRG argued that Italy had waived its rights and the rights of its citizens to compensation from Germany or German citizens for damages incurred during WWII under the Peace Treaty of February 10, 1947 and the Bonn Agreement of June 2, 1961 under which Italy waived the rights of itself and its citizens to claim damages from the FRG for events occurring between September 1, 1939 and May 8, 1945.²¹⁷ In *Civitella*, the Court rejected this argument, interpreting the Peace Treaty not to apply to the FRG because it not a party to the Treaty and because the Treaty applied only to material damages not emotional or moral ones.²¹⁸ Similarly, the Bonn Agreement did not preclude suit because it applied only to suits pending at the time of the Agreement, not to those which began after the Agreement was executed.²¹⁹

Finally, the international or forum State statutes of limitations may preclude suit.²²⁰ For example, Italy has a five-year statute of limitations on tort claims, unless the tort also constitutes a crime in which case the criminal statute of limitations for that crime would apply.²²¹ Crimes for which the punishment is life imprisonment have no statute of limitations.²²² In *Ferrini* the plaintiffs were unable to recover because the statute of limitations had already run on their claim.²²³ In *Civitella*, however, murder is punishable by life imprisonment and consequently, no statute of limitations applied so the plaintiffs were not barred from recovery.²²⁴ These five factors constitute considerable restraints holding back the floodgates of litigation. As Ciampi concludes, “Lifting immunity is only one dimension of individuals’ attempts to obtain compensation for international crimes in domestic courts.”²²⁵

The fear that abrogation of immunity will open the floodgates of litigation may also be exaggerated. However, the argument that the threat of civil litigation may serve as a deterrent, at least for States with attachable assets abroad, leading to fewer violations and consequently, less litigation²²⁶ is doubtful. Given the serious nature of the violations for which suit would be permitted, the possibility of a civil suit judgment giving the State pause is far-fetched. Such a prospect would be ludicrous to a State bent on genocide because the State would not plan for any potential claimants to even survive. Moreover, the doctrine of *forum non conveniens* can be used to deflect cases from national courts to the courts of another State or an international forum.²²⁷ However, this assumes that these alternate fora actually exist. The States where the violations allegedly occurred are unlikely to provide a forum and international bodies are not certain to take up the case. Thus, these suits may end up in national courts after all.

Nevertheless, the *Lozano* decision may somewhat serve to quell the fear that the abrogation of State immunity will open the floodgates of litigation. The Court of Cassation was very specific about the type of

²¹⁵ See Giegerich, *supra* note 54 (discussing the German-Greek example, where the Greeks weren’t able to attach German assets because under the Greek Civil Code “the Greek Justice Minister is required to approve such attachments and he refused.” This demonstrates that the courts had to comply with domestic law and that there are no inherent rights of actions for *jus cogens* violations.).

²¹⁶ Ciampi, *supra* note 31, at 611.

²¹⁷ *Id.*

²¹⁸ *Id.* at 612.

²¹⁹ *Id.* (noting that while these interpretations are not “formally binding” they are likely to be followed by lower courts and pave the way for Italian courts to entertain more claims against FRG by Italian citizens).

²²⁰ *Id.* at 613.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Orakhelashvili, *supra* note 62, at 956.

²²⁷ *Id.* at 956–57.

action, which would justify its assertion of jurisdiction in this case—war crimes.²²⁸ Moreover, the court gave a narrow definition of what constitutes a war crime by limiting it to “grave breaches of international humanitarian law of armed conflict” which are both intentional and part of a plan, policy, or “large-scale commission of such crimes.”²²⁹ The Court’s holding in *Lozano* that only war crimes would justify jurisdiction is compatible with the assertion of jurisdiction in *Ferrini* and *Civitella* since the causes of action in those cases stemmed from actions which would constitute war crimes as defined in *Lozano*. Thus, from these cases it is possible to hypothesize that there may be an objective substantive limitation on the type of actions for which Italian Court of Cassation would exercise civil jurisdiction under its emerging *jus cogens* exception to State immunity. However, such a limitation on the *Ferrini* doctrine, i.e., civil jurisdiction only for war crimes, is arguably inconsistent with the Court’s assertion that a State’s immunity from civil suit in the domestic courts of another State should be abrogated for international crimes because international crimes include much more than war crimes.²³⁰ While, *Ferrini*, *Lozano*, and *Civitella* all involved actions that constituted war crimes this does not necessarily mean the Court’s doctrine is thus limited, especially since the decisions themselves seem to quite clearly intend a much broader purview under which domestic courts could assert civil jurisdiction over a foreign State. However, as discussed *infra*, it is prudent to give these decisions a narrow reading under which the *Ferrini* doctrine would be limited to war crimes that are well-defined under international law—to wit, grave breaches of the four Geneva Conventions.

It is quite possible that, as some scholars contend, concerns that the abrogation of State immunity from civil suit will have significant negative consequences are “more imaginary than real.”²³¹ There may not even be a marked decline in bilateral relations between States as the result of such suits. Indeed, the abrogation of the FRG’s immunity in civil suits in Italian and Greek courts did not cause long-term irreparable damage to bilateral relations between the States.²³²

Despite the existence or non-existence of such consequences, for proponents of the abrogation of State immunity for *jus cogens* violations such concerns cannot be allowed to impact the assessment of the hierarchy of norms—the lifeblood of the *Ferrini* decision and its progeny—because this hierarchy is “an issue of legal science.”²³³ The question then becomes can *Ferrini* and its progeny be distilled into a doctrine that in addition to its moral attractiveness also has a sound and reasoned legal basis?

III. RULE FORMATION

Under the Italian Constitution, generally recognized norms of international law are fully applicable so long as they do not breach the essential foundations of the Italian legal system, which includes the protection of fundamental human rights.²³⁴ Italy is not a party to the Basel Convention on State Immunity nor is it a party to the United Nations Convention on Jurisdictional Immunity of States and Their Property.²³⁵ Moreover, Italy has no legislation on State immunity.²³⁶ Therefore, Italian courts must determine the

²²⁸ See Cassese, *supra* note 27, at 1083 (“The court holds that this customary rule does not apply because the act performed by Lozano was not a war crime.”).

²²⁹ Cassese contends that this definition is incorrect and under-inclusive. *Id.* at 1083–1087.

²³⁰ See *id.*, at 1084–1087 (Cassese asserts that the Court confuses *war crimes* with *grave breaches of the Geneva Conventions and the First Additional Protocol*. In fact, he argues that it is “well established that the latter are simply a sub-category of the former.” Cassese lists other possible definitions of war crimes and how acts not being defined as “‘odious or inhuman’ acts” could still constitute crimes.).

²³¹ Orakhelashvili, *supra* note 62, at 956.

²³² *Id.*

²³³ *Id.* at 957.

²³⁴ Art. 10 Costituzione ¶ 6 [Cost.] (It.).

²³⁵ The United Nations Convention on Jurisdictional Immunity of States and Their Property is not yet in force. United Nations Treaty Collections, UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITY OF STATES AND THEIR PROPERTY (2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

²³⁶ Ciampi, *supra* note 31, at 608.

applicability of such immunity and are bound by the Constitution to consider generally recognized norms of international law.²³⁷ The Court of Cassation's decisions in *Ferrini* and its progeny represent a value-oriented approach to reconciling State immunity and the protection of fundamental human rights, which are both principles of international law.²³⁸

From their analysis, De Sena and De Vittor conclude that the *Ferrini* Court placed special emphasis on the nature of the alleged wrongdoing.²³⁹ The Court's willingness to use "international crimes" and "*jus cogens*" interchangeably²⁴⁰ indicated to De Sena and De Vittor that the Court was advocating the abrogation of State sovereignty whenever the wrongdoing was "contrary to *universal values* shared by the whole international community" because "these *values* represent the fundamental principles of the international legal system."²⁴¹ According to De Sena and De Vittor, the Court's decision was the incarnation of what had been an ethereal academic legal theory—"the *formal* supremacy of the *jus cogens* norms gives them prevalence over all clashing non-peremptory norms, and therefore also over norms concerning sovereign immunity."²⁴² However, as Giegerich points out, only a select number of rules or principles "clearly belong in the *jus cogens* category" and it is even more uncertain what the consequences would be for violating *jus cogens*.²⁴³ Furthermore, while there is consensus that a State's sovereign acts enjoy immunity, with some exceptions,²⁴⁴ there is not agreement as to what constitutes a sovereign act nor as to what the exceptions are with regard to sovereign acts.²⁴⁵

This uncertainty in international law manifests itself in what Focarelli observes to be the Court's inconsistent reasoning. For example, according to the Court, the principle of State immunity and the principle that international crimes pose a threat to all of humanity coexist in international law.²⁴⁶ When conflict erupts between these principles, priority must be given to the "higher-ranking rules"—those relating to international crimes. Given the gravity of these crimes, the Court inferred an exception to State immunity.²⁴⁷ Although the Court acknowledged that there was no clear international custom abrogating civil immunity of a State for such crimes, this did not mean that there was a custom of permitting such immunity.²⁴⁸ According to Focarelli, this position is a precarious one, which serves to convolute the Court's reasoning.²⁴⁹ Under Article 10(1) of the Italian Constitution, only "generally recognized" principles of international law are applicable within the Italian legal system. Thus, if an exception to State immunity does not yet enjoy customary status, it is not part and parcel of the Italian legal system and consequently, cannot trump a principle that is, e.g., State immunity.²⁵⁰ However, by holding that this non-immunity rule trumps State immunity the Court asserted that non-immunity for such crimes is in fact an established rule in direct contradiction of its own admission a few lines earlier that such a rule was only emerging.²⁵¹

Compounding the problem is the Court's ambiguity as to the exact substantive grounds for invocation of the *Ferrini* doctrine. The Court changes its vocabulary with regard to the offenses for which State immunity from civil suit would be abrogated both within and across its decisions from fundamental human rights violations to international crimes.²⁵² Whether this is deliberate or the result of laxity is not certain but it seems likely that the Court is desirous that a considerable expanse of offenses

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ De Sena & De Vittor, *supra* note 107, at 110.

²⁴⁰ *Id.* at 100.

²⁴¹ *Id.* at 99–100.

²⁴² *Id.* at 101.

²⁴³ Giegerich, *supra* note 54, at 206.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 207.

²⁴⁶ Mantelli, *supra* note 23, at ¶ 11.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Focarelli, *supra* note 46, at 127.

²⁵⁰ *Id.* at 127–28.

²⁵¹ *Id.* at 128.

²⁵² *Ferrini*, *supra* note 1.

which would justify such abrogation. From a moral standpoint it is laudable that the Court desires to extend the availability of effective redress for serious offenses. Conversely, from a legal standpoint the fact remains that the Court is in essence a rogue actor eschewing established international law in an attempt to expound a new rule.

Nevertheless, the *Ferrini* doctrine can be saved by simply narrowing the Court's reasoning to its core and requiring a more precise articulation of the rule. *Ferrini* and its progeny all involved incidents that occurred during war.²⁵³ This is no aberration. Indeed, the abrogation of State immunity pursuant to the *Ferrini* doctrine as originally annunciated in *Ferrini* is most likely to come up in the context of war and, as discussed below, under a narrow reading of the *Ferrini* line of cases the only context in which such abrogation could arise.

The *Ferrini* doctrine will be most successful if its application is as straightforward as possible both in applicability and substance. This entails two propositions. First, abrogation of State immunity under the *Ferrini* doctrine should be applicable to all States or none. Each State can choose whether it will accept the *Ferrini* doctrine²⁵⁴ but if it does then it must be applied to all States—no picking and choosing reminiscent of the United States under the FSIA. Second, the *Ferrini* doctrine, at least for now, must only apply to grave breaches of international humanitarian law as provided in the four Geneva Conventions. This substantive limitation reflects the narrowest reading of the *Ferrini* line of cases. Moreover, the four Geneva Conventions enjoy universal acceptance and their principles constitute *jus cogens* that are also *erga omnes* obligations.²⁵⁵

This proposal limiting applicability and substance are interrelated and stem from the fact that the players in international law are States.²⁵⁶ Under the narrowest reading of the *Ferrini* line of cases abrogation of State immunity is based on violation of a *jus cogens* norm that is an *erga omnes* obligation.²⁵⁷ The duty to abide by a *jus cogens* norm is a duty of a *State* and that duty is owed to all *States*—not individuals.²⁵⁸ Thus, as the duty owed to all States has been violated each State may decide for itself what the consequences will be for the violating State. However, a foundational principle of international law is the equality of States. Thus, there should be equality between States when it comes to the consequences for an *erga omnes* obligation. If a State chooses abrogation of State immunity from civil suit as a consequence it must apply that consequence to all States that commit such a violation.

A. APPLICABILITY

Arguably, this all-or-nothing application would appear to undermine the argument that the *Ferrini* doctrine does not threaten to open the floodgates of litigation because States can enter into agreements precluding suit entirely. While such agreements would preclude a flood of litigation it would also circumvent *Ferrini*'s all-or-nothing application thus allowing for politically motivated application as States enter such agreements with their allies to the exclusion of their foes. However, as an initial matter, by limiting the *Ferrini* doctrine's application to grave breaches of the four Geneva Conventions, the number of potential cases is inherently limited to causes of action arising during an international armed conflict. And

²⁵³ *Id.*

²⁵⁴ See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 42 (D.C. Cir. 2011) ("International law itself . . . does not require any particular reaction to violations of law . . . Whether and how [a State] should react to such violations are domestic, political questions") (quoting LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 245–46 (2d ed. 1996)); *Tel-Oren v. Libya*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) ("the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.").

²⁵⁵ *Barcelona Traction, Light & Power Co. Ltd.* 1970 I.C.J. 3.

²⁵⁶ This paper argues that the *Ferrini* doctrine has the potential to change the customary international law with respect to State immunity *not* that individuals have a right to sue a State civilly. Indeed, to the extent that the Court of Cassation bases its decision on an individual right to sue this paper does not agree.

²⁵⁷ *Ferrini*, *supra* note 1.

²⁵⁸ *Barcelona Traction*, *supra* note 255.

although a sizable category, it is still much smaller than under a broad reading of the *Ferrini* doctrine, which would make any violation of fundamental human rights potentially actionable. Moreover, if the *Ferrini* doctrine is substantively limited to grave breaches of the four Geneva Conventions, any such arrangement precluding civil suit could be limited in a principled and reasoned way to formal peace treaties or settlement agreements rather than allowing preclusion based on any bilateral or multilateral agreement.²⁵⁹ In fact, such formal resolution is much more likely in the context of an international armed conflict.

Another argument against an all-or-nothing application of the *Ferrini* doctrine is that it takes away an important foreign policy bargaining chip insofar as a State could not selectively abrogate State immunity on an *ad hoc* political basis. While this is true, as a practical matter *ad hoc* abrogation of State immunity arguably does more to drive a wedge between States rather than serve as a means of pressure for certain desired behavior and ultimate rapprochement. For example, the United States has abrogated Iran's immunity from civil suit by deeming it a State-sponsor of terrorism.²⁶⁰ To date there are over fifty-two outstanding judgments against Iran amounting to over \$75 billion in compensatory and punitive damages.²⁶¹ This enormous amount in default judgments is a major obstacle to normalization of relations between the United States and Iran.²⁶² Thus, the loss of immunity as a bargaining chip may actually lead to more effective foreign policy strategies.²⁶³ And of course, as a matter of *realpolitik*, if a State wants to make *ad hoc* determinations as to State immunity it will do so. However, in order for the *Ferrini* doctrine to gain ground as a principled approach to the issue of State immunity it must be articulated as an all-or-nothing standard for the States who choose to adopt it.

B. SUBSTANCE

With regard to substance, this paper proposes that the *Ferrini* doctrine should be limited to its most narrow holding, i.e., abrogating State immunity from civil suit in the domestic courts of another State only for violations of international humanitarian law as reflected by grave breaches of the four Geneva Conventions. This paper counsels against a broader reading of the *Ferrini* doctrine for at least two reasons. First, the proposition that a State could non-consensually lose its immunity from civil suit in the domestic courts of a foreign State for violations of international obligations is novel. Thus, any case or line of cases purporting to do just that should be limited to their facts. *Ferrini* and its progeny all involved violations of international humanitarian law that constituted grave breaches of the Geneva Conventions. Thus, the substantive grounds for abrogation of State immunity should be limited to such breaches. Indeed, the Court in *Lozano* held that as the alleged conduct did not amount to a war crime the Court had no jurisdiction.²⁶⁴ Second, unlike other *jus cogens* norms that also constitute *erga omnes* obligations, grave breaches of the four Geneva Conventions are universally accepted and any variations in their application and interpretation

²⁵⁹ It is important to note that States could not enter into agreements to immunize from *criminal* prosecution individuals who had violated the Geneva Conventions.

²⁶⁰ *In Re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 128–29 (D.D.C. 2009).

²⁶¹ Josh Gerstein, *Legal Judgments Soaring Against Iran*, THE NEW YORK SUN (Apr. 3, 2006), <http://www.nysun.com/national/legal-judgments-soaring-against-iran/30230/>.

²⁶² See U.S. CONST. amend. V. (mentioning that the United States cannot nullify the judgments without compensation because the plaintiffs have a property interest in those judgments.) Cf. *id.* (noting that the 5th Amendment requires “just compensation.”) Thus, if “just compensation” is fair market value, it is unlikely the fair market value of these judgments is their face value given that there is no reasonable likelihood of every recovering anything let alone the face value. Thus, actually nullifying the judgments may be a viable option for the United States Government insofar as the fair market value compensation for the judgments would be little to nothing.

²⁶³ See *In Re Islamic Republic of Iran Terrorism Litigation*, *supra* note 260 (noting that the State sponsor of terrorism exception to the FSIA has not deterred terrorist activity and has hampered the Executive Branch's ability to handle sensitive foreign policy issues).

²⁶⁴ *Lozano*, *supra* note 28 at ¶¶ 7–8.

among States is limited.²⁶⁵ Quite simply, States cannot challenge their obligation to abide by the four Geneva Conventions and their ability to alter the scope of their obligation is nearly non-existent.

Indeed, the potential for the *Ferrini* decision and its progeny to effect a change in customary international law has serious implications for State action *jure imperii* during times of war. Thus, it should come as no surprise that many States, especially dominant or nuclear powers more willing to throw their weight around militarily, would be opposed to such a change. Ironically, the U.S. amendments to the FSIA were cited in the *Ferrini* decision as indicative of an emerging recognition of a human rights exception to sovereign immunity.²⁶⁶ However, the FSIA amendments, as the Court itself acknowledged in *Ferrini*, are highly political and clash with the international principle of State equality.²⁶⁷ Quite simply, the United States is comfortable with abrogating the immunity of States of its choosing for actions of its choosing but would likely be vehemently opposed to being subject to the international system envisioned by the Italian Court of Cassation. Indeed, if the United States refuses to submit to the International Criminal Court, largely out of a concern for the implications it would have for U.S. actions taken in wartime,²⁶⁸ it is unlikely the United States would be amenable to a rule that allowed civil suits in the domestic courts of another State for those same actions. Nevertheless, the *Ferrini* doctrine, rogue though it may be, is arguably more aligned with fundamental principles of International law than the U.S. amendments to the FSIA.

C. JURISDICTION

Limiting *Ferrini* and its progeny to their facts also resolves another obstacle inherent in a broader reading, that of jurisdiction. Reading *Ferrini* broadly, Fox views the decision as advocating the abolishment of the current dualistic system in favor of “a single regime of responsibility where a grave violation of a fundamental human right amounting to an international crime is established.”²⁶⁹ What this vision overlooks, according to Fox, is that without the State’s consent to jurisdiction the claim will “remain largely unrecognized and unenforceable.”²⁷⁰ Only the United States has directly abolished State immunity in its

²⁶⁵ Admittedly, there are other *jus cogens* norms that also constitute *erga omnes* obligations. *Barcelona Traction* annunciated several categories of *erga omnes* obligations: aggression; genocide; and the basic rights of the human person, most notably slavery and racial discrimination. Moreover, such obligations are arguably well-defined in conventions that have quasi-universal acceptance such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention to Suppress the Slave Trade and Slavery, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While there are several notable human rights treaties that do enjoy quasi-universal acceptance, variations among States as to exactly what those provisions protect are significant. Conversely, grave breaches of the Geneva Conventions—universally accepted treaties—are clearly defined. Although variation in interpretation and application between States is inevitable, any such variation is likely to be far slighter than interpretation and application of international human rights conventions such as the Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights. Indeed, the significant differences between States as to the scope of the protections of these human rights conventions call into question whether or not they are even truly quasi-universal. See *Barcelona Traction, Light & Power Co. Ltd.* 1970 I.C.J. 3, ¶ 34 (holding that *erga omnes* obligations regarding the protection of human rights are those that “have entered the body of general international law” or those “conferred by international instruments of a *universal* or *quasi-universal* character.”) (Emphasis added). Having the *Ferrini* doctrine apply to violations of all these obligations is not only unnecessary given the ability to narrow the *Ferrini* doctrine by limiting it to its essential holding but also would thwart the exportation of this nascent doctrine beyond Italian borders.

²⁶⁶ *Ferrini*, *supra* note 1, at ¶ 10.2.

²⁶⁷ *Id.*

²⁶⁸ See Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. TIMES, Sept. 7, 2002, available at <http://www.nytimes.com/2002/09/07/international/europe/07COUR.html?pagewanted=all> (reporting that the United States cited protection of its soldiers from suit as a reason not to submit to the International Criminal Court’s jurisdiction); Barbara Crossesette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, available at <http://www.nytimes.com/2002/04/12/international/12COUR.html?pagewanted=all> (reporting that the United States feared that as a military power it would be vulnerable to prosecution).

²⁶⁹ Fox, *supra* note 118, at 144.

²⁷⁰ *Id.*

amendments to the FSIA.²⁷¹ Fox finds this legislation to be an unsatisfactory approach to the issue, characterizing it as “arbitrary,” “manipulat[ive],” and “partisan.”²⁷² Thus, aside from domestic legislation purporting to authorize jurisdiction over another State, how does a violation of *jus cogens* confer jurisdiction to one State over another? Jurisdiction is a crucial issue but one that does not destroy the legal viability of the *Ferrini* doctrine. Indeed, by simply limiting *Ferrini* and its progeny to their facts, it is clear that civil jurisdiction by the domestic courts of a State over another State that has committed a grave breach of any of the four Geneva Conventions can only occur when one of the traditional bases²⁷³ of jurisdiction is present: subjective or objective territoriality; nationality; or passive personality.²⁷⁴

By giving a narrow reading to *Ferrini* and its progeny a logically consistent and arguably legally defensible rule emerges. A conservative formulation of substantive and procedural aspects of the rule limited to well-established and universally accepted international law ironically increases the potential for its ultimate purpose of radically altering the customary international law of State immunity.

IV. CONCLUSION: VIABILITY AND IMPACT

The *Ferrini* decision and its progeny mark a seminal line of cases given its potential to force States to reevaluate their stance on the issue of State immunity. Rather than attempting to discover an existent rule of international law that abrogates State immunity in these situations, the Italian Court of Cassation should accept its role as a trendsetter. However, this makes the Court’s decisions deviations from established international law and therefore “unlawful.”²⁷⁵ As such, it is eminently important for the Court to clearly articulate its reasoning in a rational and precise way in order to persuade other States to accept the *Ferrini* doctrine for what it is—a proposed new rule of international law. The narrow reading proposed by this paper would do much to advance the legitimacy of the doctrine thereby increasing the likelihood that it will effect a change in customary international law on State immunity. However, just because there can be a change in customary international law on State immunity based on the *Ferrini* doctrine does not mean that such a change is advisable.

Why should individuals be allowed to bring civil suits against a State especially if the abrogation of State officials’ functional immunity for *jus cogens* violations is already well-established? Even assuming the violating State does not provide an adequate forum it is unclear why the abrogation of function immunity of State officials by the domestic courts of a foreign State is not sufficient—why must the State itself have its immunity stripped? There are three possible reasons. First, there is a moral argument. Quite simply it means more to victims to have a judgment against a State than a mere individual. But, this is far from a compelling justification. Second, suing the State directly avoids the possible difficulty of identifying the individual

²⁷¹ *Id.* at 151.

²⁷² *Id.*; See also De Sena & De Vittor, *supra* note 107, at 103 (asserting that the Court in *Ferrini* recognized that the US legislation was not a particularly useful model since it was not in accordance with international legal principles because only countries singled out by the US as state sponsors of terrorism were liable to suit which is not consistent with the principle of “sovereign equality of States.”); See also Gattini, *supra* note 101, at 230 (asserting that the Court in *Ferrini* was reticent about citing US cases under the exception to FSIA as examples to bolster the Court’s own reasoning: “the dubious value of those judgments is indirectly admitted by the Court itself on account of the unilateral nature and political overtones of the U.S. approach.”).

²⁷³ While it is possible that the protective principle of jurisdiction could be invoked, this form of jurisdiction is arguably controversial given its uncertain contours. Moreover, this principle does not need to be invoked to find a traditional basis of jurisdiction in any of the cases from the *Ferrini* line. The same reasoning applies with respect to universal jurisdiction.

²⁷⁴ Subjective territorial jurisdiction gives the State jurisdiction over conduct that occurs in the State’s territory. *Ferrini*, *supra* note 1; See also Focarelli, *supra* note 46, at 130 (discussing Italy’s jurisdiction over conduct that began in Italy); Ciampi, *supra* note 31, at 597–98 (2009) (discussing Italy’s jurisdiction over conduct that occurred in Italy). See also Lozano, *supra* note 28 (noting that objective territorial jurisdiction gives the State jurisdiction when the effects of the conduct occur in the State’s territory. Nationality gives the State jurisdiction over conduct by the State’s nationals. Passive personality gives the State jurisdiction for conduct carried out against the State’s nationals. Usually, this conduct is seriously harmful and/or committed on the basis of nationality.).

²⁷⁵ Focarelli, *supra* note 46, at 130.

officials were responsible for the harm. However, pinpointing the responsible parties is required in any civil case.²⁷⁶ Just because pegging the State would be expedient does not mean it is just. Moreover, there is no principled reason why the identification of wrongdoers for cases involving violations of *jus cogens*—an incredibly serious allegation—should be legally easier than for a “routine” wrongful death or other personal injury claim. Third, the State has deep pockets while it is likely that the government official does not. Facially, this is a weak argument. The victim is stuck with the tortfeasor; if you can't get blood out of a stone too bad, the victim is out of luck. On the other hand, in cases with government officials the State actually provided the individuals with the funding, resources, and authority to carry out the violations. Thus, there is a much stronger argument that the State's deep pockets should be available to provide redress for those injuries since the State's pockets were involved in facilitating them. Although this third argument carries some heft, it is unlikely to outweigh the other prominent considerations that counsel against the *Ferrini* doctrine.

There are three principal reasons why the *Ferrini* doctrine, even the narrow version proposed above, is an unwise proposition. First, the gravity of a determination that a State is liable, even civilly, for violations of *jus cogens* cannot be overstated. However, the *Ferrini* doctrine would allow such momentous determinations based on international law to be made in trial level domestic courts. As the State's appearance is unlikely, default judgments would be routine. Default judgments are particularly inappropriate in this context given the heinous nature of the wrongs alleged and the potential ramifications of such violations on a State-to-State level. After all, violations of *jus cogens* that are *erga omnes* constitute a breach of obligations owed to every State. Thus, States themselves have the primary—and some may argue the exclusive—interest in such violations. Even if a State were to appear, in countries such as the United States, liability for international wrongs would be decided by lay citizens in the form of juries rather than learned jurists. Additionally, this decentralized method of decision-making could result in incongruous outcomes with some courts finding liability and others not finding liability even within the same State.²⁷⁷ In short, the *Ferrini* doctrine places the power to make a crucial determination as to an international obligation in the hands of innumerable municipal domestic tribunals. This decentralized, provincial method of determination is inappropriate given the international character of: (1) the nature of the duty (*jus cogens*) as binding on all States; and (2) to whom the obligation is owed (*erga omnes*), i.e., to all States. While each State has the authority to determine what its reaction will be to another State's violation of *jus cogens*, the initial determination that there has been a violation should be an international one. This determination should arguably be made by the concerned States themselves, the international community through a collective resolution, or a ruling of an international judicial body such as the ICJ.²⁷⁸

²⁷⁶ See, e.g., *In Re Petition of Sheila Roberts Ford*, 170 F.R.D. 504 (M.D. Ala. 1997) (acknowledging that a putative civil plaintiff seeking discovery to provide her with sufficient evidence to bring suit against law enforcement officials for the shooting death of her father was in a “Catch 22” because such discovery was unavailable prior to filing suit but that without such discovery she lacked sufficient facts to determine who were the appropriate defendants: “Indeed, she must feel that, under the rules established by our civil justice system, a law enforcement officer can get away with murder. This court has no answer for her . . .”).

²⁷⁷ At least in U.S. courts this could lead to offensive nonmutual collateral estoppel. A State that actually appeared and litigated would only have to be found liable once and then all other putative plaintiffs could piggy-back off that finding of liability so that the only question before the court would be that of damages. However, it seems highly unlikely that offensive nonmutual collateral estoppel could be applied to a State given the U.S. Supreme Court holding in *United States v. Mendoza*, 464 U.S. 154 (1984) (explaining that offensive nonmutual collateral estoppel could not be applied against the United States). In *Mendoza* the Court reasoned that:

The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government. . . . Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the Government to abandon virtually any exercise of discretion in seeking to review judgments unfavorable to it. *Id.* at 162–63.

²⁷⁸ Indeed, Common Article II of the four Geneva Conventions provide that if there is disagreement as to the existence of grave breaches then the parties should submit the dispute to an umpire. The International Committee of the Red Cross' authoritative Commentaries provide that such a dispute should be submitted to the ICJ. 1 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: FIRST GENEVA CONVENTION FOR THE AMELIORATION OF THE

Second, on the individual State level, a determination that another State has violated *jus cogens* is a political question. Thus, the judiciary should decline to entertain a claim—civil or otherwise—absent a determination on the issue of liability of the foreign State for a violation of *jus cogens* by the executive branch with substantial deference by the judiciary to that determination. Some have argued that Article 2 of the Institut de Droit International’s Resolution on The Activities of National Judges and the International Relations of Their State²⁷⁹ (“the Resolution”) undermines the political question doctrine.²⁸⁰ Article 2 provides:

National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law.

Even assuming that the Resolution constitutes a persuasive authority, its articles must be read in context, i.e., a direction to the national courts of States to determine the compliance of their *own* State with international law. Moreover, Article 7 explicitly endorses the existence of a political question doctrine,²⁸¹ at least the form such doctrine takes in the United States, by allowing deference to “the ascertainment of facts pertaining to the international relations of the forum State or other States.”²⁸² Indeed, such an ascertainment constitutes “*prima facie* evidence of the existence of such facts.”²⁸³

As the proposed narrow reading of the *Ferrini* doctrine would only apply to grave breaches of the four Geneva Conventions, determination as to the method of compensation does not create an issue merely of treaty interpretation for which courts have competence.²⁸⁴ Rather, the four Geneva Conventions create no such private right of action,²⁸⁵ thus, to the extent that a State adopts the *Ferrini*

CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 374-79 (1952); 2 JEAN S. PICTET, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: SECOND GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 271-72 (A.P. de Heney trans., 1960); 3 JEAN S. PICTET, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: THIRD GENEVA CONVENTION FOR THE RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 630-33 (A.P. de Heney trans., 1960); 4 JEAN S. PICTET, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 603-06 (Ronald Griffin and C.W. Dumbleton trans., 1958).

²⁷⁹ Institut De Droit Int’l, *The Activities of National Judges and the International Relations of their State*, Art. 7, Res. Session of Milan (Sept. 7, 1993), http://www.idi-ii.org/idiE/resolutionsE/1993_mil_01_en.PDF.

²⁸⁰ Micaela Frulli, *When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Marković Case*, 1 J. INT’L CRIM. JUST. 406, 412–13 (2003).

²⁸¹ Institut De Droit Int’l, *supra* note 279, at Art. 7(3): National courts should be able to defer to the Executive, in particular the organs responsible for foreign policy, for the ascertainment of facts pertaining to the international relations of the forum State or other States. The ascertainment of international facts by the Executive should constitute *prima facie* evidence of the existence of such facts. The legal characterization of the facts should be reserved for the judiciary alone; *Id.*

²⁸² *Id.* art. 7(1).

²⁸³ *Id.* art. 7(2).

²⁸⁴ See *id.* art. 5(3) (“National courts should have full independence in the interpretation of a treaty, making every effort to interpret it as it would be interpreted by an international tribunal and avoiding interpretations influenced by national interests.”).

²⁸⁵ See *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (referring to the Third Geneva Convention and concluding “[i]t is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities.”). See also *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006) (citing footnote 14 of *Johnson v. Eisentrager* as support for the conclusion that the Geneva Conventions do not confer a private right of action. On appeal, the Supreme Court’s plurality opinion did not reach the issue of whether the Geneva Conventions confer a private right of action because as part of the law of war covered by the Uniform Code of Military Justice which was the source of authority for the military commission slated to try Hamdan). But see *id.* at 717 (Thomas, J., dissenting) (arguing that the Geneva Conventions do not confer a private right of action. “The judicial non-enforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanism and this, too is part of the law of war.”). See also *id.* at 716 (Thomas, J., dissenting) (stating that while compliance with the laws of war are part of the UCMJ, “it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable on their own accord.”); Cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J. concurring) (noting

doctrine there would have to be some implementing legislation recognizing that cause of action. However, the initial determination as to whether there has been a grave breach is, at the very least, a determination that should be reserved to the executive.²⁸⁶ Indeed, such a determination goes beyond mere State immunity, a jurisdictional issue, to implicate the Act of State Doctrine, a substantive issue.²⁸⁷ It would be disastrous to foreign policy and international relations to have *ad hoc* decentralized determinations of whether another State's actions constitute a violation of international law.

Third, allowing civil suits against States is a hollow privilege because unless radical changes are made to State immunity with respect to State assets, plaintiffs will never meaningfully collect on these judgments if they are able to collect at all. The issue of immunity from suit is wholly separate from the issue of immunity from attachment and execution. Perhaps the starkest example of this is the Victims of Terrorism judgments in the United States stemming from the State sponsor of terrorism exception to the FSIA. In a lengthy and impassioned opinion, Chief Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia systematically laid out the problems with the private litigation model.²⁸⁸ The Court decried the fact that “the overwhelming majority of successful FSIA plaintiffs with judgments against Iran still have not received the relief that our courts have determined they are entitled to under the law”²⁸⁹ and noted “the resistance of the Executive Branch to legislation permitting the execution of court judgments through assets of state sponsors of terrorism.”²⁹⁰ Even assuming there were enough Iranian assets within the United States to satisfy the more than one thousand plaintiffs²⁹¹ and billions of dollars in judgments, the assets are often “held by certain large financial institutions that are in fact agencies or instrumentalities of other foreign nations, which are in and of themselves subject

that the Hague Conventions had never been regarded as creating a private right of action and speculating that “[i]f they were so regarded the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals . . . Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly . . . Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. It is for these reasons that the Conventions are best regarded as addressed to the interests and honor of belligerent nations, not as raising the threat of judicially awarded damages at war's end.”). But see 3 JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 1949: THIRD GENEVA CONVENTION FOR THE RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 630-33 (A.P. de Heney trans., 1960) (noting that “So far this commentary has dealt only with the relationship between prisoners of war and the belligerents in whose hands they are. What, then, is the position when the violations are the consequence of an agreement signed by the State of origin of the prisoners of war? Would it not be possible for the State of origin to be prosecuted by the prisoners of war who have suffered prejudice, in those countries at least in which individual rights may be maintained before the courts? It would seem that the reply to this question must be in the affirmative.”).

²⁸⁶ See *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (“Agreement with foreign nations for the punishment of war criminals, insofar as it involves aliens who are the officials of the enemy or members of its armed services, is a part of the prosecution of the war. It is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done. It falls as clearly in the realm of political decisions as all other aspects of military alliances in furtherance of the common objective of victory.”).

²⁸⁷ The Act of State doctrine is a prudential doctrine, which is “compelled by neither international law nor the Constitution.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964). The classic formulation of the doctrine provides: Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Supreme Court has held that “where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.” *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

²⁸⁸ *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 246.

²⁸⁹ *Id.* at 120.

²⁹⁰ *Id.* at 121, 125–26 (emphasizing the negative impact allowing such suits to proceed and the subsequent court battles over attachment have had on the Executive Branch's foreign policy objectives by the Court).

²⁹¹ *Id.* at 120.

to sovereign immunity under the FSIA.”²⁹² Given the limited assets held by a State abroad, plaintiffs who win the race to the courthouse will be the most likely to realize their judgments to the exclusion of other “equally deserving victims” who are left with nothing.²⁹³ Due to the inability to collect on judgments, the private litigation route is an illusory remedy giving victims false hope—a “meaningless kabuki dance.”²⁹⁴ In short, it is counterproductive and cruel to allow such suits. Counterproductive, by allowing judicial resources to be expended issuing judgments incapable of execution and likely to constrain the foreign policy prerogative of the executive. Cruel, by giving victim-plaintiffs a scheme of justice that is merely a Potemkin village.

As a normative matter, the political implications identified above counsel against such a doctrine. There is likely good reason that other States have not gone the route of the United States with its *ad hoc* abrogation of State immunity for civil suit or responded favorably to the *Ferrini* line of cases out of Italy—it just does not make sense legally or politically to allow civil suits for violations of international law—war crimes or otherwise. While the February 2012 ICJ decision dealt a blow to the *Ferrini* doctrine it was not fatal. There is little reason to believe that the Italian courts which were brazen enough to expound the doctrine and continue to apply and even expand upon it in the face of opposition will be cowed into conformity. Moreover, the ruling while influential in the development of international law is—by the ICJ’s own statutory provision regarding the sources of international law—only a secondary source,²⁹⁵ State practice is far more important. Thus, regardless of the ICJ’s decision in *Germany v. Italy* if the *Ferrini* doctrine is able to gain traction, customary international law on State immunity may undergo a change. Thus, while the *Ferrini* doctrine has potential to impact customary international law on State immunity the legal and practical implications of doing so are far from positive.

²⁹² *Id.* at 122.

²⁹³ *Id.* at 124.

²⁹⁴ *Id.* at 129.

²⁹⁵ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060.

ARTICLE

Weak Loyalties: *How the Rule of Law Prevents Coups D'État and Generates Long-Term Political Stability*

Ivan Perkins*

ABSTRACT

The “rule of law” is lauded for producing a variety of positive governance characteristics, including minimal corruption, human rights, and economic prosperity. What has been overlooked, however, is that rule-of-law institutions are also responsible for another phenomenon: the fact that certain states experience long-term political stability, without any coups or coup attempts (defined as internal efforts to seize central state authority through force). The prevailing theory of stability holds that “professional” military officers refrain from coups because they have internalized the norms of civilian authority and constitutional procedure. However, this theory requires a system of socialization capable of counteracting self-interest, throughout the entire political-military establishment, for centuries at a time. By examining the first two states to achieve long-term stability—the Republic of Venice and Great Britain—this Article develops a new theory. Impartial rule-of-law institutions systematically attenuate personal-loyalty relationships within the political-military establishment, and this process inhibits the formation of criminal conspiracies, including those aiming at a *coup d'état*. The Article identifies 22 states that experienced zero coups and coup attempts during the period 1961-2010. Using this data, the Article confirms a prediction of the theory: that stable states should exhibit low levels of corruption.

* B.A. Pomona College; J.D. UCLA School of Law; M.A., Ph.D. UC Berkeley (Political Science); Associate, Curiale Hirschfeld Kraemer LLP, Santa Monica, California.

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I. INTRODUCTION

In what are called “mature democracies,” people generally take the absence of military coups and other violent revolutionary upheavals for granted. The prevailing theory of stability holds that “professional” military organizations train soldiers and commanders to accept civilian supremacy, such that they do not even consider mounting a coup against the constitutionally-appointed government.¹ This theory, however, requires a stark and surprising negation of self-interest, in that military commanders must always place constitutional considerations over and above their own desires.² This anti-coup training must also be systematic: it must operate throughout the political-military establishment and be effectively transmitted to succeeding generations.³ This Article contends that the “rule of law” provides a stronger and simpler explanation for stability. Impartial rule-of-law institutions systematically attenuate personal-loyalty relationships within the political-military establishment, and this process in turn inhibits the formation of grand criminal conspiracies, including those aiming at a *coup d’état*.

As scholars like A.V. Dicey and Joseph Raz have concluded, the “rule of law” is intrinsically incompatible with governmental corruption, defined as the abuse of public office for personal gain or favoritism.⁴ While there is no such thing as a corruption-free state, a state purporting to be under the “rule of law” must exhibit low corruption levels.⁵ As some scholars of corruption have noted, corrupt activities like bribery and nepotism are facilitated by (and help solidify) strong ties based upon kinship and patronage.⁶ At a more general level, a substantial body of academic research illustrates the fundamental incompatibility between impersonal rules and personal loyalties.⁷ Rule-of-law institutions gradually move society from insular and exclusive factions, permeated by strong bonds of loyalty and reciprocity, to an open-ended network society in which individuals form a myriad of temporary combinations, wherein each link is relatively weak.⁸

The Article traces this development historically, focusing on the first two states to achieve long-term political stability: Venice and Great Britain. During the Renaissance and Early Modern periods, the Venetian Republic was famous for its exceptional stability. Venice experienced no coups or coup attempts, defined as an internal effort to seize central state authority through physical force, from 1355 until Napoleon’s conquest of the city-state in 1797.⁹ Great Britain has achieved similar stability since 1746, when the last serious

¹ See *infra* notes 224–237 and accompanying text.

² See *infra* notes 238–248 and accompanying text.

³ *Id.*

⁴ Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3, 12 (Robert L. Cunningham ed., 1979) (“The arbitrary use of governmental power for personal gain, out of vengeance or favoritism . . . is drastically restricted by close adherence to the rule of law.”); ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (10th ed. 1959) (“[T]he law in England ensures that every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”); Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 4 (Thomas Carothers ed., 2006) (“Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.”).

⁵ Carothers, *supra* note 4, at 4 (explaining that in order for “rule of law reform” to be successful, laws must apply equally to everyone, political leaders must be willing to abide by these laws, and central lawmaking institutions must be fair and efficient).

⁶ ERIC M. USLANER, CORRUPTION, INEQUALITY, AND THE RULE OF LAW 49–50 (2008); see also Johann Graf Lambsdorff, *What Nurtures Corrupt Deals? On the Role of Confidence and Transaction Costs*, in CORRUPT EXCHANGES: EMPIRICAL THEMES IN POLITICS AND THE POLITICAL ECONOMY OF CORRUPTION 20, 20–36 (Donatella Della Porta & Susan Rose-Ackerman eds., 2002) (explaining that certain social structures allow corruption to thrive based on the advantage and “kinship” of group members).

⁷ See *infra* note 344 and accompanying text.

⁸ *Id.*

⁹ See *infra* notes 24–73 and accompanying text.

attempt to topple the British state was defeated.¹⁰ Renaissance Venice was also renowned for its exceptionally fair and impartial legal system,¹¹ and eighteenth-century Britain enjoyed a similar reputation.¹² Chronologically, therefore, mature rule-of-law institutions coincide with the onset of stability in both states. The Article shows that personal-loyalty relationships weakened with the development of rule-of-law institutions in both Venice and Britain.¹³

The attenuation of personal-loyalty relationships generates long-term political stability because, in the absence of tightly-knit cliques and cabals, the formation of a grand conspiracy to seize state power becomes inordinately difficult. Scholars of corruption have pointed out that “corruption networks” tend to be based upon family, clan, tribal, and patronage bonds;¹⁴ similarly, scholars of the *coup d’état* have noted that coup organizers tend to draw upon the same “strong-tie” links to recruit followers.¹⁵ This is because any criminal endeavor—and especially a coup, which is a complex operation requiring the participation of hundreds of individuals—brings the risk of discovery and criminal punishment. As a result, conspirators turn to people they can trust.¹⁶ Even in rule-of-law states with attenuated personal loyalties, of course, some corrupt activities occur within the political-military establishment.¹⁷ For example, politicians, civil servants, and military commanders can be susceptible to the temptations of bribery—a crime that may only involve two people and can remain forever secret. Balancing risks and rewards, it may be individually rational to offer or accept a bribe. But the risk/reward calculations change with respect to a *coup d’état*, where hundreds of individuals must participate in an operation that becomes public at the moment of execution. In a rule-of-law society, a coup organizer would have to approach hundreds of fellow military officers, bureaucrats, or politicians—with whom he or she would only be connected through “weak ties”—and any one of them could betray the plot, perhaps for personal gain. In this context, it becomes highly irrational (from an individual’s perspective) to approach even one other person about a *coup d’état*. In short, the rule of law creates a “collective action problem” that renders coup conspiracies untenable. In mature democracies like Britain and the United States, it is the rule of law that inhibits any threat of a *coup d’état*.

If the theory above is correct, we would expect to find that stable states exhibit minimal corruption. By examining every state in the world between 1961 and 2010 to determine whether it experienced any coups or serious coup attempts, the Article identifies 22 states that were “coup-free” during this period.¹⁸ It compares this set of 22 states with data on relative corruption rates and finds a statistically significant correlation between stability and low corruption. Almost all of the 22 “coup-free” states appear at the very bottom of corruption indexes, showing that they are the cleanest, least corrupt, and most rule-of-law based governments in the world.¹⁹

“Coup” is defined broadly here, as any forceful seizure of central government power by internal actors.²⁰ A coup or *coup d’état* is any disorderly, unpredictable transfer of power, accomplished through

¹⁰ See *infra* notes 81–135 and accompanying text.

¹¹ See *infra* notes 250–343 and accompanying text.

¹² See *infra* notes 251–343 and accompanying text.

¹³ See *infra* notes 344–440 and accompanying text.

¹⁴ See USLANER, *supra* note 6, at 49–50 (describing how corruption is based on trust, and trust is best fostered among one’s “own kind” or “small circle”); see also LAMSDORFF, *supra* note 7 (noting that corruption often occurs among those in the same ethnicity, cultural group, or those sharing “kinship ties”).

¹⁵ EDWARD LUTTWAK, *COUP D’ÉTAT: A PRACTICAL HANDBOOK* 74–75 (1979) (finding recruitment usually based upon “family, clan and ethnic links”); see BRUCE W. FARCAU, *THE COUP: TACTICS IN THE SEIZURE OF POWER* 38 (1994) (citing factional loyalties to charismatic military officers as key factors in the origin of coups); see also SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS* 6, 288 (2nd ed. 1990) (describing a typical coup-prone African army as a coterie of “distinct armed camps” and “personal-loyalty pyramids,” where soldiers owe personal allegiance to their commanders).

¹⁶ USLANER, *supra* note 6, at 49–50.

¹⁷ See, e.g., *infra* notes 321–325 and accompanying text.

¹⁸ See *infra* notes 136–157 and accompanying text.

¹⁹ See *infra* notes 490–492 and accompanying text; see Table, “Corruption Levels and the Coup-Free Zone,” p. 79.

²⁰ See *infra* notes 445–453 and accompanying text.

physical force or intimidation.²¹ This includes a *coup d'état* by military commanders, but also encompasses, for example, palace intrigue.²² When one brother kills or imprisons another, and assumes his throne, he commits a coup. The definition extends to long civil wars for power, like that waged between Marc Antony, Octavian, and the assassins of Julius Caesar, as well as to spontaneous street revolutions, like those in Tehran in 1979, Manila in 1986, Eastern European capitals in 1989, Belgrade in 2000, Bishkek in 2010, and Tunis and Cairo in 2011. The effort to seize power need not succeed; serious but failed attempts still count. Finally, the term “coup” embraces an “executive coup,” whereby a constitutional leader radically and forcefully extends his scope of power or term of service, in violation of the constitution, as in Chancellor Hitler’s 1933 hijacking of Germany with Nazi thugs.

This definition of “coup” excludes purely secessionist rebellions, where one region simply tries to leave a larger state. These appear throughout history, and include local uprisings against the Roman, Persian, and Chinese empires, the 1857 Sepoy Mutiny in India, the U.S. Civil War, and recent conflicts in Bosnia, East Timor, and Chechnya. Such events, we should note, are compatible with central stability. Even as the American Revolution, Sepoy Mutiny, Boer rebellions, Irish uprisings, and anti-colonial movements racked the British Empire, for example, constitutional succession in Westminster remained placid and procedural. Such orderly, peaceful politics is our focus.

The Article proceeds in the following steps. Part I identifies a set of states that have entered long-term stability. First, it examines the first two states to effectively banish coups from their politics: the Republic of Venice and Great Britain. Second, it presents empirical research demonstrating that, between 1961 and 2010, only 22 independent states (including Britain) experienced no coups or coup attempts. Together, this historical and contemporary research establishes a list of 23 “coup-free states.”

Part II explores the explanations for stability that have been proposed to date. It examines the specific explanations for Venetian and British stability, as well as the prevailing theory of stability with respect to today’s “mature democracies.” Explicitly or implicitly, many of these theories rely on the concept of “virtue,” which holds that people *could* commit coups, but refrain because of ethical inhibitions. This notion places a heavy burden on training or socialization, requiring it to negate basic self-interest for decades or centuries at a time, without really explaining how it accomplishes this task.

Next, the Article searches for a better theory. It begins by asking whether Venice and Britain shared any characteristics that might explain their remarkable stability. As Part III demonstrates, both states developed the “rule of law,” with legal institutions renowned for fairness, impartiality, and dependability. Specifically, each state developed a legal system that exhibited the following eight characteristics: (1) equality under the law; (2) rational inquiry; (3) public adversarial debates; (4) procedural protections for criminal defendants; (5) a legal profession closely intertwined with political elites; (6) an independent judiciary; (7) the systematic subjection of state actions to legal scrutiny; and (8) low governmental corruption.

Part IV elucidates how, in both Venice and Britain, rule-of-law institutions gradually attenuated personal loyalties rooted in family, clan, lordship, and patronage. This process was partly intentional: both states promulgated specific laws designed to weaken the relationships between noble families and their followers.

Finally, Part V presents a new theory of stability, which applies to Venice, Britain, and the other contemporary “coup-free states.” Rule-of-law institutions, by systematically attenuating personal-loyalty relationships within the government and military, inhibit the formation of criminal conspiracies, including those aiming at a *coup d'état*. Using a statistical test, Part V confirms a basic prediction of the theory: that coup-free states should exhibit minimal corruption.

In essence, high-ranking officials under the rule of law do not trust each other enough to conspire in a *coup d'état*. In fact, as anecdotal evidence suggests, they cannot even propose a coup in casual conversation, because their interlocutors are more likely to report the incident, rather than to go along. In this context,

²¹ *Id.*

²² *See id.*

merely mentioning a coup with any degree of seriousness becomes far too risky, and the notion effectively disappears from national political life.

II. THE HISTORICAL AND CONTEMPORARY “COUP-FREE STATES”

A. VENICE AND BRITAIN

In the late fourteenth century, the oligarchic republic of Venice gained renown for its lawful, orderly, and non-violent politics.²³ Four hundred years later, Great Britain acquired a similar reputation.²⁴ These states built entirely different constitutional orders, but each managed to avoid coups and coup attempts for centuries on end.

1. *La Serenissima Repubblica: “The Most Serene Republic”*

Venice was not always tranquil. The seventh and eighth centuries saw chronic strife, and there were coups and coup attempts in 804, 836, 864, 946, 976, 1022-23, 1024, 1032, 1082, and 1172.²⁵ But following a final coup attempt in 1310²⁶ and a major conspiracy in 1355,²⁷ no Venetians attempted to overthrow their government.²⁸ The republic lasted until 1797, when it was invaded by Napoleon, and lost its independence.²⁹ Venice was known as *La Serenissima Repubblica*—“The Most Serene Republic”—and several historians call it the first state to emerge from internecine violence.³⁰

For centuries, Europeans hailed the Adriatic marvel. The republic “does not know civil discord,” wrote a fifteenth-century French scholar.³¹ A sixteenth-century philosopher noted that there were no civil wars or tyrants there.³² An Englishman proclaimed Venice free from “intestin commotions and tumults.”³³ As a

²³ See, e.g., John Martin & Dennis Romano, *Reconsidering Venice*, in *VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE 1297-1797* 1, 2 (John Martin & Dennis Romano eds., 2000) (noting that due to the city’s unique stability during the Renaissance, “Venice appeared to be a city like no other”); WILLIAM J. BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY: RENAISSANCE VALUES IN THE AGE OF THE COUNTER REFORMATION* 63 (1968) (“Venice had been celebrated . . . as a paragon of domestic tranquility” by the 1400s); JOHN JULIUS NORWICH, *A HISTORY OF VENICE* 277 (1985) (quoting James Harrington’s 1656 *The Common-Wealth of Oceana*: “[T]here never happened unto any other Common-wealth, so undisturbed and constant a tranquility and peace in her self, as is that of Venice.”).

²⁴ See generally IAN GILMOUR, *RIOT, RISINGS AND REVOLUTION: GOVERNANCE AND VIOLENCE IN EIGHTEENTH-CENTURY ENGLAND* (1992); SIR DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485* (8th ed. 1966); MALCOLM I. THOMIS & PETER HOLT, *THREATS OF REVOLUTION IN BRITAIN, 1789-1848* (1977).

²⁵ NORWICH, *supra* note 23, at 1–12, 19, 31, 34, 40, 42, 62–63, 73, 106.

²⁶ AUBREY FEIST, *THE LION OF ST MARK: VENICE: THE STORY OF A CITY FROM ATTILA TO NAPOLEON* 109–13 (1971); 1 W. CAREW HAZLITT, *THE VENETIAN REPUBLIC: ITS RISE, ITS GROWTH, AND ITS FALL, A.D. 409-1797* 544–47 (1915).

²⁷ 1 HAZLITT, *supra* note 26, at 623–38; see also 1 HORATIO F. BROWN, *STUDIES IN THE HISTORY OF VENICE* 92–94 (Hazel, Watson, & Viney LD. 1907) (describing the plan of the conspirators).

²⁸ FREDERIC C. LANE, *VENICE: A MARITIME REPUBLIC* 271 (1973) (“The devices for the restraint of faction woven into the machinery of government were sufficiently successful so that none of the men disappointed in the intense competition for honors tried to overthrow the system, at least none after Marino Falier [in 1355].”); see also ROBERT FINLAY, *POLITICS IN RENAISSANCE VENICE* 288 (1980) (“[T]he patrician republic gave Venice five hundred years of domestic peace and stability. Violence was kept from politics.”).

²⁹ 2 W. CAREW HAZLITT, *THE VENETIAN REPUBLIC: ITS RISE, ITS GROWTH, AND ITS FALL, A.D. 409-1797* 302–04 (AMS Press 1915).

³⁰ LANE, *supra* note 28, at 252; 2 HAZLITT, *supra* note 29, at 479–80 (noting that Venice was the “first European Power” to emerge “from its civil and internecine struggles”); WILLIAM ROSCOE THAYER, *A SHORT HISTORY OF VENICE* ix–x (1905) (commenting that Venice was “singularly free” from “internal rebellion,” “dynastic or class rivalry,” and “military ambition”); FINLAY, *supra* note 28, at 288 (explaining that Venice had been able to overcome problems that other political communities could not).

³¹ PHILIP LONGWORTH, *THE RISE AND FALL OF VENICE* 175 (1974) (quoting Philippe de Commynes).

³² MARION LEATHERS KUNTZ, *The Myth of Venice in the Thought of Guillaume Postel*, in *VENICE, MYTH AND UTOPIAN THOUGHT IN THE SIXTEENTH CENTURY: BODIN, POSTEL AND THE VIRGIN OF VENICE* 507 (1999) (citing Jean Bodin).

Dutchman commented, the patricians “established themselves so well in their authority” after the conspiracy of 1355 that they faced no rebellions within the city.³⁴ The Enlightenment-era *Encyclopédie* lauded Venice for “an internal tranquility that has never altered.”³⁵

Venetians themselves branded their state a glorious exception.³⁶ A local booster, for example, exaggerated his city’s record in a 1544 book. “In our city,” he claimed, “no popular tumult or sedition has ever occurred.”³⁷ This was inaccurate, but nearly two centuries had passed since the 1355 plot was quashed, and faith in Venetian stability was growing unshakable.³⁸ We are “so well established,” a Venetian ambassador told the King of Spain in 1571, “our succession is of a kind which can never fail.”³⁹

Through the years, a horde of commentators called Venice *perfect*.⁴⁰ “It seems a heroic accomplishment and more than human, indeed celestial and divine,” exclaimed one, “to remain so many centuries, without change, in the same state.”⁴¹ A humanist called Venice “the most perfect magistracy” because it remained stable, even as other princes and governments fell amidst “cruelty, violence, and ambition.”⁴²

Many expected the perfect government to last forever.⁴³ A mercenary preferred to serve Venice over Milan, he said, because “the Duke of Milan was mortal, but Venice would never die.”⁴⁴ If anything human could be “perpetual and eternal,” said one chronicler, it would be Venice.⁴⁵ “This holy republic,” wrote a Renaissance diarist, “has neither popular sedition nor discord among her patricians, but all unite in promoting her greatness; and therefore, as wise men say, she will live forever.”⁴⁶ A politician predicted his city’s concord would last “until the end of time.”⁴⁷ “Could any State on Earth Immortall be,” rhymed a seventeenth-century Englishman, “Venice by Her rare Government is she.”⁴⁸

³³ William Bouwsma, *Venice and the Political Education of Europe*, in *RENAISSANCE VENICE* 445, 454 (J.R. Hale ed., 1973) (quoting James Howell).

³⁴ ECO O.G. HAITSMA MULIER, *THE MYTH OF VENICE AND DUTCH REPUBLICAN THOUGHT IN THE SEVENTEENTH CENTURY* 151 (Gerard T. Moran trans., Van Gorcom 1980) (quoting Pieter De la Court).

³⁵ Bouwsma, *Venice and the Political Education of Europe*, *supra* note 34, at 455.

³⁶ GARRY WILLS, *VENICE: LION CITY* 367–68 (2001).

³⁷ Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 448.

³⁸ BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 162 (“The myth that Venice ideally combined freedom and order and was therefore durable beyond any polity previously known to man stimulated the European imagination for almost three centuries.”).

³⁹ Alberto Tenenti, *The Sense of Space and Time in the Venetian World of the Fifteenth and Sixteenth Centuries*, in *RENAISSANCE VENICE* 17, 34 (J.R. Hale ed., 1973).

⁴⁰ *E.g.*, NORWICH, *supra* note 23, at 277 (quoting James Harrington’s 1656 *The Common-Wealth of Oceana*: “that perfection, which, as to the civil part, hath no pattern in the universal World, but this of Venice”); LONGWORTH, *supra* note 31, at 214 (noting that the “myth of the Republic” circulating during the Renaissance presented the republic and its constitution as “uniquely perfect”); FINLAY, *supra* note 28, at 1 (“As early as the fifteenth century, Venice was renowned for its political stability and civic harmony, and even as late as the eighteenth century it was widely believed that Venetians had discovered the secret of a perfect constitution...”); ZERA S. FINK, *THE CLASSICAL REPUBLICANS: AN ESSAY IN THE RECOVERY OF A PATTERN OF THOUGHT IN SEVENTEENTH CENTURY ENGLAND* 35 (1945) (noting that Venice appeared “the supreme example” of mixed government to Renaissance theorists); BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 160 (“Her [Venice’s] good order and her survival seemed unimpeachable evidence of perfection in a world where all else were swirling flux.”); THAYER, *supra* note 30, at 225 (“We may say of the Venetian oligarchy that as a working system it came nearer to perfection than any other form of government has come.”).

⁴¹ BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 162.

⁴² KUNTZ, *supra* note 32, at 510–11 (quoting Guillaume Postel).

⁴³ *E.g.*, FINLAY, *supra* note 28, at 32 (“[V]enice was thought to have achieved constitutional immortality.”).

⁴⁴ Michael Mallett, *Venice and its Condottieri, 1404–54*, in *RENAISSANCE VENICE* 121, 127–28 (J.R. Hale ed., 1973).

⁴⁵ BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 90 (quoting Marcantonio Sabellico).

⁴⁶ *Id.* at 63 (quoting Marin Sanuto).

⁴⁷ LONGWORTH, *supra* note 31, at 197 (quoting the sixteenth-century reformer Bartolommeo Moro).

⁴⁸ JOHN EGLIN, *VENICE TRANSFIGURED: THE MYTH OF VENICE IN BRITISH CULTURE, 1660–1797* 15–16 (2001) (quoting James Howell). *See also* EDWARD MUIR, *CIVIC RITUAL IN RENAISSANCE VENICE* 53 (1981) (quoting James Howell who argued that England should emulate Venetian institutions, because if it were possible to establish “a Society and Succession of people under the same Species of Government as long as the World lasts,” the Venetian Republic provided the best model for imitation).

Even if Venice wasn't "perfect," some declared it the best state ever created.⁴⁹ One heralded "the most beautiful and best government that any city, not only in our times but also the classical world, ever possessed."⁵⁰ "This city," crowed a noble Venetian, "is administered as well as any city in the whole world ever was or will be."⁵¹

Mechanical metaphors proliferated. Seventeenth-century writers called the republic a "great and ingenious machine,"⁵² and "a clock going with many wheels and making small motions, sometimes out of order, but soon mended, all without change or variety."⁵³ For some, the clockwork state was dull! "The history of the Venetians flows on without being marked by any events worthy of the attention of posterity," complained a French historian.⁵⁴

Of course, Venice was never completely uneventful, but nothing after 1310 amounted to an overt coup attempt, and few events after 1355 even came close.⁵⁵ Doge Lorenzo Celsi was accused of overreaching his powers in the 1360s, but died before an investigation got under way, and was posthumously exonerated.⁵⁶ In 1372 and 1406, the Council of Ten, a secretive body charged with overseeing state security, discovered plots orchestrated by the Lord of Padua, whereby his paid Venetian turncoats prepared to assassinate anti-Paduan politicians.⁵⁷ Both times, the Ten acted quickly, and executed the traitors.⁵⁸ A coup conspiracy between two rich commoners in 1413 lasted only a few hours, before one turned in the other.⁵⁹

In 1456, following his son's death, an aging Doge Francesco Foscari secluded himself in his apartment and withdrew from official duties.⁶⁰ After a year and a half, the Council of Ten and the Ducal Councilors asked him to step down.⁶¹ Foscari initially complained that the request was illegal,⁶² but when the officials insisted, the Doge resigned without a fight.⁶³ This was probably a deviation from strict constitutional propriety, since only the Great Council could remove a doge, but the episode hardly resembles a seizure of power. There was no threat of violence, the councilors were in full control from the beginning, and they immediately elected a new doge through established procedures.⁶⁴

In 1618, the city faced a threat that straddled the boundary between local intrigue and foreign aggression. French mercenaries, recently employed by the republic, gathered in Venetian taverns.⁶⁵ They

⁴⁹ E.g., Felix Gilbert, *The Venetian Constitution in Florentine Political Thought*, in FLORENTINE STUDIES: POLITICS AND SOCIETY IN RENAISSANCE FLORENCE 463, 476 (Nicolai Rubinstein ed., 1968) (citing Marcantonio Sabellico's view that Venice "excelled all states that had ever existed"); BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 626 (citing Pierre D'Avity, a seventeenth-century Frenchman, who held the Venetian government superior to all others known to man); Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 454 (quoting Claude de Seyssel, who called Venice the "most perfect and best administered empire and state of community that one has seen or read of up to now").

⁵⁰ Gilbert, *supra* note 49, at 487 (quoting Francesco Guicciardini, a sixteenth-century Florentine).

⁵¹ PATRICIA H. LABALME & LAURA SANGUINETI WHITE, *VENICE, CITÀ EXCELENTISSIMA: SELECTIONS FROM THE RENAISSANCE DIARIES OF MARIN SANUDO* 84 (Linda L. Carroll trans., 2008).

⁵² Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 458 (quoting Saint-Didier).

⁵³ WILLS, *supra* note 36, at 73 (quoting Sir Dudley Carleton, the British Ambassador to Venice).

⁵⁴ NORWICH, *supra* note 23, at 459–60.

⁵⁵ See *supra* notes 23–30 and accompanying text.

⁵⁶ 1 HAZLITT, *supra* note 26, at 670–71.

⁵⁷ NORWICH, *supra* note 23, at 241, 268.

⁵⁸ *Id.*

⁵⁹ 2 HAZLITT, *supra* note 29, at 818–19.

⁶⁰ *Id.* at 980.

⁶¹ *Id.* 980–982 (detailing the contents of the motion asking the Doge to resign).

⁶² *Id.* at 982 ("Foscari . . . replied at considerable length . . . intimating that the course adopted was at variance with the Constitution . . .").

⁶³ *Id.* at 983.

⁶⁴ H.R. Trevor-Roper, *Doge Francesco Foscari*, in THE ITALIAN RENAISSANCE 263–67 (J.H. Plumb ed., 2001); 2 HAZLITT, *supra* note 29, at 966–86.

⁶⁵ Richard Mackenney, *A Plot Discover'd? Myth, Legend, and the "Spanish" Conspiracy against Venice in 1618*, in VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE 1297-1797, at 195 (John Martin & Dennis Romano eds., 2000).

talked, perhaps too carelessly, about slaughtering the Great Council, seizing the Piazza San Marco, and plundering the opulent palaces.⁶⁶ Supposedly, the Spanish Viceroy in Naples sponsored the plan—which was dubbed the “Spanish Conspiracy”—but the evidence is ambiguous.⁶⁷ In any case, nothing happened, except that one morning three mercenary leaders were found dangling from a gibbet.⁶⁸ According to some reports, the Ten quietly executed 300 men.⁶⁹ Survivors fled. Even if we call this a “coup plot,” because the participants were Venetian hirelings, it never flowered into an overt revolutionary attempt.⁷⁰

Venetian authorities treated some reformers as deeply subversive, even when they merely sought peaceful, incremental change. Noble politicians seeking to trim the powers of the Council of Ten found themselves banished, imprisoned, or placed under house arrest in 1625, 1628, 1741, 1756, and 1761.⁷¹ In 1780, a nobleman named Giorgio Pisani argued for equalizing power and wealth within the noble caste. He, too, went to jail. Opponents alleged that Pisani conspired to overthrow the government, but this is impossible to confirm.⁷² In any case, no revolution materialized.

2. *British Stability*

Like Venice, England was not always stable. King Richard II, held in the Tower of London after the coup of 1399, lamented his “fickle” realm, “which hath exiled, slain, destroyed, or ruined so many kings, rulers and great men, and is ever tainted and toileth with strife and variance and envy.”⁷³ The next two centuries saw coup attempts in 1403, 1408, 1414, 1450, 1464, 1483, 1487, 1497, 1554, and 1569, successful coups in 1455, 1456, 1483, 1485, and 1549, two coups in 1469 and 1553, and periods of civil war in 1459–61 and 1470–71.⁷⁴ Volatility persisted through the 1600s: a coup attempt in 1601,⁷⁵ a period of coups, civil wars, and coup attempts lasting from 1642 to 1660,⁷⁶ a quashed rebellion in 1685,⁷⁷ and a successful revolution in 1688⁷⁸ dotted the century. After 1688, the ousted Stuart dynasty continually conspired with

⁶⁶ *Id.* at 185, 194–97; LANE, *supra* note 28, at 399–400.

⁶⁷ Mackenney, *supra* note 65, at 194–97, 208–09.

⁶⁸ LANE, *supra* note 28, at 399–400.

⁶⁹ NORWICH, *supra* note 23, at 525; *see generally* 2 HAZLITT, *supra* note 29, at 171–75 (describing the background to the silent murder of 300 men).

⁷⁰ *See* NORWICH, *supra* note 23, at 525 (noting that the leaders of the plot were too powerful to be harmed but that their plan failed and “Venice was preserved”).

⁷¹ *See* ALETHEA WIEL, VENICE 407–10 (2nd ed. 1894) (illustrating the banishment of one particular protestor named Zeno); LANE, *supra* note 28, at 404–05 (detailing the reasons behind Zeno’s movement); *see also* 2 HAZLITT, *supra* note 29, at 462–69, 473–76 (explaining the acts of Zeno, for which he was banished); *see also* LONGWORTH, *supra* note 31, at 284 (describing three other men who were imprisoned or put on house arrest for their protests).

⁷² *See* WIEL, *supra* note 71, at 441–42 (noting, based largely upon one historical source, that Pisani did conspire against the government); *see also* LONGWORTH, *supra* note 31, at 284 (commenting that when he was arrested, Pisani “threatened to overthrow the ruling clique”).

⁷³ BRYAN BEVAN, KING RICHARD II 158 (1990).

⁷⁴ *Henry IV*, 5 THE NEW ENCYCLOPEDIA BRITANNICA 837–38 (2003); *Percy, Sir Henry*, 9 THE NEW ENCYCLOPEDIA BRITANNICA 282; *Henry IV*, 5 THE NEW ENCYCLOPEDIA BRITANNICA (GLOBAL) 837–38; *Henry V*, 5 THE NEW ENCYCLOPEDIA BRITANNICA 838–39; *Cade, Jack*, 2 THE NEW ENCYCLOPEDIA BRITANNICA 712–13; *Henry VI*, 5 THE NEW ENCYCLOPEDIA BRITANNICA 839; *Edward IV*, 4 THE NEW ENCYCLOPEDIA BRITANNICA 377–78; *Richard III*, 10 THE NEW ENCYCLOPEDIA BRITANNICA 44; *Henry VII*, 5 THE NEW ENCYCLOPEDIA BRITANNICA 839–40; *Warbeck, Perkin*, 12 THE NEW ENCYCLOPEDIA BRITANNICA 492; *Edward VI*, 4 THE NEW ENCYCLOPEDIA BRITANNICA 378; *Edward VI*, 4 THE NEW ENCYCLOPEDIA BRITANNICA 378; *Mary I*, 7 THE NEW ENCYCLOPEDIA BRITANNICA 899; *Wyat, Sir Thomas*, THE NEW ENCYCLOPEDIA BRITANNICA 12, 785; *Elizabeth I*, 18 THE NEW ENCYCLOPEDIA BRITANNICA 245; ALISON WEIR, LANCASTER AND YORK: THE WARS OF THE ROSES 197–205, 244–45, 348–65 (1995); Michael K. Jones, *The Myth of 1485: Did France Really Put Henry Tudor on the Throne?*, in THE ENGLISH EXPERIENCE IN FRANCE C. 1450–1558: WAR, DIPLOMACY AND CULTURAL EXCHANGE 90, 101 (David Grummitt ed., 2002).

⁷⁵ *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 134 (1956) (describing the 1601 coup attempt).

⁷⁶ DEREK HIRST, ENGLAND IN CONFLICT, 1603–1660: KINGDOM, COMMUNITY, COMMONWEALTH (1999).

⁷⁷ GEORGE MACAULAY TREVELYAN, A SHORTENED HISTORY OF ENGLAND 343 (1942).

⁷⁸ *Id.* at 348–53.

foreign sponsors and British friends, who were known as “Jacobites.”⁷⁹ The Jacobites mounted serious rebellions in 1715 and 1745, but their realistic hopes died at Culloden Field in April 1746.⁸⁰

Since 1746, Britain has seen two and a half centuries of legal and orderly transitions from one governing ministry to the next.⁸¹ This was new. Before 1688, writes an eminent Cambridge don, “the country had scarcely been free from turbulence for more than a decade at a time.”⁸² As many people saw it, *England* stabilized after 1688; only the Scots remained turbulent. Both major Jacobite risings broke out in Scotland, as England remained quiet.⁸³ Despite lingering Jacobite sympathies, no English Tories joined the 1745-46 rebellion.⁸⁴ Historians call 1688 the “last English revolution,”⁸⁵ and contend that no genuine revolutionary situations arose in England or Wales after 1689.⁸⁶

Politics became unusually nonviolent in eighteenth-century England. No politicians were assassinated.⁸⁷ Ministers who fell from power—at least after 1716—were not threatened.⁸⁸ Except in duels, politicians no longer tried to kill opponents.⁸⁹ After the post-1746 executions, no political offenders paid with their lives.⁹⁰ Even impeachment fell into disuse.⁹¹ At the time, Englishmen noticed the change. Bereft of violent or treasonous undercurrents, Parliament could be downright boring. One critic’s caustic remark on the Commons: “A bird might build her nest in the Speaker’s chair, or in his peruke (wig). There won’t be a debate that can disturb her.”⁹² Under the “mild and just” Hanoverian dynasty, Prime Minister William Pitt commented in 1792, “a general calm has prevailed through the country, beyond what was ever before experienced.”⁹³

Since 1746, there has been occasional revolutionary talk and conspiracy. No domestic activities, however, have risen to the level of a serious, overt, highly plausible attempt to oust British leaders by force.⁹⁴

In the late eighteenth century, many Britons sought a political overhaul. Some reformers became radicals; some radicals dabbled in revolutionary notions. In the 1760s, Member of Parliament John Wilkes pressed for democratic reforms and “liberty,” and his supporters formed unruly mobs. Neither he nor his followers, however, demonstrated revolutionary inclinations.⁹⁵ The army decisively quelled the “Gordon

⁷⁹ GEOFFREY HOLMES & DANIEL SZECHI, *THE AGE OF OLIGARCHY: PRE-INDUSTRIAL BRITAIN, 1722-1783* 97 (1993) (noting the “continuous series” of Jacobite conspiracies and revolts which were hatched, exploded, or investigated in 1689-90, 1692, 1695-96, 1704, 1706-08, 1709-10, 1713-14, 1714-15, 1716-17, 1720-22, 1725-27, 1730-32, 1743-44, 1750-52, and 1758-59).

⁸⁰ *Id.* at 330 (“Jacobite hopes were not finally extinguished, realistically, until they lay amid the carnage on Culloden’s field in 1746.”); *see also* FRANK MCLYNN, *THE JACOBITES* 19 (1985) (arguing that 1746 “ended for all time, though of course no one at the time realized it, all armed attempts to restore the Stuart dynasty to the three kingdoms”).

⁸¹ *See* ROBERT HARVEY CLIVE: *THE LIFE AND DEATH OF A BRITISH EMPEROR* 13 (1998) (describing the 1715 and 1745 Jacobite rebellions as “the last armed challenges” to the British state); *see also* KEIR, *supra* note 24, at 308 (noting that “political conspiracy, except for that connected with the ’15 and the ’45, became unknown” in eighteenth-century Britain); *see generally* THOMIS & HOLT, *supra* note 24, at 126–33 (noting that the period 1789-1848 was the time “when Britain came nearest in modern times to experiencing revolution,” but arguing that no revolutionary movements or plans came close to success, even during this relatively difficult period).

⁸² J.H. PLUMB, *SIR ROBERT WALPOLE: THE MAKING OF A STATESMAN* 15 (1956).

⁸³ TREVELYAN, *supra* note 77, at 381 (“In 1715 and again in 1745 there were Jacobite rebellions very formidable in Scotland, though they failed to elicit serious support in England.”).

⁸⁴ GILMOUR, *supra* note 24, at 116 (noting that “[n]o prominent Tory did anything at all” in the ’45 rebellion).

⁸⁵ *Id.* at 7–8.

⁸⁶ CHARLES TILLY, *CONTENTION AND DEMOCRACY IN EUROPE, 1650-2000* 133-67 (2004).

⁸⁷ GILMOUR, *supra* note 24, at 5.

⁸⁸ *Id.* at 98.

⁸⁹ *Id.* at 41.

⁹⁰ KEIR, *supra* note 24, at 289–90.

⁹¹ *Id.*

⁹² HOLMES & SZECHI, *supra* note 79, at 267 (quoting Horace Walpole on the 1746-54 period).

⁹³ GILMOUR, *supra* note 24, at 1.

⁹⁴ *See infra* notes 87–116 and accompanying text.

⁹⁵ GILMOUR, *supra* note 24, at 322 (“Wilkes had no desire to rule, and neither he nor his followers sought a violent overthrow of lawful authority.”).

Riots” of 1780.⁹⁶ There was a constitutional standoff between the Crown and leading politicians in 1782-84, but violence remained remote and implausible.⁹⁷

The 1789 French Revolution inspired radicals across the Channel. In 1793, agitators were prosecuted for seeking to assemble a “National Convention” in Edinburgh as a rival to Parliament.⁹⁸ Rioting erupted in October 1795, and two naval mutinies—mostly over sailors’ pay and conditions—broke out in 1797.⁹⁹ On the whole, however, French-inspired plotting proved ineffective. Government spies consistently infiltrated subversive cabals.¹⁰⁰ Unlike many Continental states, England had no sizeable contingent of émigrés—or local “Fifth Column”—ready to collaborate with the aggressive French “crusade for universal liberty.”¹⁰¹ Most reformers sought incremental change from within.¹⁰² In any case, there were no serious attempts to seize power through force.¹⁰³

The 1810s witnessed another wave of popular radicalism and conspiracy. “Luddites” rioted in northern England, destroying new-fangled machines.¹⁰⁴ Poor harvests brought food riots, as well as alarming instances of military-style drilling, oath-taking, and attacks on arms depots by local groups.¹⁰⁵ There were a few revolutionary actions—but none can be counted serious threats to established order.¹⁰⁶ In 1816, a small cabal of militants looted gunsmiths’ shops and attacked the Tower of London. They were easily repulsed.¹⁰⁷ Radicals planned a national uprising for June 1817. A government agent informed the authorities, who preemptively arrested the ringleaders.¹⁰⁸ The only men to rise were about 300 workers from Pentridge; they were apprehended without trouble, and three of their leaders were hanged and beheaded.¹⁰⁹ A revolutionary named Arthur Thistlewood concocted an extravagant plan—dubbed the “Cato Street Conspiracy”—to blow up Prime Minister Lord Liverpool and his entire Cabinet as they dined in February 1820.¹¹⁰ Thistlewood assumed the assassinations would trigger a national uprising; he intended to form a provisional government. But Thistlewood’s aide-de-camp, George Edwards, was a government agent—and the “Cabinet dinner” was a ruse anyway.¹¹¹ Police arrested the conspirators; Thistlewood and four confederates were hanged.¹¹²

⁹⁶ See *id.* at 364–69 (explaining how the King ordered the army to suppress the riots).

⁹⁷ See *id.* at 378–84 (concluding that although there were bad times, outside of the Gordon Riots, there was not much violence).

⁹⁸ ANN LYON, *CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM* 309 (2003).

⁹⁹ *Id.*

¹⁰⁰ GILMOUR, *supra* note 24, at 402, 428; EVANS, *THE FORGING OF THE MODERN STATE: EARLY INDUSTRIAL BRITAIN 1783-1870* 77 (London: Longman, 1993) (noting that many covert activities were “inherently bizarre and self-destructive”).

¹⁰¹ 2 R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA* 56 (1964); SPENCER R. WEART, *NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER* 270 (1998); THOMIS & HOLT, *supra* note 24, at 28.

¹⁰² See W.R. CORNISH & G. DE N. CLARK, *LAW AND SOCIETY IN ENGLAND 1750-1950* 13 (1989) (noting that only a “fringe” contemplated “physical violence as the means towards reform,” and that most radicals thought Parliament could be induced to make the Commons more democratic); see also EVANS, *supra* note 100, at 69 (describing 1790s activists as largely ill-prepared for “any struggle which spread beyond the comfortable limits of the printed pamphlet or the discussion group”); see also THOMIS & HOLT, *supra* note 24, at 1–2 (explaining that central to this period of time was the idea of parliamentary reform).

¹⁰³ GILMOUR, *supra* note 24, at 442–43 (no “revolutionary situation or opportunity” arose from 1780 to 1800).

¹⁰⁴ LYON, *supra* note 98, at 316.

¹⁰⁵ *Id.*

¹⁰⁶ EVANS, *supra* note 100, at 195–96 (describing the authorities’ “ability to nip trouble in the bud” with “bevvies of informers who penetrated supposedly secret radical committees with ease”); THOMIS & HOLT, *supra* note 24, at 46–49 (neither the Pentridge Rebellion nor the Cato Street Conspiracy “came near to success,” and authorities calculated that activities “might safely be allowed to proceed without serious threat to the public safety”).

¹⁰⁷ EVANS, *supra* note 100, at 193–94; LYON, *supra* note 98, at 317.

¹⁰⁸ THOMIS & HOLT, *supra* note 24, at 46–47.

¹⁰⁹ *Id.* at 46–49; EVANS, *supra* note 100, at 194–95.

¹¹⁰ LYON, *supra* note 98, at 317.

¹¹¹ EVANS, *supra* note 100, at 194.

¹¹² *Id.* at 194–95; LYON, *supra* note 98, at 317.

The last revolutionary alarms sounded in the 1830s and 1840s. Middle-class and working-class reformers struggled to make the oligarchic Parliament more representative of the nation. They wanted to expand the franchise, and eliminate the “rotten boroughs” usually dominated by aristocratic patrons.¹¹³ Two moments of high tension culminated in the landmark 1832 Reform Act. In October 1831, the House of Lords defeated the government’s reform bill.¹¹⁴ Rioting erupted in various cities; a mob held Bristol for three days. The following May, the Lords again blocked reform.¹¹⁵ Mass demonstrations and riots followed, and rumors swarmed of insurrection.¹¹⁶ The Birmingham Political Union—with an army of 1500 men and muskets, at least on paper—pledged itself to an uprising, if necessary.¹¹⁷ It proved unnecessary. In the face of disorder, reform passed. Earl Grey, the Prime Minister, argued reform would “prevent the necessity for revolution.”¹¹⁸ King William IV pressured reluctant Tory Lords, and the Reform Act became law.¹¹⁹ “Rotten boroughs” lost seats in Parliament, cities gained them, and the franchise widened.¹²⁰ Now, one in five men could vote.¹²¹

Still, working classes remained dissatisfied. “Chartists,” who supported a written constitutional charter, pressed for universal male suffrage, equal representation in Parliament, payment of MPs, and vote by secret ballot—in short, for democracy.¹²² Chartists mounted serious demonstrations, riots, and strikes between 1838 and 1848, as militants urged their followers to “arm, arm, arm.”¹²³ Some gatherings displayed weapons and discharged guns; shadowy coup plots developed.¹²⁴ No one—including Chartists themselves—knew whether demonstrations would descend into riots, or whether rioting could bring revolution.¹²⁵ Chartists attacked a hotel in Newport in 1838, but soldiers and local authorities chased them away.¹²⁶ Chartist violence remained mostly rhetorical. Ultimately, Chartist activities proved less menacing than the disturbances of 1831–32.¹²⁷ The movement dissipated after 1848—but its goals were largely implemented by 1900.

Popular revolutions toppled governments across the Continent during the 1830s and 1840s.¹²⁸ In Britain, revolutionary talk was primarily tactical, designed to leverage fear into political gain.¹²⁹ In 1832 at least, the bluff worked. After 1848, even militant language went into decline. As workers won rights, prospects for revolt dimmed.¹³⁰

What about the military? Did any elites—politicians, the Crown, or military commanders—try to use military force against the constitutional order? In short, were there any attempts at *coup d’état* after 1688? Scholars agree: there were not. The British military has been well-behaved and solidly

¹¹³ EVANS, *supra* note 100, at 208–61.

¹¹⁴ THOMIS & HOLT, *supra* note 24, at 86.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 86–95; EVANS, *supra* note 100, at 216–21.

¹¹⁸ EVANS, *supra* note 100, at 223.

¹¹⁹ 1 SIR THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD: 1760–1860 119–20 (1896); EVANS, *supra* note 100, at 223 (“Some Whigs believed a revolution to be imminent unless reform were immediately conceded; others doubted this but agreed that the old system now lacked that general support necessary for government by consent.”).

¹²⁰ See EVANS, *supra* note 100, at 223 (“The inescapable fact is that the unreformed Parliament willed its own demise and its replacement by one which redrew the political map of Britain.”).

¹²¹ *Id.* at 224.

¹²² *Id.* at 208–61.

¹²³ THOMIS & HOLT, *supra* note 24, at 103.

¹²⁴ *Id.* at 103–04.

¹²⁵ *Id.* at 104.

¹²⁶ See generally THOMIS & HOLT, *supra* note 24, at 100–14 (describing the background and effect of the Newport attacks).

¹²⁷ *Id.* at 100–14; EVANS, *supra* note 100, at 262–267.

¹²⁸ EVANS, *supra* note 100, at 223–224.

¹²⁹ THOMIS & HOLT, *supra* note 24, at 1–2, 82–83, 101–03 (describing British militancy as “tactical talk” designed to “extort concession by inducing fear”).

¹³⁰ See *id.* at 117 (explaining that revolution would have occurred during the period 1789–1848 if it was going to occur at all).

constitutional for over three hundred years.¹³¹ From time to time, mere murmurs have sounded. A small conspiracy formed within one army battalion in 1802-03, but never bloomed.¹³² During World War One, Prime Minister Lloyd George feared army commanders were plotting a coup, but this appears unlikely.¹³³ In 1974, army exercises near Heathrow Airport generated media buzz about a possible coup; one author found the episode interesting only because “it marked the end of a long period in which the question had never been raised at all.”¹³⁴

B. CONTEMPORARY STABILITY: THE 22 COUP-FREE STATES

This Article seeks to identify with precision the set of contemporary “coup-free states,” defined as those independent states that have experienced no coups or serious coup attempts for a period of at least 50 years. Tracing the histories of all 22 coup-free states, in a manner parallel to the analyses of Venetian and British history presented here, is outside the scope of this Article. Still, the general chronology can be presented here.

After Britain came the United States of America¹³⁵ and Sweden,¹³⁶ which have maintained independence and stability for over 200 years. Switzerland has witnessed over 150 years of stability.¹³⁷ Aside from these four states, the following eighteen states were the *only* states to remain stable and

¹³¹ See generally John Sweetman, *Introduction: Civil-Military Relations in Britain*, in *SWORD AND MACE: TWENTIETH-CENTURY CIVIL-MILITARY RELATIONS IN BRITAIN* ix, xi (John Sweetman ed., 1986) (finding an “absence of power struggles” after 1688, and noting that armed force has been “effectively controlled within the constitutional and political framework”); see also FREDERICK S. ALLEN, *THE SUPREME COMMAND IN ENGLAND, 1640-1780* 150–65 (1966) (describing how civilian control was “worked into the fabric of the British Constitution” by 1760, such that no one questioned it); Robert Blake, *Great Britain: The Crimean War to the First World War*, in *SOLDIERS AND GOVERNMENTS: NINE STUDIES IN CIVIL-MILITARY RELATIONS* 25, 27 (Michael Howard, ed., 1957) (describing a “complete absence of any military threat to the traditional constitutional liberties of Britain” from 1854 to 1918); John Sabine, *Civil-Military Relations*, in *BRITISH DEFENCE POLICY IN A CHANGING WORLD* 229, 230 (John Baylis ed., 1977) (“Britain provides the most long-standing example of a state which has maintained civil control of its armed forces.”); Adam Roberts, *The British Armed Forces and Politics: A Historical Perspective*, 3 *ARMED FORCES AND SOCIETY* 531, 531 (1977) (noting that constitutional authority is “not likely to be even challenged, still less overthrown, by a military putsch”).

¹³² GILMOUR, *supra* note 24, at 445–46 (“[T]he affair demonstrated that a *coup d’état* was no likelier a route to successful revolution than was mass rebellion.”).

¹³³ Blake, *supra* note 131, at 39–40 (“It was not altogether surprising that some politicians – notably Lloyd George – came to suspect the Army leaders of aiming at a military dictatorship, although in fact the charge has no real substance.”); see also Diddy R. M. Hitchins & William A. Jacobs, *United Kingdom*, in *THE POLITICAL ROLE OF THE MILITARY: AN INTERNATIONAL HANDBOOK* 404, 410–11 (Constantine P. Danopoulos & Cynthia Watson eds., 1996) (detailing how there was a lack of trust in Lloyd George).

¹³⁴ Roberts, *supra* note 131, at 548.

¹³⁵ Richard H. Kohn, *The Inside History of the Newburgh Conspiracy: America and the Coup d’Etat*, *THE WILLIAM AND MARY QUARTERLY* 187, 189 (1970) (describing the 1783 Newburgh incident as “the only known instance of an attempted coup in American history”); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989*, at 87 (Richard H. Kohn ed., 1991) (“No military force in the United States has ever risen up to . . . challenge constitutional procedures or the Constitution itself, nor has any political leader, so far as is known, ever attempted to use military force against the Constitution.”).

¹³⁶ See generally FRANKLIN D. SCOTT, *SWEDEN: THE NATION’S HISTORY* (1977); J.A. LAUWERYS, *SCANDINAVIAN DEMOCRACY: DEVELOPMENT OF DEMOCRATIC THOUGHT AND INSTITUTIONS IN DENMARK, NORWAY AND SWEDEN* (1958); DOUGLAS V. VERNEY, *PARLIAMENTARY REFORM IN SWEDEN 1866-1921* (1957); NEIL ELDER, ALASTAIR H. THOMAS, & DAVID ARTER, *THE CONSENSUAL DEMOCRACIES? THE GOVERNMENT AND POLITICS OF THE SCANDINAVIAN STATES* (1982) (detailing Swedish stability since the early nineteenth century).

¹³⁷ See generally 28 *THE NEW ENCYCLOPEDIA BRITANNICA* 354–55 (15th ed. 2003) (“Before [1848] internal conflict was a fact of Swiss political life; since then there has been an absence of major internal crises along ethnic and religious lines, and the country has prospered. With political stability, the Swiss could spend a greater portion of their time and efforts developing industry, agriculture, and communications.”); see also WILLIAM BROSS LLOYD, JR., *WAGING PEACE: THE SWISS EXPERIENCE* (1980); CHARLES GILLIARD, *A HISTORY OF SWITZERLAND* (D.L.B. Hartley trans., 1955) (explaining Swiss stability since the mid-nineteenth century).

independent from 1961 through 2010: Belgium,¹³⁸ the Netherlands,¹³⁹ Luxembourg,¹⁴⁰ Norway,¹⁴¹ Denmark,¹⁴² Finland,¹⁴³ Iceland,¹⁴⁴ Germany,¹⁴⁵ Austria,¹⁴⁶ Japan,¹⁴⁷ Canada,¹⁴⁸ Australia,¹⁴⁹ New Zealand,¹⁵⁰ Ireland,¹⁵¹ Israel,¹⁵² Mexico,¹⁵³ Costa Rica,¹⁵⁴ and South Africa.¹⁵⁵ All other independent states during this period experienced coups and serious coup attempts.¹⁵⁶

¹³⁸ See generally ELS WITTE, JAN CRAEYBECKX, & ALAIN MEYNEN, *POLITICAL HISTORY OF BELGIUM FROM 1830 ONWARDS* 26 (Raf Casert trans., 2000); STEPHEN B. WICKMAN, *BELGIUM: A COUNTRY STUDY* (1984); E.H. KOSSMAN, *THE LOW COUNTRIES 1780-1940* (1978) (detailing Belgian history).

¹³⁹ AREND LUPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* 72 (1975) (“Since 1848, Holland has not experienced any civil wars, rebellions, or attempts to upset the government by violent means.”).

¹⁴⁰ See generally JAMES NEWCOMER, *THE GRAND DUCHY OF LUXEMBOURG: THE EVOLUTION OF NATIONHOOD, 963 AD TO 1983* (1984) (giving a historical perspective on Luxembourg’s evolution).

¹⁴¹ See generally J.A. LAUWERYS *supra* note 136; ELDER et al., *supra* note 137; HARRY ECKSTEIN, *DIVISION AND COHESION IN DEMOCRACY: A STUDY OF NORWAY* (1966) (describing Norway as a stable democracy).

¹⁴² See generally JOHN FITZMAURICE, *POLITICS IN DENMARK* (1981); W. GLYN JONES, *DENMARK: A MODERN HISTORY* (1986); ELDER et al., *supra* note 136, at 11–15 (explaining Denmark’s history).

¹⁴³ See ELDER et al., *supra* note 136, at 15 (“[V]iolence and the threat of violence have disappeared from the Finnish political scene . . . since the ending of the Second World War.”).

¹⁴⁴ See generally J.A. LAUWERYS *supra* note 136; ELDER et al., *supra* note 136; GUNNAR KARLSSON, *THE HISTORY OF ICELAND* (2000) (detailing Iceland’s history).

¹⁴⁵ See generally 20 *THE NEW ENCYCLOPEDIA BRITANNICA* 116–18 (15th ed. 2002); FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, *GERMANY: A COUNTRY STUDY* (Eric Solsten ed., 1996) (describing German history).

¹⁴⁶ See generally 14 *THE NEW ENCYCLOPEDIA BRITANNICA* 537 (15th ed. 2003); Melanie A. Sully, *The Austrian Way? in THE AUSTRIAN PARTY SYSTEM* (Anton Pelinka & Fritz Plasser eds., 1989); FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, *AUSTRIA: A COUNTRY STUDY* (Eric Solsten & David McClave eds., 1994) (providing background for the evolution of Austria).

¹⁴⁷ See generally 22 *THE NEW ENCYCLOPEDIA BRITANNICA* 306–307 (15th ed. 2002); FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, *JAPAN: A COUNTRY STUDY* (Ronald E. Dolan & Robert L. Worden eds., 1992) (explaining Japanese history).

¹⁴⁸ See generally CAROLYN J. TUOHY, *POLICY AND POLITICS IN CANADA: INSTITUTIONALIZED AMBIVALENCE* (1992); MALCOLM ALEXANDER & BRIAN GALIGAN, *COMPARATIVE POLITICAL STUDIES: AUSTRALIA AND CANADA* (1992) (detailing Canadian history).

¹⁴⁹ See generally MALCOLM TURNBULL, *THE RELUCTANT REPUBLIC* (1993); F.G. CLARKE, *AUSTRALIA: A CONCISE POLITICAL AND SOCIAL HISTORY* (1992); Gary Smith, *The State and the Armed Forces: Defence as Militarism, in SOCIETY, STATE AND POLITICS IN AUSTRALIA* (Michael Muetzelfeldt, ed., 1992) (describing Australian history).

¹⁵⁰ See generally GEOFFREY W. RICE, ED., *THE OXFORD HISTORY OF NEW ZEALAND* (1992) (explaining the history of New Zealand).

¹⁵¹ See generally JOHN COAKLEY & MICHAEL GALLAGHER, *POLITICS IN THE REPUBLIC OF IRELAND* (1992); NEIL COLLINS & FRANK MCCANN, *IRISH POLITICS TODAY* (1991); BILL KISSANE, *EXPLAINING IRISH DEMOCRACY* (2002) (describing Ireland’s history).

¹⁵² See generally POLICY STUDIES, *ISRAEL DEMOCRACY INSTITUTE, NATIONAL SECURITY AND DEMOCRACY IN ISRAEL* (Avner Yaniv ed., 1993) (describing Israeli stability after the nation’s only coup attempt shortly after independence in 1948); See also YORAM PERI, *BETWEEN BATTLES AND BALLOTS: ISRAELI MILITARY IN POLITICS* (1983); YEHUDA BEN MEIR, *CIVIL-MILITARY RELATIONS IN ISRAEL* (1995) (describing Israeli history).

¹⁵³ See generally DAN A. COTHRAN, *POLITICAL STABILITY AND DEMOCRACY IN MEXICO: THE ‘PERFECT DICTATORSHIP’?* (1994) FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, *MEXICO: A COUNTRY STUDY* (James D. Rudolph ed., 1985) (explaining the absence of coups and coup attempts in Mexico since the 1930s).

¹⁵⁴ See generally FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, *COSTA RICA: A COUNTRY STUDY* 57 (Harold D. Nelson ed., 1983); SETH ROLBEIN, *NOBEL COSTA RICA: A TIMELY REPORT ON OUR PEACEFUL PRO-YANKEE, CENTRAL AMERICAN NEIGHBOR* (1989); Philip Mauceri, *Nine Cases of Transitions and Consolidations, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM* (1989) (illustrating the absence of coups and coup attempts in Costa Rica since 1955).

¹⁵⁵ See generally ROBERT M. PRICE, *THE APARTHEID STATE IN CRISIS: POLITICAL TRANSFORMATION IN SOUTH AFRICA 1975-1990* 9-10 (1991); R.W. JOHNSON & LAWRENCE SCHLEMMER, *LAUNCHING DEMOCRACY IN SOUTH AFRICA: THE FIRST OPEN ELECTION, APRIL 1994* 1, 11–12 (1996) (citing the absence of coups and coup attempts (despite revolutionary agitation) in South Africa since independence in the 1930s).

¹⁵⁶ A total of 96 states maintained their independence from 1961 through 2010 (see “Coups and Corruption” table on page 79 for a complete list). Information on coups within each of the 74 non-coup-free states, as well as additional information on stability in the 22 coup-free states, can be found in the following sources: (1) *THE NEW ENCYCLOPAEDIA BRITANNICA* (2003); (2) Federal Research Division, Library of Congress, “Country Studies,” available at <http://memory.loc.gov/frd/cs/cshome.html#toc>; (3) State

III. PRIOR EXPLANATIONS OF STABILITY

A. VENICE AND BRITAIN

Separately, scholars of the Venetian Republic and Great Britain have formulated explanations for long-term stability in those states. As we will see, “virtue” has figured prominently in their explanations, as it has in the prevailing theory of stability within the “mature democracies.” But as section (B) of this part contends, all virtue-based theories make improbable claims about the power of ethical training to defeat self-interest over long periods. None of the other proposals—generally involving particular structural features of the Venetian or British constitutions—are convincing either. The puzzle of lasting constitutional order awaits a solution.

1. *Theories of Venetian Serenity*

Three main explanations for the constitutional stability of Venice have been floating around since the Renaissance. They usually appear as short passages; few scholars sat down to build systematic theories.

First, Venetian patricians were seen as selfless, unassuming, and patriotic public servants.¹⁵⁷ We might call this the “virtue theory.” “[O]ur ancestors were concerned not with ambition and empty fame,” wrote a Renaissance politician, “but only with the good of their country and the common welfare.”¹⁵⁸ Venetians were thought to eschew narrow, self-interested factions.¹⁵⁹ Virtue theory persists: in current lingo, Venice enjoyed an “internalized conformity to the fundamental demands of the state.”¹⁶⁰ In other words, Venetians believed in playing by the rules.

Department Background Notes, available at <http://www.state.gov/r/pa/ei/bgn/>; (4) EDWARD LUTTWAK, COUP D’ÉTAT: A PRACTICAL HANDBOOK (1979) (Appendix C); (5) THE WORLD ALMANAC AND BOOK OF FACTS 2004 (2004); (6) TIME ALMANAC 2003 (Borgna Brunner ed., 2003); (7) On the 1970 coup attempt in Italy: FRANCO FERRARESI, THREATS TO DEMOCRACY: THE RADICAL RIGHT IN ITALY AFTER THE WAR 117-20 (1996); FREDERIC SPOTTS & THEODOR WEISER, ITALY: A DIFFICULT DEMOCRACY 172 (1986); (8) On the 1975 executive coup by Prime Minister Indira Gandhi in India: BIPAN CHANDRA, IN THE NAME OF DEMOCRACY: JP MOVEMENT AND THE EMERGENCY (2003); P.N. DHAR, INDIRA GANDHI, THE ‘EMERGENCY,’ AND INDIAN DEMOCRACY (2000); KATHERINE FRANK, INDIRA: THE LIFE OF INDIRA NEHRU GANDHI 373-410 (Boston: Houghton Mifflin Company, 2002); (9) On the 1996 coup attempt in North Korea: The Economist, *Echoes from the Hermit Kingdom* (May 22, 1999); C. Kenneth Quinones, *The 2nd US-North Korea Nuclear Crisis – Negotiations or War?*, Research Institute of Economy, Trade & Industry Seminar (July 2, 2003) available at <http://www.rieti.go.jp/en/events/bbl/03070201.html>, (last visited September 14, 2008); (10) On the 1987-1988 executive coup in Malaysia: ROBERT STEPHEN MILNE & DIANE K. MAUZY, MALAYSIAN POLITICS UNDER MAHATHIR 28-30 (1999); (11) On the ambiguous coup attempt in Taiwan in 1964: JAY TAYLOR, THE GENERALISSIMO’S SON: CHIANG CHING-KUO AND THE REVOLUTIONS IN CHINA AND TAIWAN 270 (2000); (12) On the ambiguous threat to the North Vietnamese regime posed by rebellions between 1977 and 1983: DOUGLAS PIKE, PAVN: PEOPLE’S ARMY OF VIETNAM 77-83 (1986).

¹⁵⁷ FINLAY, *supra* note 28, at 31–32 (noting the widespread perception that “Venetians displayed a moderate and selfless temperament” and that “[s]elf-interest, the source of grievous sin, constitutional decay, and civic turmoil, was supposedly absent from Venetian electoral activity and public administration”); Martin & Romano, *supra* note 23, at 2 (explaining that humanists depicted Venice as “an ideal republic, a strong maritime empire, and an independent state in which the Venetian nobles were devoted to the ideals of civic humanism and the commercial virtues of sobriety, hard work, and self-sacrifice”).

¹⁵⁸ FINLAY, *supra* note 28, at 31.

¹⁵⁹ See James Everett & Donald E. Queller, *Family, Faction, and Politics in Early Renaissance Venice*, 14 STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY 1, 1–2 (1993) (“According to the ‘myth’ of Venetian republicanism, the Serenissima’s treasured political stability and sobriety was assured by the absence of faction. Patricians were to devote themselves to the service of the state with no thought for their own ambition, let alone the ambition of their clans.”); see also LANE, *supra* note 28, at 88 (“Another myth which, when fully formed, contributed to the solidarity of the state was a belief that Venice was free of factions, that all worked together for the glory of their city.”).

¹⁶⁰ BOUWSMA, VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY, *supra* note 23, at 93.

Second, humanists credited a “mixed” or “balanced constitution,” a concept harking back to Aristotle. In this view, the monarchical, aristocratic, and democratic elements—represented by doge, nobility, and commoners—stood at equipoise. A sturdy architecture blocked each segment from overreaching.¹⁶¹

Third, Venetians themselves believed that justice delivered peace.¹⁶² Through a high-quality, equitable, and impartial judiciary, even poor folk could vindicate their rights.¹⁶³ “[A]n injury done by a Venetian gentleman unto the least inhabitant of the city,” commented a Frenchman, “is right severely corrected and punished.”¹⁶⁴ An English observer attributed Venetian harmony to “justice dulle and equallie ministred.”¹⁶⁵

None of these theories are quite satisfying. Virtue theory suffers from all the problems discussed below—essentially, that it expects far too much from the transient human capacity for public-spirited generosity—as well as from the fact that Venetians were not reliably or unusually virtuous. Modern historians have easily undermined their lofty image, finding numerous instances of nepotism, bribery, bias, and vote-selling.¹⁶⁶ Stringent bookkeeping methods checked corruption within the city,¹⁶⁷ but many patricians sent to govern overseas territories pumped the locals for cash.¹⁶⁸ Baroque anti-cheating measures infused the electoral system.¹⁶⁹ Many Venetians, it seems, broke the rules when they could get away with it. It strains credulity that pangs of conscience trumped the will to power for half a millennium.

The “balanced constitution” concept is too vague and circular to offer a persuasive account of stability. What exactly is the correct proportion between monarchical, aristocratic, and democratic parts? What powers should each segment hold, and how should they interact, to maintain peace? The theory is circular because the only way to know that a constitution is “balanced” is through evidence of stability. By this logic, every stable state has a balanced constitution by definition. Moreover, just how “balanced” was Venice anyway? Only the *nobili*, constituting roughly 5% of the city, could sit in the Great Council or hold any of the higher state offices.¹⁷⁰ Below them, the *cittadini* were eligible to hold civil service positions, but this class constituted only another 5% of the population.¹⁷¹ The Venetian *popolo* had essentially no role in

¹⁶¹ Stanley Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, in *VIOLENCE AND CIVIL DISORDER IN ITALIAN CITIES, 1200-1500* 184, 187 (Lauro Martines ed., 1972); see also Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 448–49 (explaining that Venice was so successful because the constitution “held the potentially antagonistic forces of the political arena in complementary equilibrium”); see also BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 147–49 (quoting the sixteenth-century patrician Gasparo Contarini: “No greater plague can infect a republic than when one part prevails over the others . . . if you wish a city or a republic to last, it is above all necessary that no part should operate more powerfully than the others, but all, as far as possible, should participate in the public authority.”).

¹⁶² See Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 455 (“It was usual to attribute the internal stability of Venice to the excellence of her laws, their strict enforcement and their impartial application to all classes.”); see also LABALME & WHITE, *supra* note 51, at 115 (“Law and justice were considered the foundations of the Republic, guaranteeing its order and longevity, maintaining the unity and structure of its society.”).

¹⁶³ LABALME & WHITE, *supra* note 51, at 115 (explaining that Venetian law applied equally to patricians and citizens).

¹⁶⁴ Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 455 (quoting Jean Bodin).

¹⁶⁵ J.R. Hale, *Editor’s Preface*, in *RENAISSANCE VENICE* 13, 13–14 (J.R. Hale ed., 1973).

¹⁶⁶ See generally Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 187 (“Among Venetian public officials . . . there were those who took advantage of their positions to line their pockets.”); Everett & Queller, *supra* note 159, at 15–20; 1 HAZLITT, *supra* note 26, at 593; 2 HAZLITT, *supra* note 29, at 209, 461–69; BROWN, *supra* note 27, at 313 (describing “rampant corruption and bribery” within the Great Council); LONGWORTH, *supra* note 31, at 151, 169, 175 (“[C]orruption was too deeply entrenched in the administration for the system to justify all the plaudits of its admirers.”); WILLS, *supra* note 36, at 114 (noting the presence of “electioneering, family pressure, fraud, and bribes in the politics of Venice”); Gaetano Cozzi, *Authority and the Law in Renaissance Venice*, in *RENAISSANCE VENICE* 293, 307 (J.R. Hale ed., 1973) (finding “no lack” of failures to live up to the Venetian reputation for clean government).

¹⁶⁷ WILLIAM H. MCNEILL, *VENICE: THE HINGE OF EUROPE, 1081-1797* 225 (1974) (describing the “careful bookkeeping techniques” that “prevented any widespread peculation”); 2 HAZLITT, *supra* note 29, at 519–20 (explaining that Venice enforced rigorous anti-corruption laws).

¹⁶⁸ LONGWORTH, *supra* note 31, at 151 (noting that many administrators, “especially those overseas,” were corrupt).

¹⁶⁹ LANE, *supra* note 28, at 259–60 (“Every stage of the election procedure at Venice contained similar evidence that cheating was expected unless provision was made to prevent it – a sign of the intensity of competition for honors.”).

¹⁷⁰ BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 59–60.

¹⁷¹ *Id.*

government.¹⁷² Last, a “mixed constitution” might explain why branches of government remained in rough parity during the course of ordinary politics, but does not explain the absence of rogue actors. Constitutional rules, by themselves, cannot ensure that no one assembles a small army, disregards the law, and reorganizes the state.

Equal justice offers an intriguing suggestion, because it plausibly explains the absence of popular risings. If the masses suffer no outrageous treatment, they should be less inclined to riot. But this is a partial explanation at best. Many coups—like the Tiepolo Rebellion of 1310—are elite-driven and unconnected to popular grievances.¹⁷³ Moreover, benevolent justice may not eradicate revolutionary leanings. Nazis overthrew the Weimar republic, after all, because they craved domination, not equality. Still, we should remember that Venetians attributed their own stability to impartial justice.

Recent theorists have credited the nascent Venetian welfare state, and the security it provided the lower classes.¹⁷⁴ This argument overlaps with “equal justice” theory, and suffers the same limitations. Other ideas include the city’s great wealth,¹⁷⁵ the exclusion of priests, bishops, and cardinals from politics,¹⁷⁶ the professional *cittadino* bureaucracy,¹⁷⁷ and even political traditions inherited from Byzantium,¹⁷⁸ but it is unclear why these factors should prove stabilizing.

Some authors argue that personal loyalties—to family, friends, patrons, and clients—decayed in Venice.¹⁷⁹ There is an obvious link to stability: without factions, there can be no “bloody factional strife.”¹⁸⁰ But what generated unity? Aside from patriotic virtue, proposals include a sense of shared danger,¹⁸¹ crisscrossing blood ties within the small noble class,¹⁸² laws and procedures that minimized family clout,¹⁸³ and the city’s spatial isolation within the lagoon.¹⁸⁴

¹⁷² See *id.* (explaining that with the *cittadini*’s 5% and the *nobili*’s 5%, only 10% of the population had a role in public life).

¹⁷³ E.g., Gerhard Rösch, *The Serrata of the Great Council and Venetian Society, 1286-1297*, in *VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE 1297-1797* 67, 81 (John Martin & Dennis Romano eds., 2000) (explaining that the 1310 Tiepolo Rebellion was not even connected to class-based resentments within the upper echelons, much less a truly populist rising).

¹⁷⁴ Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 187 (“Scholars in recent times have . . . pointed to the respect and protection Venetian law extended to the popular classes . . .”); see also BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 150 (describing how the sixteenth-century Venetian scholar and politician, Gasparo Contarini, praised the government for feeding the people, controlling contagious diseases, and supporting the sick and elderly); see also LONGWORTH, *supra* note 31, at 194–95 (“Contarini’s picture of Venice as a welfare state was exaggeratedly rosy, but though its welfare did not measure up to ideal standards of our own day, compared to other states of the time it was advanced indeed. Centuries of experience had branded an awareness of the need to forestall social discontent into the minds of Venice’s rulers, and it was this sensitivity which lay at the root of political stability for which Venice was to become so justly famed.”).

¹⁷⁵ LONGWORTH, *supra* note 31, at 261–62 (citing James Howell).

¹⁷⁶ *Id.*

¹⁷⁷ MCNEILL, *supra* note 167, at 225 (“What made the regime stable was the activity of professional bureaucrats who staffed the numerous government offices, boards, councils, and commissions.”).

¹⁷⁸ LANE, *supra* note 28, at 109 (“Venice could restrain family rivalries more easily because it inherited from the Byzantine Empire a tradition of unified allegiance to a sovereign state.”).

¹⁷⁹ See, e.g., LANE, *supra* note 28, at 88–89 (“It was not true that Venice had never known the bloody strife of factions; it was true that she found means of taming them.”); Everett & Queller, *supra* note 159, at 20 (“Unable to rely on family, faction, or patrons for their political future, patricians were obliged to treat all their peers as potential allies, and ingratiate themselves to everyone.”); LONGWORTH, *supra* note 31, at 150 (citing “the comparative solidarity of the ruling group”).

¹⁸⁰ LANE, *supra* note 28, at 89.

¹⁸¹ WILLS, *supra* note 36, at 156 (“People cooperate with vigor, follow leaders, [and] coordinate their efforts, when they act from a sense of shared danger and reciprocal need.”).

¹⁸² See Everett & Queller, *supra* note 159, at 18 (“The whole patriciate fused together into a dense network of kinship in which any family would be related to a considerable proportion of all patrician clans.”).

¹⁸³ See generally LANE, *supra* note 28, at 106–17, 271 (describing how factions were kept at bay which enabled the government to function under the law).

¹⁸⁴ NORWICH, *supra* note 23, at 155.

Finally, a few people through the ages have floated a structural idea: no Venetian had the capability to smash the republic. Early Venice, says a character in a sixteenth-century dialogue, saw frequent bloodshed. “In later times,” though, “there were Doges and others who aspired to tyranny, but they were soon suppressed.”¹⁸⁵ The political institutions, he concludes, “are well designed to suppress quickly anyone who begins to rise by taking this road.”¹⁸⁶ Some historians sprinkle this notion into their writings, while remaining equally vague about how it works. We hear that the system “bent patricians toward compromise, accommodation, and self-effacement,”¹⁸⁷ forced them to “treat all their peers as potential allies,”¹⁸⁸ and made it “hard to build a power base.”¹⁸⁹ We do not learn exactly how “the system” accomplished these feats.

In Parts IV and V, the Article takes up the last two themes—the absence of factions and a structural incapacity to topple the regime—to craft a new theory of the coup-free state. For now, we turn to explanations of British stability.

2. *British Stability Examined*

Since stable governance became apparent in eighteenth-century Britain, theorists have generated virtue-based and structural explanations. Some emphasize internalized ideas and values, while others highlight formal aspects of the British constitutional system. Many weave the two kinds of explanations together. Charles-Louis de Secondat—the Baron de Montesquieu—inaugurated the systemic study of the British constitution. In *The Spirit of the Laws*, published in 1748, Montesquieu heralded England’s unique system.¹⁹⁰ He calls England a republic “disguised under the form of monarchy,”¹⁹¹ and describes it as the one nation in the world whose constitution aims at “political liberty.”¹⁹² For Montesquieu, political liberty is “a tranquility of mind arising from the opinion each person has of his safety,”¹⁹³ which occurs when “one man need not be afraid of another.”¹⁹⁴

Famously, Montesquieu attributes British liberty and order to the separation of powers.¹⁹⁵ The executive, legislative, and judicial functions, he argues, operate in largely independent spheres.¹⁹⁶ Each branch checks, moderates, and restrains the others. The balance of forces maintains liberty, and prevents the rise of tyranny or arbitrary power.¹⁹⁷ As a theory of stability, though, separation of powers is weak. It assumes that the judicial and legislative branches will always be available to check any rogue executive

¹⁸⁵ DAVID CHAMBERS & BRIAN PULLAN, WITH JENNIFER FLETCHER, *VENICE: A DOCUMENTARY HISTORY, 1450-1630*, at 62 (1992) (quoting a dialogue by Francesco Guicciardini).

¹⁸⁶ *Id.*

¹⁸⁷ FINLAY, *supra* note 28, at 140.

¹⁸⁸ Everett & Queller, *supra* note 159, at 20.

¹⁸⁹ WILLS, *supra* note 36, at 111; *see also* Norwich, *supra* note 23, at 282 (by 1400, “[a]ny attempt on the part of an individual or group to gain power or popularity outside the constitutional framework was instantly suppressed,” and political institutions exhibited “exquisitely calculated systems of checks and balances that made their misuse always difficult and usually impossible”); *see also* Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 70 (social alignments “cut right through the ranks of the great families,” making it “impossible for any one faction . . . to attain unchallenged supremacy”).

¹⁹⁰ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., Hafner Publishing 1949) (1748).

¹⁹¹ *Id.* at 68.

¹⁹² *Id.* at 151.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 151–52.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 151–52 (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”).

actors. But what if a *junta* abolishes those branches and rules by decree? Separation-of-powers principles cannot explain why no one sends army divisions into the streets, or imprisons the judges and legislators.

Despite his emphasis on constitutional structure, Montesquieu also credits the unusual “spirit” of the English. Suffering in perpetual rain and gloom, the English are unhappy, suicidal, restless, and constantly striving for social advancement.¹⁹⁸ The public remains vigilant, and prone to mass hysteria over threats to liberty.¹⁹⁹ If any power violated the “fundamental laws,” he notes, “everyone would unite against that power.”²⁰⁰ While the ordinary people retain their honesty and love of liberty, wrote Montesquieu to an English friend, “it will be difficult to subvert your constitution.”²⁰¹

A few decades later, a Swiss-born lawyer named Jean-Louis de Lolme pondered the mysterious calm of Great Britain.²⁰² De Lolme moved to England as an adult, and published *The Constitution of England* in 1784.²⁰³

De Lolme considers England unique. Unlike all other kingdoms—and the ancient republics—England does not face a constant threat of men seeking to usurp the “supreme governing authority.”²⁰⁴ For de Lolme, England’s “remarkable liberty” is due to “the impossibility under which their Leaders, or in general all Men of power among them, are placed, of invading and transferring to themselves any branch of the Government Executive authority.”²⁰⁵ The “remarkable solidity of the governing Executive Authority,” he says, “takes from the great Men in the Nation all serious ambition to invade this authority, thereby preventing those anarchical and more or less bloody struggles to result from their debates, which have so constantly disturbed other Countries.”²⁰⁶ In other words, England is distinctive because a *coup d’état* is impossible.²⁰⁷

But why? What prevents a British coup? Following Montesquieu, de Lolme credits the separation of powers. Despite spending considerable time on the subject, however, de Lolme seems unsatisfied. He repeatedly describes English stability as “mysterious” and “astonishing,” and posits “some inward essential difference” between England and other nations.²⁰⁸ Even amidst political ferment, “insuperable impediments” block those who might “raise themselves on the wreck of the governing authority.”²⁰⁹ A “secret force” goes to work, which “gradually brings things back to a state of moderation and calm.”²¹⁰ Those who “seem to have it in their power” to seize executive authority, he remarks, “are, somehow, prevented from entertaining thoughts of doing so.”²¹¹ But what prevents politicians from imagining themselves as Caesar or Cromwell? And what explains the “astonishing subordination” of military leaders to civilian rule? De Lolme cannot

¹⁹⁸ *Id.* at 231–32, 307–15.

¹⁹⁹ *Id.* at 231–32, 308–09.

²⁰⁰ *Id.* at 309.

²⁰¹ C.P. Courtney, *Montesquieu and English Liberty*, in MONTESQUIEU’S SCIENCE OF POLITICS: ESSAYS ON THE SPIRIT OF LAWS 273, 286 (David W. Carrithers et al. eds., 2001).

²⁰² JEAN-LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND* (1793) (1784).

²⁰³ *Id.* at ii.

²⁰⁴ *See id.* at 436–37 (“In other Monarchies, those Men who, during the continuation of the public disturbances . . . finding it in their power . . . to parcel out . . . the supreme governing authority . . . and to transfer the same to themselves . . . constantly did so, in the same manner, and from the very same reasons, as it constantly happened in the ancient Commonwealths But in England, the great Men in the Nation finding themselves in a situation essentially different, lost no time in pursuits like those in which the great Men of other countries used to indulge themselves on the occasion we mention.”).

²⁰⁵ *Id.* at 387.

²⁰⁶ *Id.* at 433.

²⁰⁷ *See id.* at 79–80 (“For though, by wise distribution of the powers of Government, great usurpations are become in a manner impracticable . . .”).

²⁰⁸ *Id.* at 390, 419, 442 (invoking the “mysterious solidity” and “stability” of the English crown and citing “the astonishing subordination in which the military is kept to the civil power”).

²⁰⁹ *Id.* at 440.

²¹⁰ *Id.* (noting also that “mighty struggles” are moderated “by some means or other”; and that an occasionally stormy political sea, “to appearance so deeply agitated, constantly stops at certain limits which it seems as if it wanted the power to pass”).

²¹¹ *Id.* at 408; *see also id.* at 438 (stating that English elites “somehow” judge it “impracticable” to transfer executive authority “to themselves or their party”).

identify the pressure keeping every Englishman within constitutionally-ordained boundaries. He never gets beyond “somehow.”²¹²

Renowned Victorian scholar Albert Venn Dicey acknowledged the mystery of British stability, but determined that it was unsolvable. Dicey crafted a meticulous theory to explain how the unwritten, implicit conventions of the British Constitution were enforced.²¹³ No one would be able to subvert those conventions, he argued, without violating *other* laws, which are enforceable in court.²¹⁴ For example, if Parliament did not assemble for two years, tax revenues would cease to be legally due, and anyone who collected taxes would face criminal charges.²¹⁵ The “boldest political adventurer” must “obey the fundamental principles of the constitution,” Dicey concludes, because breaching them “will almost immediately bring the offender into conflict with the courts and the law of the land.”²¹⁶ But what if the “adventurer” rules by force? What if he kills the judges or intimidates them into submission? Facing this question, Dicey threw up his hands. “No constitution can be absolutely safe from revolution or from a *coup d’état*,” he writes. “No one is concerned to show, what indeed can never be shown, that the law can never be defied, or the constitution never be overthrown.”²¹⁷

Today, the mystery remains palpable. “Call it socialization or tradition,” says Peter Karsten, “something has been at work in certain competitive democracies to preclude military coups—something other than economic prosperity, constitutional formulas, or careful stroking of military elites.” Karsten falls back on virtue: coups are absent when the military believes “that it *should* remain subject to civilian control.”²¹⁸

Like their counterparts in Venetian studies, the historians of England postulate a structural immunity to revolution, but fail to craft a convincing theory.²¹⁹ We hear that Crown, Parliament, and judiciary balance each other, ensuring that no one, “not even the monarch,” exceeds their boundaries.²²⁰ Radical groups have been too weak to challenge the British state,²²¹ but that does not explain why military commanders or politicians have failed to seize power. After 1688, one author suggests, few Britons advocated revolution, and none “had the means of achieving it.”²²²

B. MILITARY PROFESSIONALISM: THE PREVAILING THEORY OF STABILITY

Almost every scholar who addresses the question of why coups *don’t* happen in what are called the “mature democracies” invokes professional military norms.²²³ I call this the “virtue theory” because it

²¹² *Id.* at 438.

²¹³ DICEY, *supra* note 4, at 420-52.

²¹⁴ *Id.* at 441.

²¹⁵ *Id.* at 441-51.

²¹⁶ *Id.* at 445-46.

²¹⁷ *Id.* at 451.

²¹⁸ Peter Karsten, *The Coup d’État and Civilian Control of the Military in Competitive Democracies*, in TO SHEATHE THE SWORD: CIVIL-MILITARY RELATIONS IN THE QUEST FOR DEMOCRACY 149, 155 (John P. Lovell & David E. Albright eds., 1977).

²¹⁹ See DE LOLME, *supra* note 202, at 408 (“English elites somehow judge it impracticable to transfer executive authority to themselves or their party.”); MONTESQUIEU, *supra* note 190, at 151-52, 231-32, 307-15 (attributing stability to the balance of powers and unique “spirit” of the English); DICEY, *supra* note 4, at 420-52 (finding the mystery of British stability unsolvable).

²²⁰ CORNISH & CLARK, *supra* note 102, at 10.

²²¹ See generally THOMIS & HOLT, *supra* note 24, at 100-33 (providing a detailed history of groups that attempted to revolt against the British state).

²²² GILMOUR, *supra* note 24, at 7-8.

²²³ To my knowledge, the only exception is Bruce Farcau, who identifies the scale and complexity of modern states as factors that make coups difficult or impossible. In the United States, for example, “even a modicum of control over the country could not be established without seizing dozens of locations in half a dozen massive cities, to say nothing of hundreds of transportation chokepoints, airports, television and radio stations, microwave transmission centers, and many major military bases scattered over tens of thousands of square miles of territory.” Ultimately, Farcau concludes, coups depend on “the number, diversity, and dispersion of targets.” BRUCE W. FARCAU, *THE COUP: TACTICS IN THE SEIZURE OF POWER* 88-89 (1994). Farcau’s analysis, however, does not mesh very well with the historical record. Venice, for example, was a highly centralized imperial state, with just a few critical targets inside the city. Yet it seems to have gone for centuries without any coups or coup

depends on inner attitudes, education, and training. Ultimately, it suggests that officers *could* coup, but that they *won't* for ethical reasons.

Louis Smith, an American military historian, explained the U.S. military's failure to mount any coup attempts through inner restraints.²²⁴

The major factor in civil control lies in the fact that the military have never manifested any ambition to usurp first power in America and to overwhelm for all our citizens the great values of freedom under the law. In entering the armed forces, the American does not put off the citizen in becoming the soldier. The habits of obedience to authority and respect for law persist.²²⁵

Samuel Huntington's 1957 work, *The Soldier and the State*, helped define the field of "civil-military relations."²²⁶ Huntington argues that Western states since the nineteenth century have developed what he calls "objective civilian control."²²⁷ The essence of objective control is "the recognition of autonomous military professionalism."²²⁸ This produces "professional attitudes and behavior among the members of the officer corps," rendering them "politically sterile and neutral."²²⁹ Civilian control is assured, writes Huntington, only when the armed forces are motivated by purely "military ideals."²³⁰

Samuel Finer's *The Man on Horseback: The Role of the Military in Politics*, published in 1962, presents another classic "internalization" account.²³¹ Finer explains that "military professionalism"²³² inhibits the desire to mount a coup within "mature political cultures." He includes Britain, the United States, Norway, Denmark, Sweden, Switzerland, Canada, Australia, New Zealand, Ireland, and the Netherlands among the list of these cultures.²³³ When commanders grow immersed in complex technical tasks, Finer argues, they lose interest in politics.²³⁴ The "truly effective check" against a military coup, according to Finer, is a "firm acceptance of civilian supremacy."²³⁵

Eric Nordlinger wrote that "subordination to civilian authority" must be thoroughly internalized. "Soldiers who are imbued with these beliefs and values—what might be referred to as the *civilian ethic*—are attitudinally disposed to accept civilian authority and to retain a neutral, depoliticized stance even when in sharp disagreement with the government."²³⁶

We might suspect that military leaders are predisposed to embrace "virtue theory" because it bolsters their own patriotic aura, and burnishes the reputation of the armed forces. Why not take credit for an extraordinary record of restraint? In fact, to avoid suspicion, military leaders *must* say they believe in constitutional succession, and would never consider mounting a *coup d'état*. During the Watergate crisis, for example, one senior commander repudiated rumors of a military intervention by assuring a reporter that he

attempts. See *supra* notes 13-54 and accompanying text. Tiny states like Luxembourg and Iceland are similarly coup-free, but historical giants including Rome, Byzantium, and the Ottoman Empire, and modern states such as Russia, have lurched from *coup d'état* to *coup d'état*.

²²⁴ LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER: A STUDY OF CIVIL CONTROL OF THE MILITARY POWER IN THE UNITED STATES* (1951).

²²⁵ *Id.* at 263.

²²⁶ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 74-84 (1957).

²²⁷ *Id.* at 83.

²²⁸ *Id.*

²²⁹ *Id.* at 83-84.

²³⁰ *Id.* at 74.

²³¹ S.E. FINER, *THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS* (1988).

²³² *Id.* at 20-26.

²³³ *Id.* at 79.

²³⁴ *Id.* at 21.

²³⁵ *Id.* at 26.

²³⁶ ERIC A. NORDLINGER, *SOLDIERS IN POLITICS: MILITARY COUPS AND GOVERNMENTS* 13 (1977).

and his colleagues recognized their Constitutional duties.²³⁷ But this does not mean that the virtue-based story that military leaders tell—to the general public, to scholars, to cadets at the academies, and to themselves—identifies the true causal mechanism behind centuries of constitutional leadership succession.

There are two main problems with virtue theory as an explanation for long-term stability. First, it simply displaces the causal explanation back one level. Why do some military organizations internalize professional norms, while others retain “unprofessional” attitudes? Presumably, all political leaders—from hereditary monarchs to elected presidents—have sought to instill obedience and loyalty within their security forces.²³⁸ None of the “virtue theorists” explain in detail why or how professional values took root within certain states, but not others.²³⁹

Second, virtue theory is inordinately complex. It requires a precise mode of education or socialization, throughout the entire political-military establishment, so as to nullify basic self-interest, over very long periods of time. Socialization must be precise, in that it must instill the wrongness of extra-constitutional action, against the potent human tendency to rationalize what one desires. In times of crisis, for example, when people may legitimately sense that a leadership change is vital for everyone’s safety or well being, constitutional values must continue to trump all other considerations.

The socialization must take effect throughout the entire political and military class. This may seem relatively straightforward in a city equipped with a state-run system of education, training, and indoctrination, such as ancient Sparta or modern Singapore, but what about a sprawling, diverse nation like the United States of America? How exactly are all Americans entering the political-military establishment inculcated with constitutional values? Is it at home, by parents and teachers? Is it when a person joins the military or enters politics?

Obviously, the anti-coup training must directly counteract what most people consider basic self-interest. Men must willingly forgo the chance for great power, everlasting fame, and all the riches they could possibly desire, all because they are committed to an ethical standard. Virtue theory violates an ancient perception: that people will frequently do whatever they can get away with.²⁴⁰ Glaucon makes this point at the beginning of Plato’s *Republic*, when he tells the story of the Ring of Gyges.²⁴¹ The ancestor of Gyges was a shepherd who discovered a ring that, when turned the right way, rendered its wearer invisible. The shepherd immediately set out to make use of his new power. He got a job as the king’s messenger, committed adultery with the king’s wife, murdered the king, and ruled as tyrant.²⁴² Of course, the rest of the *Republic* presents Socrates’ elaborate response, in which he insists that people can learn to love justice for its own sake. This requires, however, a strenuous ethical education and communal lifestyle for the ruling philosopher-kings.²⁴³ In essence, virtue theory claims that today’s mature democracies have achieved this Platonic ideal, with military guardians so well trained they can easily ignore the temptations of injustice. Such an explanation would surprise many of our constitutional Framers, who thought that men were “ambitious, vindictive, and rapacious,”²⁴⁴ that “if men were angels, no government would be necessary,”²⁴⁵

²³⁷ Karsten, *supra* note 218, at 155.

²³⁸ See, e.g., FINER, *supra* note 231, at 25 (discussing President Kennedy’s assertion that the military must be subject to civilian control); NORDLINGER, *supra* note 236, at 12-13 (referencing the statement by President Nkrumah of Ghana that “[i]t is not the duty of a soldier to criticize or endeavor to interfere in any way with political affairs of the country . . .”).

²³⁹ See, e.g., FINER, *supra* note 231, at 20-22 (citing professionalism as a deterrent to military intervention but not discussing how a State imbues the military with professionalism).

²⁴⁰ See PLATO, THE REPUBLIC 45 (Neill H. Alford, Jr. et al. eds, Francis MacDonald Cornford trans., 1991) (“No one, it is commonly believed, would have such iron strength of mind as to stand fast in doing right or keep his hands off other men’s goods, when he could go to the market-place and fearlessly help himself to anything he wanted, enter houses and sleep with any woman he chose, set prisoners free, and kill men at his pleasure, and in a word go about among men with the powers of a god.”).

²⁴¹ *Id.* at 44-45.

²⁴² *Id.*

²⁴³ *Id.* at 47-53.

²⁴⁴ THE FEDERALIST NO. 6, at 35 (Alexander Hamilton) (Edward Gaylord Bourne ed., 1901).

²⁴⁵ THE FEDERALIST NO. 51, at 354 (James Madison) (Edward Gaylord Bourne ed., 1901).

and that the structure of government must remedy “the defect of better motives” through “opposite and rival interests.”²⁴⁶

Finally, the whole edifice of rigorous and universal ethical training must last for centuries. This is quite a feat, especially because values and cultural attitudes can change rapidly. Even as new ideas and behavioral norms pass through the population, constitutionalism must remain a bedrock principle.

By themselves, each of these four requirements is quite a stretch. In combination, they seem to demand a total suspension of common sense. To put it more formally, the theory requires a long series of tenuous assumptions and inferences. None of this is to deny the existence of genuine idealism, patriotism, or self-sacrifice—it is simply that virtue theory as an explanation for long-term stability places too much weight on these fleeting capacities. Virtue theory requires an inspired idealism among too many people, for far too long, in the face of staggering incentives pressing in the other direction.

Still, the question remains: why are coups absent in certain states? Is there a structural explanation for the long-term absence of revolutions and *coups d'état* in states like Venice, Great Britain, the United States, and 20 other states around the world? If so, it might account for the intuitions of theorists from de Lolme to Karsten, who imagine a “secret force” or “something” ensuring stability.²⁴⁷

Following A.V. Dicey, we might reasonably assume that the courts produce lawful government.²⁴⁸ Can the “rule of law,” enforced by independent and impartial courts, explain stability, nonviolent politics, and the absence of *coups d'état*?

IV. THE RULE OF LAW IN VENICE AND BRITAIN

Renaissance Venice was renowned for its uniquely fair, impartial, and dependable legal system.²⁴⁹ Eighteenth-century Britain established a similar reputation.²⁵⁰ The two states were hardly identical, of course. They progressed along different timelines, developed unique constitutions, and promulgated separate bodies of law. But at a broad level of comparison, Venice and Britain exhibited parallel legal orders. Each state created a judicial system with equality under the law,²⁵¹ rational inquiry,²⁵² public adversarial

²⁴⁶ *Id.* at 355.

²⁴⁷ See DE LOLME, *supra* note 202 at 79–80 (“For though, by wise distribution of the powers of Government, great usurpations are become in a manner impracticable . . .”); see also Karsten, *supra* note 218, at 155 (“[S]omething has been at work in certain competitive democracies to preclude military coups—something other than economic prosperity, constitutional formulas, or careful stroking of military elites.”).

²⁴⁸ See DICEY, *supra* note 4, at 131 (“Authority, again, may be given to some person or body of persons, and preferably to the courts, to adjudicate upon the constitutionality of legislative acts, and treat them as void if they are inconsistent with the letter or the spirit of the constitution.”).

²⁴⁹ Bouwsma, *Venice and the Political Education of Europe*, *supra* note 33, at 455 (citing the general appreciation for the “excellence of [Venetian] laws, their strict enforcement and their impartial application to all classes”); LABALME & WHITE, *supra* note 51, at 115; Hale, *supra* note 165, at 13–14 (quoting Sir John Smythe regarding the “justice dulle and equallie ministred” in Venice).

²⁵⁰ ANTHONY BABINGTON, *THE RULE OF LAW IN BRITAIN FROM THE ROMAN OCCUPATION TO THE PRESENT DAY: THE ONLY LIBERTY* 179, 201 (3rd ed. 1995) (explaining how courts had become the “guardians of law”); see generally David Lemmings, *Introduction*, in *THE ENGLISH AND THEIR LAWS IN THE EIGHTEENTH CENTURY* 1 (David Lemmings ed., 2005); ESMÉ WINGFIELD-STRATFORD, *THE SQUIRE AND HIS RELATIONS* 92 (1956); GILMOUR, *supra* note 24, at 21, 434 (explaining the British legal system).

²⁵¹ NORWICH, *supra* note 23, at 275; Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 227; LANE, *supra* note 28, at 271–73 (explaining equality under the law in Venice); see 1 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 407–08 (1898) (noting that all free men in Britain are equal under the law).

²⁵² See THAYER, *supra* note 30, at 219–22; Cozzi, *supra* note 166, at 307–09 (extensively describing the legal system in Venice); see also Edward Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400–1429*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800*, at 106–16 (J. S. Cockburn & Thomas Green eds., 1988); TREVELYAN, *supra* note 77, at 138 (detailing the legal history of Britain).

debates,²⁵³ procedural protections for criminal defendants,²⁵⁴ a legal profession closely intertwined with political elites,²⁵⁵ and an independent judiciary.²⁵⁶ In Venice and in Britain, all state actions were subject to legal scrutiny,²⁵⁷ and this “rule of law” brought low governmental corruption²⁵⁸ and economic prosperity.²⁵⁹

From its rudimentary origins at the Doge’s court, the machinery of Venetian justice evolved gradually. By the fifteenth century, grand committees of forty presided in Venetian tribunals, and cases could move through a series of appellate hearings.²⁶⁰ The Doge’s Council was generally supposed to hear complaints of injustice, and the Great Council occasionally settled matters when political-legal controversies grew volatile.²⁶¹ “On the whole,” concluded a British lawyer who published an immense two-volume history of Venice, “there was probably no early European State, where property and life were equally secure from violence, and where nocturnal repose might be enjoyed almost as confidently as in a modern home.”²⁶²

England developed a centralized, national system of laws and courts during an age generally known for feudal anarchy. When William the Conqueror arrived in 1066, he acquired a kingdom with a particularly strong central government; he and his Norman descendants strengthened it further.²⁶³ Royal courts

²⁵³ See THAYER, *supra* note 30, at 219; Cozzi, *supra* note 166, at 307–09 (describing the judicial system and jurisdictional restraints that allowed for the adversarial process in Venice); see also Powell, *supra* note 252, at 106–16; Thomas A. Green, *A Retrospective on the Criminal Trial Jury, 1200-1800*, in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800, at 374 (J. S. Cockburn & Thomas Green eds., 1988) (noting the evolution of the trial process and adversarial proceedings in Britain).

²⁵⁴ Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 221–23; THAYER, *supra* note 30, at 219–21; Cozzi, *supra* note 166, at 308–09 (detailing the rights of the defendant during interrogation and the accused’s right to counsel in Venice); see generally J.S. COCKBURN & THOMAS GREEN, TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 (1988); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 221 (Cambridge University Press, 1963); JAMES HEATH, TORTURE AND ENGLISH LAW 46–48 (1982) (explaining the trial process and the rights of the accused in Britain).

²⁵⁵ LONGWORTH, *supra* note 31, at 126; MCNEILL, *supra* note 167, at 225; 2 HAZLITT, *supra* note 29, at 821–22; LABALME & WHITE, *supra* note 51, at 115 (describing how noblemen consistently controlled the political, economic, and legal world in Venice); see generally BABINGTON, *supra* note 250, at 123; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 133–216 (2nd ed. 1979); BOWEN, *supra* note 76, at 58–68, 278–80 (illustrating broadly how the legal arena was controlled mainly by British aristocracy).

²⁵⁶ See 2 HAZLITT, *supra* note 29, at 455–57; Labalme & White, *supra* note 51, at 148–51; HAITSMA MULIER, *supra* note 34, at 152–56; Gilbert, *supra* note 49, at 494 (explaining the judicial branch of the Venetian government); see generally BABINGTON, *supra* note 250, at 201; BAKER, *supra* note 255, at 145, n.20; LYON, *supra* note 98, at 263; FREDERICK GEORGE MARCHAM, A CONSTITUTIONAL HISTORY OF MODERN ENGLAND, 1485 TO THE PRESENT 238–39 (1960); KEIR, *supra* note 24, at 294 (describing the British judicial system).

²⁵⁷ See LANE, *supra* note 28, at 95–100, 256; Cozzi, *supra* note 166, at 307; WIEL, *supra* note 71, at 191–92; NORWICH, *supra* note 23, at 499; 2 HAZLITT, *supra* note 29, at 457–59. (describing that government questions of “importance” and “gravity” such as foreign policy decisions and granting pardons were subject to Venetian legal review or “built in checks and balances”); see also DICEY, *supra* note 4, at 222; KEIR, *supra* note 24, at 29, 294 (explaining that British judges often provided a necessary check and on “local authorities” and “governmental authority” through close supervision).

²⁵⁸ See MCNEILL, *supra* note 167, at 225; WILLS, *supra* note 36, at 124; 2 HAZLITT, *supra* note 29, at 480–81, 519–20; NORWICH, *supra* note 23, at 499; BOWEN, *supra* note 75, at 428 (detailing how the Venetian legal system, specifically, the accurate bookkeeping, the distribution of bureaucratic functions, the avoidance of bribery, and harsh punishment for corruption fostered stability); see also HOLMES & SZECHI, *supra* note 79, at 326; KEIR, *supra* note 24, at 373.

²⁵⁹ See NORWICH, *supra* note 23, at 155, 277–82; LONGWORTH, *supra* note 31, at 172–73 (describing the luxuries and wealth of Venice); see also GEOFFREY HOLMES, THE MAKING OF A GREAT POWER: PRE-INDUSTRIAL BRITAIN, 1660-1722 36, 52, 257–61, 356 (1993); HOLMES & SZECHI, *supra* note 79, at 133–43; EVANS, *supra* note 100, at 107–09 (describing rising British wealth in the eighteenth century).

²⁶⁰ 2 HAZLITT, *supra* note 29, at 491; 1 BROWN, *supra* note 75, at 309–12.

²⁶¹ See generally LANE, *supra* note 28, at 96–97; 2 HAZLITT, *supra* note 29, at 461–71 (detailing the functions of the different councils).

²⁶² 2 HAZLITT, *supra* note 29, at 577.

²⁶³ See generally R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 10, 90–92 (1973) (noting how the organization of a central state occurred early in England); D.J.A. MATTHEW, THE NORMAN CONQUEST 10, 149–64, 268–72 (1966); MICHAEL POWICKE, MILITARY OBLIGATION IN MEDIEVAL ENGLAND 25 (1962); R.H.C. Davis, *The Norman Conquest*, in THE IMPACT OF THE NORMAN CONQUEST 123, 125–27 (C. Warren Hollister ed., 1969) (describing relatively efficient

dispensing “Common Law” became popular venues, as litigants sought to harness their power.²⁶⁴ Over the centuries, royal justice developed an increasingly firm and impartial presence across the country.²⁶⁵

Each state dispensed justice in a roughly egalitarian manner, without regard to social rank.²⁶⁶ In Venice, *nobiles* and *cittadini* did enjoy specific political privileges,²⁶⁷ but in theory, could expect no advantage in court. *Promissioni*—contracts drawn up at the beginning of each doge’s reign—provided that Venice had only one law, for the doge and the poorest fisherman.²⁶⁸ In England, the Common Law paid little attention to social estates and ranks.²⁶⁹ As serfdom grew obsolete in the later middle ages, all Englishmen were “free.” England exhibited a social hierarchy of minute gradations, with no chasms between legally distinct castes.²⁷⁰

Each state developed rational systems of fact-finding, including adversarial courtroom contests. Regular Venetian courts (i.e., not the Council of Ten) featured lively public debates, in which defense counsel sparred with prosecutors.²⁷¹ English juries determined questions of fact, and by the fifteenth and sixteenth centuries, jurors largely relied upon evidence presented in court.²⁷²

Venice and England each pioneered certain protections for criminal defendants. These should not be overstated: *Miranda* rights did not apply, but compared to their neighbors, these states provided humane sanctuaries for the accused.²⁷³

taxation and administration in the Anglo-Saxon kingdom); JOHN P. DAWSON, A HISTORY OF LAY JUDGES 116-17, 180-88 (1960) (describing how the survival of the system can largely be accredited to the English central government in 1066 and after); 1 MARC BLOCH, FEUDAL SOCIETY 270-71 (1961) (detailing the centralization of the country); T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 2-3 (1967) (explaining that following the conquest, the Normans further “tightened” the system); BAKER, *supra* note 255, at 13 (illustrating that the Normans strengthened the system by instituting “safeguards”).

²⁶⁴ VAN CAENEGEM, *supra* note 263, at 17-18, 88-89; *see also* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 287-91 (1968); 1 POLLOCK & MAITLAND, *supra* note 251, at 108 (illustrating the differences between equity and common law).

²⁶⁵ *See* MICHAEL HICKS, BASTARD FEUDALISM 123-24 (1995) (suggesting that the eleventh through seventeenth centuries probably witnessed a “gradual progression towards less partial administration of justice”); *see also* Ted Gurr, *Historical Trends in Violent Crime: A Critical Review of the Evidence*, 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 295, 313 (1981) (combining data from numerous sources and finding that homicide rates in England dropped dramatically from 1200 to 1950, before rising relatively slightly in the late twentieth century).

²⁶⁶ *See* NORWICH, *supra* note 23, at 275 (commenting that in theory and mostly in practice, every man in Venice was equal in the sight of the law); LANE, *supra* note 28, at 271 (“Venice maintained also the high reputation it had gained in earlier centuries for equitable administration of justice. Nobles and commoners had equal standing in court.”); Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 223-27 (showing that patricians and commoners in the thirteenth century received equal sentences for equal crimes); THAYER, *supra* note 30, at 221-22 (noting that foreigners came to Venice seeking a fair tribunal); *see generally* LYON, *supra* note 98, at 263 (“From the early eighteenth century, the judiciary increasingly applied and developed the law without fear or favour.”); Lemmings, *supra* note 250, at 1-26; DICEY, *supra* note 4, *passim*.

²⁶⁷ BOUWSMA, VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY, *supra* note 23, at 59-60 (describing the privileges of the *nobili* and *cittadini* in public life).

²⁶⁸ 1 HAZLITT, *supra* note 26, at 629.

²⁶⁹ 1 POLLOCK & MAITLAND, *supra* note 251, at 407-08.

²⁷⁰ *E.g.*, RICHARD W. KAEUPER, WAR, JUSTICE, AND PUBLIC ORDER: ENGLAND AND FRANCE IN THE LATER MIDDLE AGES 364 (1988) (“English society showed a series of gradations merging one into another, an unbroken spectrum rather than a ladder of clearly stratified social ranks.”).

²⁷¹ Cozzi, *supra* note 166, at 307-09 (explaining the difference between the Council of Ten and adversarial Venetian courts, where there were public trials and debate between lawyers); *see also* THAYER, *supra* note 30, at 219 (“Prosecutors were warned not to cross-question in a vexatious spirit.”).

²⁷² *See generally* Green, *supra* note 253, at 374 (describing the change in the jury role from medieval times); Dawson, *supra* note 260, at 124-29; Powell, *supra* note 252, at 115-16; BAKER, *supra* note 255, at 65-66 (illustrating the history of how jurors became triers of fact in Britain).

²⁷³ *See* Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 221-23 (describing the “scrupulous” defendant-friendly aspects of Venetian criminal procedures); *see also* SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE (S.B. Chrimes trans. and ed., 1942) (describing the superiority of English procedures compared to the cruel and arbitrary treatment prevailing throughout much of the Continent).

In Venice, defendants had the right to choose their own counsel, which would otherwise be appointed by the court.²⁷⁴ The exception to this right was the Council of Ten, where defendants appeared alone.²⁷⁵ Torture was occasionally employed, particularly in treason cases, but with some safeguards. A certain number of the *Signoria* and Forty were supposed to be present, and prisoners could not be pushed “beyond the normal limit,” whatever that meant.²⁷⁶ Unless the situation was urgent, the State Attorney needed a warrant from the Forty to make an arrest.²⁷⁷ If a police officer made an arrest, he had to secure the approval of his colleagues within the week, or the prisoner was released.²⁷⁸ Venetian prisons were relatively clean and hygienic,²⁷⁹ although that probably isn’t saying much, considering the rat-infested, turd-littered dungeons of Renaissance Europe.²⁸⁰

In England, the jury system was long regarded as a defendant’s primary shield against arbitrary or unfair treatment.²⁸¹ This is not to say that juries were incorruptible: bribery and selective empanelling of jurors sometimes affected the outcome of cases.²⁸² Torture clearly occurred, especially under the Tudors, but it was applied by royal tribunals like the Privy Council and Court of Star Chamber (not the ordinary law courts), required a royal warrant, and usually involved matters of state security.²⁸³ Like the Star Chamber, torture was abolished after 1642.²⁸⁴ “Due process of law” first appeared in a fourteenth-century statute.²⁸⁵ Over time, it came to mean that any judicial process had to include a fair hearing before a neutral decision-maker.²⁸⁶ Defendants imprisoned in violation of the law could use the writ of *Habeas corpus* to gain their freedom, especially after the Habeas Corpus Act of 1679.²⁸⁷

In Venice and in England, legal expertise and skilled analysis became prized assets, which enabled aspirants to rise in government and politics. Law framed political debates among Venetian patricians.²⁸⁸ *Cittadini* constituted a second stratum of legal professionals; many studied law and public administration at

²⁷⁴ LANE, *supra* note 28, at 271–73.

²⁷⁵ Cozzi, *supra* note 166, at 309.

²⁷⁶ THAYER, *supra* note 30, at 219 (noting that in cases of torture, “the law grimly insisted that this must not be pushed ‘beyond the normal limit’”); see also 2 HAZLITT, *supra* note 29, at 614 (“At Venice, torture was seldom applied, except in cases of treason in which it was found impracticable to elicit the truth by gentler means, and the law directed that in no circumstances should any person be subjected to the process, unless a certain number of the Privy Council and the Forty were present to take depositions and to observe that no undue cruelty was exercised.”); see also Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 223 (noting that suspected thieves were tortured to recover stolen goods, but the torture was governed by “careful procedures”).

²⁷⁷ Cozzi, *supra* note 166, at 309.

²⁷⁸ Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 222–23.

²⁷⁹ 2 HAZLITT, *supra* note 29, at 611.

²⁸⁰ See, e.g., *id.* (contrasting the Venetian prisons to those in Germany where the conditions were dark, cold, isolated, and “swarming with vermin”).

²⁸¹ SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* (S. B. Chrimes ed. trans., Cambridge University Press 1942) (1546).

²⁸² J.B. Post, *Jury Lists and Juries in the Late Fourteenth Century*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800* 65, 72 (J.S. Cockburn & Thomas Green eds., 1988).

²⁸³ MAITLAND, *supra* note 254, at 221 (noting that the Court of Star Chamber developed unique procedures, including torture, but torture never became part of ordinary court procedures, and remained strictly a practice of the royal council); FORTESCUE, *supra* note 273, at 47 (explaining that torture was used for “guarding security”); MARCHAM, *supra* note 256, at 32–33 (describing the Tudor Privy Council’s use of torture); KEIR, *supra* note 24, at 99 (describing the Tudor Privy Council’s use of arbitrary arrest, detention, torture, and spies); BOWEN, *supra* note 75, at 92–93 (noting that torture was only performed by the privy council); HEATH, *supra* note 254, at 105 (describing how “specific instructions” were necessary if torture was going to be used).

²⁸⁴ HEATH, *supra* note 254, at xvii (noting torture occurred as late as 1640); BOWEN, *supra* note 75, at n. 92 (“After the Commonwealth [1649] there is no instance of torture in England.”).

²⁸⁵ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 26 (2004).

²⁸⁶ *Id.*

²⁸⁷ BAKER, *supra* note 255, at 126–28.

²⁸⁸ LABALME & WHITE, *supra* note 51, at 115 (explaining that debates about the law form an important part of the Venetian record); see also, e.g., 2 HAZLITT, *supra* note 29, at 821–22 (describing a Great Council meeting in 1410 where the Doge declared the *Avogadori* had no jurisdiction in a matter, the *Avogadori* responded that the Doge had no right under the *Promissione* to interfere, and fined him for committing a misdemeanor).

the University of Padua and qualified for office by passing examinations.²⁸⁹ By the sixteenth century, Englishmen trained for legal careers in London, at the Inns of Court.²⁹⁰ Young gentlemen preparing to manage their estates, and to serve as Justices of the Peace and Members of Parliament, also attended.²⁹¹

Aside from dispersing knowledge of law across the top social strata, this premium on expertise contributed to impartiality because lawyers and judges proved their abilities by applying legal doctrines correctly.²⁹² The young Edward Coke, for example, first gained notoriety by arguing a complaint about the food served in the Inner Temple. Coke stated his case “so exactly,” says a chronicler, that “all the House admired him and his pleading it, so that the whole Bench took notice of him.”²⁹³

In Venice, judges were independent because they were elected by a large council,²⁹⁴ their terms were *always* short,²⁹⁵ and they voted by ballot in committees (which provided numerical cover).²⁹⁶ While other Italian cities routinely hired foreign jurists, who might stand above local factions, Venice trusted its own patricians.²⁹⁷ According to a Florentine, Venetian judges rendered fair verdicts because they suffered no political interference.²⁹⁸

English judges of the sixteenth and seventeenth centuries sometimes ruled against the Crown,²⁹⁹ but doing so was problematic because they served at the monarch’s pleasure,³⁰⁰ and kings often expected cooperation on matters touching their own interests.³⁰¹ But after 1688, judges were commissioned during “good behavior”—meaning they could only be removed for cause—and the 1701 Act of Settlement guaranteed this form of judicial tenure.³⁰² After 1701, Parliament could not pressure judges by withholding salaries or by tempting them with raises,³⁰³ and judges retained office unless majorities in both Houses of Parliament found them guilty of misconduct.³⁰⁴ Since then, British judges have served as independent bastions of state power.³⁰⁵

²⁸⁹ LONGWORTH, *supra* note 31, at 126; THAYER, *supra* note 30, at 221–22; *see also* MCNEILL, *supra* note 167, at 225 (noting that *cittadini* civil servants were regularly the real decision-makers).

²⁹⁰ RICHARD H. BRITNELL, *THE COMMERCIALISATION OF ENGLISH SOCIETY 1000-1500*, at 216 (1996).

²⁹¹ *Id.* at 215–16 (1996); *see generally* Baker, *supra* note 255, at 133–49 (explaining the British legal profession).

²⁹² *See* LABALME & WHITE, *supra* note 51, at 115 (“The legal activity of so many of the political committees and councils ensured patricians a broad exposure to the legal system . . .”).

²⁹³ BOWEN, *supra* note 75, at 68.

²⁹⁴ LANE, *supra* note 28, at 96.

²⁹⁵ *Id.* at 96–97; 2 HAZLITT, *supra* note 29, at 455–57; BROWN, *supra* note 27, at 309–10.

²⁹⁶ LANE, *supra* note 28, at 405 (noting the prominence of balloting throughout the Venetian constitution); 2 HAZLITT, *supra* note 29, at 456 (describing balloting procedures within the Council of Ten); LABALME & WHITE, *supra* note 51, at 148–51 (noting cases where persons were pardoned by balloting procedures); HAITSMA MULIER, *supra* note 34, at 152–53 (referring to secret balloting in Venetian courts).

²⁹⁷ LANE, *supra* note 28, at 98 (“The other Italian communes felt it necessary to employ a foreigner in order to have a supreme judge and an executive in whom impartiality could at least be hoped for. The Venetians had more confidence in themselves and in each other.”); *see also* HAITSMA MULIER, *supra* note 34, at 156 (contrasting Genoa with Venice, and noting that in Genoa, “[a]ll the judges were foreigners which was not unusual for Italy where family feuds could make an undisturbed dispensation of justice impossible”).

²⁹⁸ Gilbert, *supra* note 49, at 494 (citing Florentine observer Donato Giannotti).

²⁹⁹ BABINGTON, *supra* note 250, at 123; *see also* CORNISH & CLARK, *supra* note 102, at 8 (citing a “much longer tradition of judicial independence” before 1701).

³⁰⁰ Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 *AM. L. & ECON. REV.* 1, 8 (2005); BAKER, *supra* note 255, at 143–46.

³⁰¹ BAKER, *supra* note 255, at 144 (“[K]ings often expected subservience from their judges in matters affecting the Crown.”).

³⁰² *Id.* at 145–46 & n.20; MAITLAND, *supra* note 254, at 312–13; MARCHAM, *supra* note 256, at 123, 238–39; LYON, *supra* note 98, at 263; *see also* BABINGTON, *supra* note 250, at 201 (“Following the revolution of 1688 the courts had come to be regarded as the guardians of the rule of law, the independent arbiters between the executive and the subject, and the protectors of civil liberties.”).

³⁰³ *See* Lemmings, *supra* note 250, at 1–26 (explaining that judicial appointments ended upon the monarch’s death, and a few judges were removed by new monarchs in 1702, 1714, and 1727); *see also* BAKER, *supra* note 255, at 145–46 (explaining that the official traditions now restrict judicial interference); LYON, *supra* note 98, at 263 (noting that after 1760, judicial tenure extended beyond the life of the monarch).

³⁰⁴ LYON, *supra* note 98, at 263; MARCHAM, *supra* note 256, at 123.

³⁰⁵ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 268 (15th ed., 1809) (calling the “distinct and separate existence of the judicial power” a “main preservative of the public liberty”); JOHN PHILLIP REID, *RULE OF LAW: THE*

At its core, the “rule of law” means that legal rules control the exercise of state power.³⁰⁶ The rule of law requires, and builds upon, the facets of a legal system identified above.

“The affairs of Venice are governed with laws,” proclaimed the Republic.³⁰⁷ No magistrate or committee could exceed legal boundaries with impunity, because other dignitaries—notably the *Avogadori* or State Attorneys—served as watchdogs.³⁰⁸ State Attorneys themselves could be sued for dereliction of duty,³⁰⁹ and everyone in Venice might find themselves under scrutiny by the Council of Ten.³¹⁰ Despite their secrecy, forbidding reputation, streamlined procedures, and broad powers, even the Council of Ten observed strict rules.³¹¹ State Attorneys attended their meetings,³¹² and no member of the Ten could sit in judgment upon a relative, or accept any gifts or presents.³¹³ From time to time, the Ten expelled one of their own, with no reason recorded.³¹⁴

Before 1600, the English crown essentially policed itself.³¹⁵ In the early seventeenth century, Chief Justice Edward Coke, of the Court of King’s Bench, began appropriating this function. Under the Common Law, Coke claimed jurisdiction to correct “errors and misdemeanors extrajudicial, tending to the breach of the peace, or oppression of the subjects . . . or any other manner of misgovernment.”³¹⁶ Distinctive principles of English law had formed; all governmental powers were subject to the regular law courts, and ordinary subjects could sue for a remedy if any official exceeded his authority.³¹⁷ By the eighteenth century, the rule-of-law principle was firmly established in Britain.³¹⁸ “Individuals of the most exalted rank, wrote Jean-Louis de Lolme in the 1770s, “do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law.”³¹⁹

Low corruption is a close corollary of the rule of law.³²⁰ On the whole, the Venetian Republic earned a reputation for rigor, scruples, and good government.³²¹ By and large, *cittadini* bureaucrats minimized

JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 6 (2004) (citing Blackstone); MAITLAND, *supra* note 254, at 312–13 (noting that judicial independence was “secured” by the early eighteenth century); KEIR, *supra* note 24, at 294 (“Made independent of the executive by the Act of Settlement, the judges were almost equally so of the legislature, which could obtain their dismissal only by a joint address from both Houses to the Crown.”); MARCHAM, *supra* note 256, at 238–39 (stating that after the Act of Settlement, “the independence of the judges was in fact complete”); *see also* LYON, *supra* note 98, at 263 (“From the early eighteenth century, the judiciary increasingly applied and developed the law without fear or favour.”).

³⁰⁶ Raz, *supra* note 4, at 5; TAMANAHA, *supra* note 285, at 114.

³⁰⁷ Cozzi, *supra* note 166, at 307.

³⁰⁸ LANE, *supra* note 28, at 95 (“Each committee or council was checked by some other committee or council so as to assure the rule of law”); *id.* at 100 (describing the duties of the *Avogadori di Comun*); *id.* at 256 (“[T]he Ten never acted entirely alone. Regularly it had seventeen voting members, including the doge and his Councillors. It met with one of the State’s Attorneys present, who, if he thought the Council was exceeding its authority or disobeying its statutes, could appeal the case to the Great Council.”); *see also* Cozzi, *supra* note 166, at 307 (describing how the State Attorneys served as the “civic conscience of the governing aristocracy” and ensured compliance with the law).

³⁰⁹ LANE, *supra* note 28, at 100.

³¹⁰ WILLS, *supra* note 36, at 113; *see also* LABALME & WHITE, *supra* note 51, at 119 (describing a 1511 case in which the State Attorneys argued for setting aside a criminal sentence before the Senate, upon which the Attorneys were dismissed by the Ten).

³¹¹ 2 HAZLITT, *supra* note 29, at 457 (noting that among the Ten the “sternest adherence to rules and principles prevailed”); *see also* WIEL, *supra* note 71, at 191–92 (explaining that minute regulations governed whether the Ten could hear an anonymous accusation); NORWICH, *supra* note 23, at 499 (“In practice, however, abuses [by the Ten] were largely avoided by built-in checks and balances.”); LANE, *supra* note 28, at 256 (stating that whenever the Ten discussed foreign affairs, the six *Savii Grandi* had to attend).

³¹² LANE, *supra* note 28, at 256.

³¹³ WIEL, *supra* note 71, at 189.

³¹⁴ 2 HAZLITT, *supra* note 29, at 443.

³¹⁵ *See* BAKER, *supra* note 255, at 123 (stating that until the seventeenth century, the function of “controlling authority” was regarded as a royal prerogative, generally exercised by the Privy Council).

³¹⁶ *Id.* at 123.

³¹⁷ *Id.* at 123–24.

³¹⁸ KEIR, *supra* note 24, at 294 (“From the King downwards, every executive official derived his authority from the law.”); DICEY, *supra* note 4, at 222 (“The judges . . . were invested with the means of hampering or supervising the whole administrative action of the government, and of at once putting a veto upon any proceeding not authorised by the letter of the law.”).

³¹⁹ DE LOLME, *supra* note 202, at 310.

³²⁰ Raz, *supra* note 4, at 12–13 (explaining that the rule of law helps to stop the worst forms of arbitrary power).

corruption by maintaining precise ledgers of revenue and spending.³²² Of course, the city could never live up to its billing as a paradise of virtue. Historians have found many incidents of bribery, vote-selling, and family influence—but this is only surprising if you credit extreme versions of the Venetian myth.³²³ And such instances must be kept in perspective. In the kingdoms and principalities across Europe, nepotism was an ordinary facet of political life. In Venice, it triggered scandal.³²⁴

Like Venetian officials before them, eighteenth-century British civil servants acquired a reputation for honesty. In large part, this was because competence, diligence, and merit began to outweigh personal and factional connections as the criteria for hiring and promotion.³²⁵ “Patronage” ties connected many eighteenth-century Englishmen to one another, but these were similar to what we call “connections.”³²⁶ Men landed government positions largely through personal recommendations; the higher the recommender’s rank, the more valuable his word.³²⁷ Still, the system accommodated talented but unconnected aspirants,³²⁸ and no contemporary state could boast a more efficient administration.³²⁹ Later reforms cemented the rule-bound character of the bureaucracy. During its imperial crescendo, Britannia ruled the waves—and much of the world besides—with a brisk, businesslike, and no-nonsense Victorian civil service.³³⁰

In Venice and Britain, the rule of law generated wealth.³³¹ Venice was a city of fabulous riches, especially in its Renaissance heyday.³³² Relying on strict enforcement of contracts, Venetian merchants readily formed short-term partnerships in kaleidoscopic combinations.³³³ An efficient civil service contributed as well; issuing penalties for every type of commercial trickery, thereby establishing the Venetian brand for quality.³³⁴ Detail-oriented bureaucracies like the Board of Health regulated chimneys

³²¹ See generally 2 HAZLITT, *supra* note 29, at 480–81, 519–20.

³²² MCNEILL, *supra* note 167, at 225 (stating that the *cittadini*’s “high professional morale” reinforced by “careful bookkeeping techniques” prevented any “widespread peculation”); see also WILLS, *supra* note 36, at 124 (noting the skill of clerks and their dexterity with bookkeeping).

³²³ Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 196 (stating that Venetian officials were generally not corrupt, but some used their positions to “line their pockets”); Everett & Queller, *supra* note 159, at 16 (explaining that men often sold their votes to “the highest bidder”); WILLS, *supra* note 36, at 144 (“Donald Queller [a historian who undermines the ideal picture of Venice] is shocked—shocked!—to find electioneering, family pressure, fraud, and bribes in the politics of Venice.”); LONGWORTH, *supra* note 31, at 175 (suggesting that Venice was in fact corrupt and did not deserve the praise it received).

³²⁴ See, e.g., 1 HAZLITT, *supra* note 26, at 593 (describing a 1340 controversy wherein the Doge leveraged his sons into lucrative positions); 2 HAZLITT, *supra* note 29, at 209, 461–69 (describing a struggle for reform in the 1620s which targeted palace nepotism).

³²⁵ HOLMES & SZECHI, *supra* note 79, at 325–26 (explaining that eventually the British bureaucracy was successful because skill, impartial service, and “insulation from political spoils” were accepted); see also HOLMES, *supra* note 259, at 257–65 (describing the principle of job security based upon competence within the eighteenth-century civil service).

³²⁶ EVANS, *supra* note 100, at 14.

³²⁷ *Id.*

³²⁸ *Id.* at 15.

³²⁹ HOLMES & SZECHI, *supra* note 79, at 326 (stating that the eighteenth-century British civil service “was the equal and probably the superior of efficiency of any in Europe”).

³³⁰ KEIR, *supra* note 24, at 373 (explaining that parliamentary reforms begun in 1782 diminished royal influence based upon patronage, and created a more “vigorous and businesslike spirit” in the civil service).

³³¹ See, e.g., *Order in the Jungle*, THE ECONOMIST, March 15, 2008, at 83–85 (noting, as does a burgeoning amount of literature today, the economic benefits of that come with a better rule of law); KIMBERLY ANN ELLIOTT, CORRUPTION AND THE GLOBAL ECONOMY (1997); MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 33 (2005) (demonstrating a strong association between poverty and corruption).

³³² NORWICH, *supra* note 23, at 277–82 (detailing the rise of wealth and splendor in Venice); see also LONGWORTH, *supra* note 31, at 172–73 (illustrating the luxuries of the Venetian marketplace).

³³³ NORWICH, *supra* note 23, at 155 (noting that “mutual trust” was a distinctive feature of the Venetian merchant class, which “easily formed short-term partnerships”).

³³⁴ See, e.g., 2 HAZLITT, *supra* note 29, at 506 (explaining the operations in the recovery of claims and in the prosecution of fraudulent insolvents).

and foul smells, and maintained a clean water supply.³³⁵ In England, a reliable legal environment prepared the way for industrial takeoff. Economic historians consider eighteenth-century England—unlike Scotland or France—“famine-proof.”³³⁶ By 1750, England was the richest nation in the world, per person.³³⁷ The average income was £12 per year, and rising rapidly. This was higher—in real purchasing power—than many African and Asian nations in the late twentieth century.³³⁸

Venetians and Britons took pride in their rule of law. In Venice, the prow of the Doge’s barge—called the *Bucintoro*—did not feature a Viking dragon, or the bronze battering ram of a Roman trireme. Instead, there sat a golden figure of Justice, holding a sword in her right hand, but gazing upon the scales in her left.³³⁹ For eighteenth-century Britons, legality was a point of national pride.³⁴⁰ The “free-born Englishman” cliché pervaded political talk.³⁴¹ Englishmen of all classes considered themselves free because they had rights—of liberty and property—that no one could infringe.³⁴²

V. THE ATTENUATION OF PERSONAL LOYALTIES

As a substantial body of scholarship demonstrates, personal loyalties and impersonal rules are generally incompatible. When legal rules mediate relationships between individuals, people have less need for, and cannot easily form, strong, diffuse, overriding relationships of personal allegiance and mutual assistance.³⁴³

Governmental corruption (which is inversely related to the rule of law)³⁴⁴ is closely associated with strong personal and factional ties.³⁴⁵ Within a highly corrupt state, members of particular “in-groups” (generally defined through kinship, clan, tribal, and patronage relationships)³⁴⁶ receive all kinds of special advantages through their network, but in return, they are expected to favor their “own people” whenever possible. If they are state officials or even judges, they are essentially *required* (by their own people) to practice corruption.³⁴⁷

³³⁵ 2 HAZLITT, *supra* note 29, at 743 (explaining how Venetian health and safety regulations were framed with “extraordinary attention to the minutest and most trifling details”).

³³⁶ HOLMES, *supra* note 259, at 257–61; *see also* PETER LASLETT, *THE WORLD WE HAVE LOST: ENGLAND BEFORE THE INDUSTRIAL AGE* 113 (1965) (“[S]tarvation was extremely rare in England as a stated cause of death.”).

³³⁷ HOLMES & SZECHI, *supra* note 79, at 133.

³³⁸ *Id.* at 133–143; EVANS, *supra* note 100, at 107–9.

³³⁹ LABALME & WHITE, *supra* note 51, at 115.

³⁴⁰ Lemmings, *supra* note 250, at 1–2; *see also* BABINGTON, *supra* note 250, at 201 (describing the successful judicial reforms).

³⁴¹ WINGFIELD-STRATFORD, *supra* note 250, at 92, 121 (1956); GILMOUR, *supra* note 24, at 21.

³⁴² *See* MARCHAM, *supra* note 256, at 281 (explaining that the courts avowed to protect the rights of liberty and property regardless of whether one was rich or poor); *see also* CORNISH & CLARK, *supra* note 102, at 11 (“[A]ny interference with person or property would in principle be a legal wrong.”).

³⁴³ *See generally* Richard Sandbrook, *Patrons, Clients and Factions: New Dimensions of Conflict Analysis in Africa*, 5 CANADIAN JOURNAL OF POLITICAL SCIENCE 104, 109 (1972) (“Where a society’s impersonal legal guarantees of physical security, status, and wealth are relatively weak or nonexistent, individuals seek personal substitutes by attaching themselves to ‘big men’ capable of providing protection and even advancement.”); ALLEN W. JOHNSON & TIMOTHY EARLE, *THE EVOLUTION OF HUMAN SOCIETIES* 255 (1987) (explaining that state-formation in the later medieval period involved “the replacement of ties of loyalty based on kinship and personal allegiance by legal, impersonal ties enforced by courts and police”); KEN JOWITT, *NEW WORLD DISORDER: THE LENINIST EXTINCTION* (1992) (contrasting the “corporate,” family-centered nature of traditional societies with the “individuated” quality of modernity); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (documenting how impersonal “civic” traditions have persisted for centuries in northern Italy, even while life in Sicily and Naples continues to revolve around kinship and patron-client ties).

³⁴⁴ Raz, *supra* note 4, at 12; CAROTHERS, *supra* note 4, at 4; DICEY, *supra* note 4, at 193.

³⁴⁵ USLANER, *supra* note 6, at 49–50; *see generally* LAMBSDORFF, *supra* note 6, at 20–36 (analyzing the cultural conditions associated with corruption).

³⁴⁶ LAMBSDORFF, *supra* note 6, at 23.

³⁴⁷ DANIEL JORDAN SMITH, *A CULTURE OF CORRUPTION: EVERYDAY DECEPTION AND POPULAR DISCONTENT IN NIGERIA* 65 (2007); *see generally* ROBERT M. PRICE, *SOCIETY AND BUREAUCRACY IN CONTEMPORARY GHANA* 56–82 (1975) (illustrating the principle that, in Ghana, family members frequently put pressure on public officials to provide corrupt benefits).

Effective rule-of-law institutions, on the other hand, attenuate personal-loyalty relationships, and generate an open-ended network society of relatively detached individuals. This process can be observed historically, alongside the rise of rule-of-law institutions in both Venice and Britain. Within these states, the rule of law evolved on different timelines, via distinct institutions, but with broadly parallel social effects. This discussion prepares the way for the argument in Part V: that the systematic attenuation of personal loyalties (produced by rule-of-law institutions) inhibits the formation of grand criminal conspiracies, including those aiming at a *coup d'état*, and thereby produces the long-term political stability observed in Venice, Britain, and the other “coup-free states.”

A. VENICE: “FREE AND WITHOUT FACTIONS”

Early Venice seethed with feuds and factional rancor. Our evidence for the sixth through tenth centuries consists of endless drama; doges were deposed and blinded, and successors associated their sons in office, attempting to establish a dynasty. Some factions leaned toward Byzantium, others favored the Franks or Lombards, while committed republicans preferred an independent stance.³⁴⁸

In the centuries after 1032, as republicanism gained a permanent ascendancy, Venetians enacted many laws to pacify kin-based rivalries.³⁴⁹ No family could have more than one member at a time on the Ducal Council, the Ten, Great Council nominating committees, or other boards, so government always required inter-clan cooperation.³⁵⁰

The doge’s family faced special restrictions. Like the doge, they were only supposed to accept gifts like rose-water, leaves, and flowers.³⁵¹ *Promissioni* required the doge, his wife, sons, grandsons, and nephews to sell any lands they held in Venice or nearby.³⁵² To stifle any dynastic hopes, the sons of a Doge could barely enter politics. They might become Senators, but wielded no vote.³⁵³ In fact, Venetians preferred doges without *any* wives or children.³⁵⁴ When bachelors assumed the ducal cap, they swore not to marry a foreign wife without their Council’s approval.³⁵⁵ A doge could not even meet with relatives unsupervised.³⁵⁶

Election rules calmed partisanship. Campaigning was banned; in fact, patricians were forbidden to indicate their ambitions for office in any manner.³⁵⁷ As one might expect, some found this rule difficult to follow.³⁵⁸ A 1497 statute condemned electioneering as inimical to “peaceful institutions”; a decade later, the

³⁴⁸ See generally NORWICH, *supra* note 23, at 1–106 (detailing the unsteady setting in early Venice).

³⁴⁹ LANE, *supra* note 28, at 109.

³⁵⁰ *Id.*; Everett & Queller, *supra* note 159, at 4–5.

³⁵¹ WIEL, *supra* note 71, at 156.

³⁵² *Id.* at 221 (illustrating that *promissioni* forced all the family members to sell their land at the time of the election); NORWICH, *supra* note 23, at 182 n.1 (“Fiefs – presumably in the new Venetian colonies – held by any member of his family were to be given up within a year of his accession.”); 1 HAZLITT, *supra* note 26, at 676–77 (stating that all family estates must be disposed of before one enters power).

³⁵³ BROWN, *supra* note 27, at 59–60; see also NORWICH, *supra* note 23, at 182 n.1 (explaining that one Doge’s *Promissione* barred his sons from all great offices except ambassadorships and ship’s captaincies).

³⁵⁴ FINLAY, *supra* note 28, at 161 (noting that familial bonds were always perceived as a threat to liberty, and Venetian patricians preferred a doge without sons).

³⁵⁵ NORWICH, *supra* note 23, at 182 n.1.

³⁵⁶ WILLS, *supra* note 36, at 98–99.

³⁵⁷ Everett & Queller, *supra* note 159, at 4 (“Any form of electioneering for office was prohibited. Patricians were even forbidden to indicate their desire for office in any way, shape, or form.”); see also FINK, *supra* note 40, at 32–33 (stating that penalties for canvassing or campaigning were severe); LANE, *supra* note 28, at 109 (“Rivalries were reduced also by outlawing campaigns for office. Theoretically, the office sought the man, and anyone elected to office was required to serve.”).

³⁵⁸ Everett & Queller, *supra* note 159, at 17.

Council of Ten regulated dinner parties to inhibit stealth campaigns.³⁵⁹ Laws even governed how people could congratulate victors.³⁶⁰

Nominations by lot introduced random shuffling, making it difficult for allies to engineer outcomes.³⁶¹ In the Byzantine process for electing a doge, for example, five rounds of arbitrary culling generated the final committee, which then drew names from an urn and voted.³⁶² For other offices, the Great Council chose nominators by lot, and voted on nominees during the same day, making canvassing difficult.³⁶³ During voting, nominees and their relatives had to leave the hall.³⁶⁴ Secret balloting made any form of “party discipline” impossible.³⁶⁵

“[T]he Venetians,” wrote an anonymous London pamphleteer in 1707, “have made severe laws against all manner of canvassing or making interest for Places. And besides, they have so contrived the way and manner of their Elections, that they have made it almost impossible for the Electors to form themselves into Parties for any Candidate whatsoever, because of the uncertainty to whose lot it will fall to be Candidates for the Place. The Votes are likewise collected with so much secrecy, that it is impossible for one man to know how another has voted.”³⁶⁶ Such measures, the author argued, could prevent the “intestine commotions” which had long plagued England.³⁶⁷

Venetians took pains to weaken links between patrician houses and their followers. A law enacted after Dandolo and Tiepolo gangs brawled in the streets prohibited commoners from wearing noble emblems or coats of arms, or painting them on their houses.³⁶⁸ Similarly, security and police officials were barred from having any private, economic, or familial relationships with their armed underlings.³⁶⁹

By all accounts, such measures worked. From the Renaissance to the Enlightenment, people saw Venice as uniquely free of factions, and thereby tranquil.³⁷⁰ Bartolus de Saxoferrato, for example, was a fourteenth-century law professor at Perugia, who thought Venetian patricians were “not easily divided among themselves.”³⁷¹ Venice avoided “internal plots” and “warring factions,” observed a Renaissance chronicler.³⁷² A noble diarist waxes effusively: his city seems “an earthly paradise, without any tumult of war or suspicion of enemies” because it is “free and without factions.”³⁷³

³⁵⁹ Stanley Chojnacki, *Identity and Ideology in Renaissance Venice*, in *VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE, 1297-1797* 263, 263–64 (John Martin & Dennis Romano eds., 2000).

³⁶⁰ Everett & Queller, *supra* note 159, at 4.

³⁶¹ *Id.* at 4 (describing how patrician legislators sought to “neutralize the forces of faction” by using random lot drawings in the election process).

³⁶² LANE, *supra* note 28, at 110–11 (stating that selections by lot were expressly designed to prevent electoral campaigns, which would inflame factions); *see also* NORWICH, *supra* note 23, at 166–67 (explaining how the *ballotino* had the duty of collecting the vote slips during the lot process); *see generally* T. OKEY, *VENICE AND ITS STORY* 88–90 (1903); WIEL, *supra* note 71, at 165–66; 1 BROWN, *supra* note 27, at 304–05 (illustrating the lottery process).

³⁶³ Everett & Queller, *supra* note 159, at 16–17 (“With nominators chosen by lot [although there was occasional cheating], last minute canvassing made political sense. There was little point in the office-seeker cultivating an enduring relationship with any particular group of men, for they might never be nominators for the office he sought.”).

³⁶⁴ LANE, *supra* note 28, at 109, 259–60.

³⁶⁵ *Id.* at 259–60; FINK, *supra* note 40, at 32–33 (suggesting that it was impossible to enforce any “party discipline” because “no one could tell how another had voted on any measure”).

³⁶⁶ FINK, *supra* note 40, at 181.

³⁶⁷ *Id.*

³⁶⁸ LANE, *supra* note 28, at 106–07; NORWICH, *supra* note 23, at 165–66.

³⁶⁹ Chojnacki, *Crime, Punishment, and the Trecento Venetian State*, *supra* note 161, at 196–97.

³⁷⁰ LANE, *supra* note 28, at 88 (“Another myth which, when fully formed, contributed to the solidarity of the state was a belief that Venice was free of factions, that all worked together for the glory of their city.”); Everett & Queller, *supra* note 159, at 1–2 (“According to the ‘myth’ of Venetian republicanism, the Serenissima’s treasured political stability and sobriety was assured by the absence of faction.”); FINK, *supra* note 40, at 181–82 (quoting eighteenth-century writers on the absence of factions in Venice).

³⁷¹ LANE, *supra* note 28, at 114.

³⁷² Tenenti, *supra* note 39, at 34 (quoting Lorenzo de’ Monaci).

³⁷³ *Id.* at 33 (quoting Girolamo Priuli).

Modern historians confirm and elaborate this picture. One study examined Great Council nominations during the 1380s.³⁷⁴ The investigators assumed they would find nobles consistently nominating kinfolk for office.³⁷⁵ In fact, a man's family provided no clue about his choice of nominee.³⁷⁶ Not only did patricians avoid family bias, they formed no discernible factions or alliances of any sort.³⁷⁷ The finding undermines any suppositions about family-based coalitions, the authors conclude, and also casts "considerable doubt on the conjecture that certain families acted as patrons to client families."³⁷⁸ The Tiepolo Rebellion in 1310, they suggest, was the "last gasp" of traditional family solidarity.³⁷⁹

Ironically, kinship bonds weakened because they proliferated. Nobles intermarried, especially after the "Great Closing" of 1297 defined their caste boundaries. Over time, kin ties within the small patrician world grew inordinately complex, creating a dense thicket of interrelatedness.³⁸⁰ If everyone is family, effectively no one is.

Family never became irrelevant, of course. A family's joint wealth shaped members' lives. Children frequently lived together into adulthood, worked out prospective marriages, and managed family businesses.³⁸¹ Noble clans retained their pride: an insult to *Ca' Morosini*—the "House of Morosini"—triggered a street fight in 1364.³⁸² A man might sail into elected office after his kin performed well in battle.³⁸³

Still, blood lost its power to congeal. Venetian politics—like its commerce—featured shifting, unpredictable, and kaleidoscopic coalitions. Allies on one issue found themselves opponents or competitors on others.³⁸⁴ The city presented a sharp contrast with the rest of northern Italy, where permanent "Guelph" and "Ghibelline" factions warred. (Guelphs favored the pope, and Ghibellines backed the Holy Roman Emperor.) These struggles barely registered in Venice.³⁸⁵ Historians cite a "unique spirit of cohesion and cooperation,"³⁸⁶ a "comparative solidarity,"³⁸⁷ a "mutual dependence,"³⁸⁸ and a "mutual trust of a kind that in other cities seldom extended far outside the family circle."³⁸⁹ People still held animosities and grudges, of course, but ironed out serious conflicts in the courts, Senate, and Great Council.³⁹⁰

A few authors approach the source of serenity. "Unable to rely on family, faction, or patrons for their political future," comment two specialists, "patricians were obliged to treat all their peers as potential allies, and ingratiate themselves to everyone."³⁹¹ In this way, "individual weakness" brought collective strength.³⁹² Frederic Lane taught at Johns Hopkins, presided at the American Historical Association, and spent decades studying the republic.³⁹³ "The devices for the restraint of faction woven into the machinery of government

³⁷⁴ Everett & Queller, *supra* note 159, at 5.

³⁷⁵ *Id.* at 7.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 12.

³⁷⁹ *Id.* at 16.

³⁸⁰ *Id.* at 18 (describing a "dense network of kinship" in which "the importance of any particular marriage tie in the quest for nomination to political office was substantially diminished" because "so many could claim the privileges due to kin").

³⁸¹ *Id.* at 3; BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY*, *supra* note 23, at 66–67.

³⁸² Stanley Chojnacki, *In Search of the Venetian Patriciate: Families and Factions in the Fourteenth Century*, in *RENAISSANCE VENICE* 62 (J.R. Hale ed., 1973).

³⁸³ LANE, *supra* note 28, at 265.

³⁸⁴ Chojnacki, *In Search of the Venetian Patriciate*, *supra* note 382, at 70 (noting that social alignments cut through the great families, which "prevented Venice from going the factional way of other Italian cities").

³⁸⁵ Rösch, *supra* note 173, at 82 ("Party conflict . . . did not lead to programmatic opposition in Venice").

³⁸⁶ NORWICH, *supra* note 23, at 155; *see also* LANE, *supra* note 28, at 117 (citing a "general feeling of solidarity and loyalty among the Venetian nobility").

³⁸⁷ LONGWORTH, *supra* note 31, at 150.

³⁸⁸ Everett & Queller, *supra* note 159, at 20.

³⁸⁹ NORWICH, *supra* note 23, at 155.

³⁹⁰ LANE, *supra* note 28, at 265.

³⁹¹ Everett & Queller, *supra* note 159, at 20.

³⁹² *Id.*

³⁹³ Moses Abramovitz & Richard Goldthwaite, *Association Notes: In Memoriam: Frederic C. Lane 1900-1984*, 46, Vol. 1 *THE JOURNAL OF ECONOMIC HISTORY* 239–41 (1986).

were sufficiently successful” after 1355, Lane argues, that “none of the men disappointed in the intense competition for honors tried to overthrow the system.”³⁹⁴

B. BRITAIN: FROM FEUDAL LORDS TO “TEMPORARY PATRONS”

Anglo-Saxon England was a world of blood feuds and kinship solidarity, where vengeance was a sacred duty.³⁹⁵ “The family bond is strong,” wrote Frederic Maitland, a renowned legal historian. “[A]n act of violence will too often lead to a blood feud, a private war.”³⁹⁶ As an alternative to feuding, kin groups could accept a *wergeld* payment.³⁹⁷ Even in the seventh century, however, royal laws encroached on the power of families to protect their members.³⁹⁸

Lordship coexisted with kinship. Lords—like gang leaders or Mafia bosses—extended their protection to kin and other neighborhood clients.³⁹⁹ Lords were responsible to political superiors, such as the King, for the conduct of their dependents.⁴⁰⁰ In practice, kinship and lordship bonds swirled together. When a lord avenged his kinsman, was he acting as “lord” or “kin?” Lordship ties frequently brought two families into an alliance.⁴⁰¹ If a man’s daughter married his lord’s nephew, feudal and bloodlines grew thoroughly intermingled. Like Scottish clan chieftains, many lords governed and protected their own kinsmen.⁴⁰²

Nonetheless, the rising profile of lordship and vassalage undercut kinship solidarity.⁴⁰³ The Norman Conquest of 1066, as many have argued, bolstered the power of feudal lords.⁴⁰⁴ Primogeniture, or passing all property to the first male offspring, came into widespread use after the Conquest.⁴⁰⁵ Some have argued that primogeniture was a natural corollary of feudal relationships. To fulfill feudal obligations—to supply lords with military manpower—vassals bestowed feoffs to a single heir.⁴⁰⁶ Primogeniture tends to weaken kinship, because brothers assume wholly different stations.⁴⁰⁷ Still, feudalism sustained tight personal allegiances.

³⁹⁴ LANE, *supra* note 28, at 271.

³⁹⁵ Robert Brentano, *Introduction*, in THE EARLY MIDDLE AGES, 500-1000 3, 14 (Robert Brentano ed., 1964); *see also* 1 POLLOCK & MAITLAND, *supra* note 251, at 31 (“[A] man’s kindred are his avengers, and, as it is their right and honour to avenge him, so it is their duty to make amends for his misdeeds, or else maintain his cause in fight.”).

³⁹⁶ *Id.*

³⁹⁷ Brentano, *supra* note 395, at 14; *see also* MAITLAND, *supra* note 254, at 4 (explaining that law makers wanted people to accept payments instead of seeking revenge).

³⁹⁸ SIR FRANK STENTON, ANGLO SAXON ENGLAND 315–17 (3d ed. 1971).

³⁹⁹ ROBERT LACEY & DANNY DANZIGER, THE YEAR 1000: WHAT LIFE WAS LIKE AT THE TURN OF THE FIRST MILLENNIUM 48, 150 (1999) (“Power politics in the year 1000 can best be understood by observing how gangs and Mafias operate. Though frightening to outsiders, the structure of the gang offers cohesion, protection, and a sense of belonging to the ‘family.’”); *see also* Brentano, *supra* note 395, at 15–16 (describing the strength of the bond between man and leader).

⁴⁰⁰ STENTON, *supra* note 398, at 493.

⁴⁰¹ 1 BLOCH, *supra* note 263, at 190.

⁴⁰² STENTON, *supra* note 398, at 493.

⁴⁰³ JACK GOODY, THE EUROPEAN FAMILY: AN HISTORICO-ANTHROPOLOGICAL ESSAY 48 (2000) (explaining how kinship loses importance to lordship in Anglo-Saxon England); MARTIN DALY & MARGO WILSON, HOMICIDE 31 (1988) (“Vassalage at least partially replaces kinship as a basis of loyalty and power in feudal society.”); *see also* JACK GOODY, THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE 22 (1983) (describing the dissolution of extended family and clan structures during the High Middle Ages in Spain); *see generally* JOHNSON & EARLE, *supra* note 343, at 249–56 (“Kinship was sometimes still important in group formation, but truly tribal peoples disappeared as the warlords’ power grew.”).

⁴⁰⁴ 1 BLOCH, *supra* note 263, at 272; C. Warren Hollister, 1066: *The ‘Feudal Revolution,’* in THE IMPACT OF THE NORMAN CONQUEST 109, 109–19 (C. Warren Hollister ed., 1969).

⁴⁰⁵ TREVELYAN, *supra* note 77, at 130.

⁴⁰⁶ TREVELYAN, *supra* note 77, at 130 (“After the Norman Conquest the rule of primogeniture had gradually been adopted for land, to secure that a feoff should not be broken up among the sons of a vassal and so become unable to supply the military service due to the lord.”); *see also* 2 MAX WEBER, ECONOMY AND SOCIETY 1137 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al., trans., 1978) (“[T]he division of hereditary fiefs must be limited in the interest of their service capacities.”).

⁴⁰⁷ *See generally* Judith J. Hurwich, *Lineage and Kin in the Sixteenth Century Aristocracy: Some Comparative Evidence on England and Germany*, in THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE 33,

Vassals were expected to aid their lord in every way, and lords oversaw vassals' interests, such as by providing for their widows and orphaned children.⁴⁰⁸ A ceremony—homage and fealty—sealed the bond.⁴⁰⁹

The later middle ages witnessed an attenuation of feudal relationships. With an increasingly commercial economy,⁴¹⁰ and a burgeoning royal government,⁴¹¹ the lord-vassal tie grew less total.⁴¹²

Late medieval lordship, indeed, has not much in common with feudal *dominium*. When a man asked another to be his 'good lord', he was not commending himself and his land; nor did he become anything remotely like a vassal. Rather he was acquiring a temporary patron.⁴¹³

Nevertheless, late-medieval lordship continued to derail the law. "Livery and maintenance" were great evils to public order.⁴¹⁴ "Livery" was a practice whereby men wore their lord's colors, uniforms, or emblems.⁴¹⁵ It implied the lord's protection against enemies, and probably emboldened wearers to break the law.⁴¹⁶ "Maintenance" was the support a lord gave his man in legal cases, often by corrupt methods like bribery and intimidation.⁴¹⁷ Livery and maintenance were not new: both practices can be traced back centuries.⁴¹⁸ But they aroused public fury in late-medieval England, probably because people had acquired higher expectations for law, order, and justice.⁴¹⁹ Justice also suffered when lords "retained"—or paid—royal judges. Over a long period, Crown and Parliament slowly restricted such relationships. A 1346 statute banned anyone but the King from retaining judges.⁴²⁰ Political pressures in the late 1300s actually curtailed that practice.⁴²¹ After 1595, lords could no longer retain local Justices of the Peace.⁴²²

The Crown reined in livery and maintenance. Statutes passed from 1399 to 1401, for example, restricted livery to members of a lord's household.⁴²³ The Tudors, especially through councils like Star

43–59 (A.L. Beier, David Cannadine, & James M. Rosenbaum eds., 1989) (describing how medieval English society was individualistic in nature because of the patrilineal system of inheritance).

⁴⁰⁸ Frank Barlow, *The Effects of the Norman Conquest*, in *THE IMPACT OF THE NORMAN CONQUEST* 28, 34 (C. Warren Hollister ed., 1969).

⁴⁰⁹ 1 POLLOCK & MAITLAND, *supra* note 251, at 297–98.

⁴¹⁰ BRITNELL, *supra* note 290, at 128–29.

⁴¹¹ See J.M.W. BEAN, *FROM LORD TO PATRON: LORDSHIP IN LATE MEDIEVAL ENGLAND* 235–37 (1989) (describing how the role of the Crown became more prominent from the middle of the sixteenth century forward); see also 1 POLLOCK & MAITLAND, *supra* note 251, at 344 (noting that crown servants were "inclined to loosen the feudal bond").

⁴¹² BEAN, *supra* note 411, at 235–37 (illustrating that as patronage to the Crown grew, the lord-vassal bond was weakened); see also 1 POLLOCK & MAITLAND, *supra* note 251, at 297 (explaining that homage in the thirteenth century was "but a pale reflection of moral sentiments which are still strong but have been stronger").

⁴¹³ K.B. MCFARLANE, *Parliament and 'Bastard Feudalism'*, in *ENGLAND IN THE FIFTEENTH CENTURY: COLLECTED ESSAYS* 1, 17–18 (1981).

⁴¹⁴ G.L. HARRISS, *Introduction* to K.B. MCFARLANE, *ENGLAND IN THE FIFTEENTH CENTURY: COLLECTED ESSAYS* ix, x (1981); see also K.B. MCFARLANE, *Bastard Feudalism*, in K.B. MCFARLANE, *ENGLAND IN THE FIFTEENTH CENTURY: COLLECTED ESSAYS* 23, 42–43 (1981) ("Livery and maintenance . . . were gradually reduced to more manageable proportions by . . . the central authority.").

⁴¹⁵ HICKS, *supra* note 265, at 63.

⁴¹⁶ *Id.*

⁴¹⁷ TREVELYAN, *supra* note 77, at 195–96; HICKS, *supra* note 265, at 119.

⁴¹⁸ HICKS, *supra* note 265, at 121; HARRISS, *supra* note 414, at x.

⁴¹⁹ See HARRISS, *supra* note 414, at xxii (describing "local demand for more effective peace keeping" as well as complaints in parliament of "disorder and corruption"); see also MCFARLANE, *supra* note 413, at 42 ("The novelty [of 'bastard feudal' disorder] lay in its being more talked about, denounced and legislated against. It was in fact being measured by men with a higher conception of public order."); see also HICKS, *supra* note 265, at 123 (describing increasing complaints of disorder in the mid-thirteenth century); see also J.R. Maddicott, *Law and Lordship: Royal Justices as Retainers in Thirteenth- and Fourteenth-Century England*, in 4 *PAST & PRESENT SUPPLEMENT* 1, 3 (1978) ("The ability of the rich and powerful to turn the law and its ministers to their own advantage was doubtless as old as the legal system itself. . . . The novelty in the late twelfth century thus lay not in the existence of abuses but in the criticism of them which was bred by rising expectations and in the opportunities now available for voicing that criticism.").

⁴²⁰ Maddicott, *supra* note 419, at 46–48.

⁴²¹ *Id.* at 80–81.

⁴²² HICKS, *supra* note 265, at 206.

⁴²³ HARRISS, *supra* note 414, at xxii–xxiii.

Chamber, took stern measures against maintenance and judicial corruption.⁴²⁴ In the sixteenth century, feuds and private wars dwindled.⁴²⁵

Sharp factional divisions remained at the political heights, however. Parliamentarians and royalists warred from 1642 to 1649;⁴²⁶ courtier factions reappeared under Charles II; the “Exclusion Crisis” of 1679-81 drove the political class into “Whig” and “Tory” parties;⁴²⁷ Whigs and Tories inhabited separate social enclaves, eyeing each other with suspicion, during the “Rage of Party” under Queen Anne (1702-14).⁴²⁸

After the Jacobite rising of 1715, treason-stained Tories went into steep decline.⁴²⁹ Whigs governed for decades, and splintered into various leadership groups.⁴³⁰ The name “Tory” reappeared in the 1780s,⁴³¹ but by this time, the nature of partisanship had transformed. Opponents were no longer enemies, engaging in dangerous intrigues and threatening collective retribution. Now, parties formed loosely-knit coalitions around broad ideological positions.⁴³² In the 1770s, Jean-Louis de Lolme perceived that “family feuds,” “party animosities,” and the “victories and consequent outrages of factions” were “in very great measure unknown in England.”⁴³³

The attenuation of personal loyalties is evident spatially, as well as chronologically. Strong ties flourished in places royal justice found difficult to reach. Feuds, vendettas, and clan solidarity persisted in the hilly and mountainous fringes of late-medieval and early modern England.⁴³⁴ Northern England was long seen as a wild, clannish, and feudal backwater.⁴³⁵ Private feuding also disturbed Cornwall, in the hilly

⁴²⁴ Thomas G. Barnes, *The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law*, CRIMINAL LAW REVIEW 316, 324–25 (1977); see BOWEN, *supra* note 75, at 107–08 (noting that great nobles in the sixteenth century might bribe or intimidate local JPs, but exhibited a “healthy awe” of Star Chamber); see also HICKS, *supra* note 265, at 216 (“No less than a quarter of the cases in Star Chamber under James I involved conspiracy, maintenance, embracery and suborning.”); see generally Dawson, *supra* note 263, at 172–73 (explaining the composition and the main roles of the Star Chamber).

⁴²⁵ CHRISTOPHER HILL, REFORMATION TO INDUSTRIAL REVOLUTION: THE MAKING OF MODERN ENGLISH SOCIETY, 1530-1780 19–20 (1968) (describing a reduction in private wars under the reign of the Tudors); see also PERRY ANDERSON, LINEAGES OF THE ABSOLUTIST STATE 118–19 (1979) (explaining the successful application of royal power to prevent warfare under the Tudor reign); see also TREVELYAN, *supra* note 77, at 227 (“The patient craft of Henry VII and the imperious vigor of Henry VIII had laid the foundations of modern England. Order had been restored, the nobles and their retainers had been suppressed, royal government through Council and Parliament had become a reality in every corner of England and even of Wales . . .”); see generally LAWRENCE STONE, THE CRISIS OF THE ARISTOCRACY 1558-1641 12 (stating that the period 1580-1620 represents the time when “the State fully established its authority,” and when “dozens of armed retainers were replaced by a coach, two footmen, and a page-boy”).

⁴²⁶ HOLMES, *supra* note 259, at 17, 36–37.

⁴²⁷ *Id.* at 124–31.

⁴²⁸ *Id.* at 334.

⁴²⁹ See HOLMES & SZECHI, *supra* note 79 (noting that much of the Whig success was due to the demise of the Tory party).

⁴³⁰ See *id.* (describing one of the branches of the Whig party as “the most ideologically motivated Whig group”); see also EVANS, *supra* note 100, at 19 (detailing that the fight for power was between feuding Whigs who did not even face Tory opposition until the 1760s).

⁴³¹ See EVANS, *supra* note 100, at 19 (explaining that the role of the Tory opposition became more clear in the late 1770s).

⁴³² See *id.* at 19 (“Allegiance to ‘Whig’ and ‘Tory’ which had been surprisingly, even frighteningly, tenacious between 1689 and 1714 on a range of political, religious, diplomatic, financial and constitutional issues slackened thereafter.”). See HOLMES & SZECHI, *supra* note 79, at 272 (“Whichever politician [in the 1750s] could convince the infantrymen of the Old Corps [Whig establishment] that he best represented their interests and ideals would win their support.”).

⁴³³ DE LOLME, *supra* note 202, at 514–15.

⁴³⁴ R. L. STOREY, THE END OF THE HOUSE OF LANCASTER 8 (London: Barrie & Rockliff, 1966) (“The feuds of the nobility in the more outlying parts of the kingdom attained the proportions of private wars.”).

⁴³⁵ JOHN A.F. THOMSON, THE TRANSFORMATION OF MEDIEVAL ENGLAND, 1370-1529, at 81 (1983) (noting “the more clannish nature of society” in Northern England and how southern English folk believed the North to be a “strange and wild world”); see also HICKS, *supra* note 265, at 82–83 (describing the feudal system in Northern England); see also Storey, *supra* note 434, at 106 (“The problem of keeping order in the north [of England] . . . remained until the end of the sixteenth century.”); but see ALAN MACFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM 71 (1978) (calling Northern England a “supposedly more remote and backward upland area”).

southwest.⁴³⁶ Mountainous Wales was infamous for “chronic lawlessness.”⁴³⁷ The Scottish Highlands remained clannish and disorderly into the mid-eighteenth century.⁴³⁸ And of course, the last coup attempt in British history came in 1745-46, when Highland chiefs brought their clansmen to fight under the banner of Stuart rebellion.⁴³⁹

VI. ATTENUATED LOYALTIES AND THE INHIBITION OF COUP CONSPIRACIES

This Article proposes the following theory to explain long-term political stability in the “coup-free states.” By systematically weakening personal-loyalty relationships throughout the political-military establishment, the rule of law makes it inordinately difficult to assemble a grand criminal conspiracy aimed at the seizure of state power. When personal loyalties are strong, especially when those ties involve corrupt relationships, it is relatively safe for members of the same “in-group” to propose, discuss, and plan a new criminal enterprise.⁴⁴⁰ The suggestion may be considered and refused, or even dismissed out of hand, but the person offering the idea is unlikely to be turned in to the authorities. There are two main reasons for this: first, members of the same faction trust each other more than they trust “outsiders” who hold other state offices;⁴⁴¹ and second, participants within a “corruption clique” could always retaliate by disclosing the criminal activities of their comrades.⁴⁴² Moreover, even a large-scale conspiracy can be achieved, with perhaps only a few risky communications between different factions or cliques.

But in the absence of tightly-knit solidarity groups, crossing the threshold into a criminal solicitation or conspiracy (especially involving a serious felony such as treason) becomes fraught with peril. Under the rule of law, with systematically attenuated personal loyalties, people *recognize* the difficulties of assembling a conspiracy large enough to mount a *coup d'état*. At an implicit level, at least, people understand that if a member of the political-military establishment were approached about joining a coup conspiracy, he would, by balancing risks and rewards, almost certainly choose to disclose the plot to the authorities, rather than wholeheartedly join the conspirators.⁴⁴³ After all, if someone is eventually going to betray the plot, it might as well be oneself; otherwise, one runs a severe risk of being associated with treason. This is why even the first steps towards a coup conspiracy—overtures or proposals from one person to another, about using force to seize political power—appear to be exceedingly rare in rule-of-law states.

This section proceeds in the following six steps. First, it examines the *coup d'état* as a practical operation, requiring at least dozens, and more likely hundreds, of individual participants. Second, it shows

⁴³⁶ CHARLES ROSS, EDWARD IV 407 (1974).

⁴³⁷ Ralph A. Griffiths, *Local Rivalries and National Politics: The Percies, the Nevilles, and the Duke of Exeter, 1452-55*, 43 SPECULUM 589, 589 (1968); see also 1 POLLOCK & MAITLAND, *supra* note 251, at 224 (describing how *wergild* persisted in thirteenth-century Wales); see generally ROSS, *supra* note 436, at 407-08 (exemplifying some of the defiant Welsh clans).

⁴³⁸ TREVELYAN, *supra* note 77, at 391 (citing the “warlike organization of the tribes and the extra-legal allegiance to the chiefs” in Scotland); ANDERSON, *supra* note 425, at 136-37 (noting the continuing strength of lordship, and the persistence of feuding, in Scotland though the sixteenth century); HOLMES, *supra* note 259, at 21 (noting the “feudal” characteristics of eighteenth-century Scotland); see also HOLMES & SZECHI, *supra* note 79, at 218 (“Only after 1780 did economic criteria (i.e. how much rent they would pay) begin to play a major role in the relationship between most [Scottish] landlords and their tenants. Until then putative kinship, prolonged residence and the memory of ancient services rendered was at least as important.”).

⁴³⁹ See *supra* notes 80-84 and accompanying text.

⁴⁴⁰ See USLANER, *supra* note 6, at 49 (“Corruption, of course, depends upon trust – or ‘honor among thieves.’”).

⁴⁴¹ *Id.* at 49-50 (“Entrance into a corruption network is not easy. Members of a conspiracy of graft cannot simply assume that others are trustworthy [C]orruption thrives on particularized trust, where people only have faith in their own kind (or their own small circle of malefactors) Clientelism reinforces strong in-group ties and hostility toward out-groups, paving the way for corruption.”).

⁴⁴² See Lambsdorff, *supra* note 6, at 21 (explaining that partners in corruption are at the mercy of each other and constantly must fear being outed by their colleagues).

⁴⁴³ See Luttwak, *supra* note 15, at 75 (describing the motivation for reporting a coup plot to the authorities: “[t]he natural thing [for a soldier] to do, therefore, is to report [the plot]”).

how personal-loyalty relationships are central to the organization of coups, as well as to the general phenomenon of corruption. Third, it presents two hypothetical scenarios, designed to pinpoint the obstacles to coup conspiracies under rule-of-law conditions. Fourth, it offers anecdotal evidence suggesting that within rule-of-law states, it is exceedingly difficult (and rare) for high-ranking officials to even suggest a *coup d'état*. Fifth, it explains how rule-of-law institutions inhibit popular revolutions as well as elite-led coups. Sixth, it applies a statistical test: if rule-of-law institutions inhibit *coups d'état*, and if the rule of law necessarily entails minimal corruption, we would expect to find that stable or “coup-free” states exhibit particularly low levels of corruption. In fact, as we will find, the correlation between stability and low corruption is robust. Coups and corruption go together, because both emanate from the same basic source: relationships of personal loyalty that undermine, subvert, and defeat impersonal rules.

A. PLANNING AND EXECUTING A COUP D'ÉTAT

What allows a relatively small, subordinate minority to overthrow established leaders? Edward Luttwak is an entertainingly blunt, Romanian-born defense intellectual. In his classic study—*Coup d'État: A Practical Handbook*—Luttwak details the basic strategy.⁴⁴⁴ Coup organizers seize critical government⁴⁴⁵ and communications⁴⁴⁶ facilities, and instantly publicize their victory in order to dissuade challenges.⁴⁴⁷ In other words, they race to make their new order a *fait accompli*.

In Luttwak's presentation, coups are complex games, based ultimately upon bluff, psychology, and momentum. Luttwak considers, for example, how a *coup d'état* appears from the perspective of an ordinary soldier, loyal to the existing leadership. As the coup gets under way, this soldier may notice some odd or unusual events, but continues performing his job.⁴⁴⁸ He might even fire his weapon at “rebel” units. At some point, though, enough evidence may accumulate to convince him that *someone else is now in charge*. Perhaps the presidential palace is in flames, and a new government is announcing itself over the radio. At that point, loyalists like him can feel isolated. Numerically, they may constitute a majority, but have no way of knowing that fact, communicating with each other, or combining efforts. Rather than fight the new regime by themselves, scattered loyalists may accept what appears inevitable, and declare their support.⁴⁴⁹ As they do, the coup gains momentum. Every successful *coup d'état* passes a “tipping point,” after which it becomes nearly irresistible.

Coordination is critical. Each coup participant must take drastic and highly criminal steps—like leading an armed assault against major government facilities—and hope that coconspirators execute their missions. Only a unitary, sudden, and overwhelming onslaught will convince the security forces and mass public to fold. While it is difficult to pinpoint the exact number of people required to stage a coup, the number appears to be in the hundreds.⁴⁵⁰ Just as a *blitz* intimidates regimes and their loyalists, it also misleads observers. Academics and journalists routinely discuss coups as essentially bureaucratic maneuvers, whereby “the military” decides to “intervene in politics.”⁴⁵¹ This apparently sophisticated locution vastly overstates the degree of coordination and consensus. Tellingly, this single-actor narrative is rarely used when coups fail,

⁴⁴⁴ LUTTWAK, *supra* note 15, *passim*.

⁴⁴⁵ *Id.* at 128 (noting that the “need to provide the bureaucracy and the masses with visual evidence of the reality and power of the *coup*” can make it critical to seize symbolically important public buildings).

⁴⁴⁶ *See id.* at 118 (describing how “control over the flow of information emanating from the political centre” is the most important way for coup organizers to establish their authority).

⁴⁴⁷ *Id.* at 168 (noting that one of the main reasons for controlling the media is to “discourage resistance”).

⁴⁴⁸ *Id.* at 150 (“When army officers find themselves doing unusual things, their natural reaction is to try and fit them into familiar patterns; the most familiar pattern of all will be to arrive at the conclusion that the ‘politicians are guilty of yet another ‘mess’.”).

⁴⁴⁹ *See id.* at 168 (explaining that a major obstacle to active resistance is created when individual opponents are isolated, “cut off from friends and associates,” and prevented from hearing news about other resistance); *id.* at 122–23 (noting that road blocks can delay the arrival of loyalist military forces until coup organizers have “received the allegiance of the bulk of the state bureaucracy and military forces,” which turns the *loyalist* forces into an “isolated band of rebels”).

⁴⁵⁰ *See* DAVID HEBDICH & KEN CONNOR, *HOW TO STAGE A MILITARY COUP: FROM PLANNING TO EXECUTION* (2008).

⁴⁵¹ NORDLINGER, *supra* note 236, *passim*.

because in those cases, it is usually obvious that some armed forces *resisted* the coup. Roughly half of all coups go down in flames.⁴⁵² Even when conspirators prevail, this model is hopelessly inaccurate. Every coup is a miniature, chaotic, and unpredictable civil war.

B. COUPS, CORRUPTION, AND TRUST

Trust and strong personal relationships are essential to organizing a *coup d'état*. Luttwak acknowledges that “friendship” and a “shared political outlook” can foster conspiracies, but finds recruitment usually based upon “family, clan and ethnic links.”⁴⁵³ Bruce Farcau worked as a U.S. Foreign Service Officer, and experienced two coups while stationed in Bolivia. “It is my opinion,” he writes, “that personal ambition of individual officers and the subsequent struggle of the factions which form around the most charismatic ones have far greater relevance than most social theorists have recognized.”⁴⁵⁴ Samuel Decalo describes the typical African army as “a coterie of distinct armed camps,” where soldiers owe personal allegiance to commanders, and coup plotters are motivated by “ambition, fear, greed, and vanity.”⁴⁵⁵ Africans themselves do not interpret coups as coordinated military actions, he comments, but rather the spectacular emergence of certain factions to power and privilege.⁴⁵⁶ Coup leaders frequently offer high-minded justifications—like corruption or poor economic performance—but Decalo is skeptical.⁴⁵⁷ Often, new regimes prove just as corrupt as their predecessors. In fact, Decalo detects a close connection between corruption and *coups d'état*. No leader, he points out, can afford to antagonize officers “intent at social plunder” who are “backed by personal loyalty pyramids.”⁴⁵⁸

Personal loyalties are central to coup conspiracies, but also to the phenomenon of corruption more generally. As a bureaucrat in Ghana reported, if a man refused to “fix” things for family members, he “would be regarded as a bad man and members of the family might refuse to have anything to do with him again.”⁴⁵⁹ “Even if I wanted to avoid the practice of awarding contracts on the basis of favoritism,” a Nigerian official has commented, “I could not. My people would say that I am selfish and foolish.”⁴⁶⁰ The causal arrow goes both ways: personal relationships foster corruption, while corruption builds personal trust. For example, when customs officials accept bribes from drug smugglers (an obvious temptation and a common problem), they are committing serious crimes. In Mexico and Colombia, for example, warlords buy police officials and judges, effectively recruiting them into their private armies.⁴⁶¹ In order to avoid criminal prosecution in turn, corrupt officials may need to share the proceeds with coworkers, supervisors, or law enforcement agents.⁴⁶² Offering a bribe—especially to an unfamiliar party—is risky. The other party can

⁴⁵² See STEVEN DAVID, *DEFENDING THIRD WORLD REGIMES FROM COUPS D'ÉTAT* 4 (1985) (“While exact figures are difficult to establish, it is generally agreed that since World War II there have been more than one hundred successful coups and about as many unsuccessful attempts.”).

⁴⁵³ LUTTWAK, *supra* note 15, at 75.

⁴⁵⁴ FARCAU, *supra* note 15, at 38.

⁴⁵⁵ SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS* 6 (2nd ed. 1990).

⁴⁵⁶ *Id.* at 6–7.

⁴⁵⁷ *Id.* at 7–8.

⁴⁵⁸ *Id.* at 288.

⁴⁵⁹ PRICE, *supra* note 347, at 56–82.

⁴⁶⁰ SMITH, *supra* note 347, at 65.

⁴⁶¹ E.g., GUY GUGLIOTTA & JEFF LEEN, *KINGS OF COCAINE: INSIDE THE MEDELLÍN CARTEL* 243–53 (1989) (recounting the Medellín cartel’s power to bribe policemen, judges, politicians, and others, and thereby warp the functioning of legal institutions); ENRIQUE DESMOND ARIAS, *DRUGS & DEMOCRACY IN RIO DE JANEIRO: TRAFFICKING, SOCIAL NETWORKS, & PUBLIC SECURITY* 1–2 (2006) (describing similar patterns in Colombia, Jamaica, Peru, Mexico, and Brazil).

⁴⁶² PAUL CHEVIGNY, *THE EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 233–36 (1995); Stanley Pimentel, *The Nexus of Organized Crime and Politics in Mexico*, in *ORGANIZED CRIME AND DEMOCRATIC GOVERNABILITY: MEXICO AND THE U.S.-MEXICAN BORDERLANDS* 33, 41–42 (John Bailey & Roy Godson eds., 2000). See also ARIAS, *supra* note 461, at 44, 185 (“Police who make money from criminals and can deliver better pay-offs to corrupt superiors may be more likely to obtain promotions to powerful positions in the security hierarchy. Frequently, [Mexican] police take payment from traffickers in order to fulfill their bribe ‘quota’ to higher-ranking officers.”).

report the incident or demand more. Once a regular pattern of sharing illicit dividends arises, though, the danger ebbs, because each partner has exposed himself to criminal sanctions. At this point, the “insiders” share a common danger and purpose, and try to keep “outsiders” at bay.⁴⁶³

C. COST-BENEFIT CALCULATIONS: TWO HYPOTHETICAL SCENARIOS

Coups are difficult and perilous in any setting. In rule-of-law societies with systematically weakened personal-loyalty relationships, individual cost-benefit considerations make it practically impossible to organize a *coup d'état*.

We might consider a hypothetical scenario: one senior U.S. Army officer (“General #1”) approaches another (“General #2”) about using military force to depose the President. How would General #2 respond? Even if he finds the President politically objectionable, his personal interests militate against entering a conspiracy.

On the one hand, the dangers are self-evident. This could be a setup, just to test his loyalty. Even if the solicitation is genuine, the obstacles to success would seem enormous, verging on insurmountable. After all, this is not Haiti, Thailand, or Equatorial Guinea, but the United States of America, where no one has ever attempted a coup! Who knows if it could actually work? Even in unstable states, coups fail about as often as they succeed. To have any chance, Generals #1 and #2 would have to enlist many other officers, including field-level commanders, any of whom could betray the plot.

Supposing the plan worked, then what? Presumably, General #2 would play some prominent role in the new regime. But how long would it last? Outrage within the public, political establishment, and non-participating military forces might spark a swift counterrevolution. Or, the new *junta* might govern for a period, only to lose their grip later. Through any number of routes, General #1 and General #2 could find themselves court-martialed and punished as traitors. Conceivably, of course, Generals #1 and #2 could govern brilliantly and usher in a golden age, and posterity might add their heads to Mount Rushmore. But for this to happen, a lot has to go perfectly, and almost nothing can go wrong. Taking all the risks into account, the case for entering a conspiracy appears dubious at best.

On the other hand, consider the alternative: General #2 could simply report General #1. By foiling the plot and preserving democracy, General #2 will probably enjoy a period of media stardom and, potentially, a bright political future: he might easily find himself on the short list for President or Vice-President. This road to power is much straighter, while incurring few if any risks.

Viewed in this light, it appears wondrous that anyone pulls off a *coup d'état*. And yet, a drumbeat of coups persists around the globe. The crucial factors are personal trust and the closely related power to derail justice. Consider two other military leaders, General A and General B. If they are brothers, cousins, old friends, or patron-client, they are more likely to collaborate. If Generals A and B are skimming money from military procurement contracts, each is less likely to inform the authorities about *any* matter, because the other could easily retaliate by disclosing everything. If General A is a “warlord” or “big man,” controls a private army of loyalists, poses a clear threat to anyone who crosses him, and can bribe or threaten judges, *no one* will lightly betray his confidence. The more such conditions apply, the more likely General B would go along, if General A begins talking about a *coup d'état*.

D. CONSPIRACIES AND SOLICITATION EPISODES

Fortunately, we are not limited to hypothetical scenarios and thought experiments to probe the difficulties of organizing a coup under rule-of-law conditions. Under the theory presented in this Article, we might imagine that over a long period of time, certain individuals would still be tempted to propose a coup, particularly during moments of national or personal crisis. If so, how did they go about it, and what happened? Does such evidence support or contradict our theory?

We find three telling vignettes from the histories of coup-free states. A short-lived coup conspiracy appeared in Venice in the early fifteenth century, and in the United States, we can identify two

⁴⁶³ See *supra* notes 4-8 and accompanying text.

interesting “solicitation episodes,” in which senior officials appear to be suggesting, proposing, or insinuating a *coup d’état*. (This discussion does not purport to present a complete list of conspiracies and “solicitation episodes” within coup-free states. From all indications, however, such events appear to be rare.)

The first episode took place in Venice in 1413.⁴⁶⁴ (This was 103 years after the last Venetian coup attempt, and 58 years after the major conspiracy of 1355.) Two rich commoners, named D’Anselmo and Baldovino, tried to get themselves ennobled.⁴⁶⁵ (Through a seldom-used procedure, men could be elected into the nobility and Great Council.) After failing, the two men vented their frustrations to each other, and their talk turned treasonous. D’Anselmo and Baldovino agreed to organize their followers, and in two days, to massacre the nobles emerging from the Great Council.⁴⁶⁶ After they parted, D’Anselmo panicked. Hearing his words echoing in his ears, he agonized about possible eavesdroppers and decided there was only one way to save himself.⁴⁶⁷ He went straight to the authorities and spilled the whole story.⁴⁶⁸ They seized Baldovino, tortured him, and at eight o’clock the next morning, executed him. D’Anselmo, the informer, was pardoned and ennobled.⁴⁶⁹

The second episode took place during the U.S. Civil War, when General George McClellan apparently contemplated opposing President Lincoln by force. A Democrat, McClellan commanded the largest Union army in the East.⁴⁷⁰ Newspapers called him “Young Napoleon” because of his physical resemblance and magnetic hold over soldiers.⁴⁷¹ “By some strange operation of magic,” McClellan wrote in the summer of 1861, “I seem to have become *the* power of the land. I almost think that were I to win some small success now, I could become Dictator or anything else that might please me—but nothing of that kind would please me—therefore I won’t be Dictator.”⁴⁷²

After the Emancipation Proclamation in September 1862, opposition to Lincoln among certain Northerners grew virulent. Racists were particularly incensed.⁴⁷³ Democratic groups like the “Knights of the Golden Circle”⁴⁷⁴ and the “Sons of Liberty”⁴⁷⁵ murmured about forcing an end to the war. Republicans called them “Copperheads.”⁴⁷⁶

At this time, General McClellan invited three fellow generals to dinner. He told them that his admirers were urging him to take a public stand against emancipation, and that his troops were ready to follow.⁴⁷⁷ The generals were shocked. They pleaded with him to avoid any confrontation with the President, and told him that no soldier would stand by him.⁴⁷⁸ McClellan agreed, but may have been probing their attitudes.⁴⁷⁹

⁴⁶⁴ 2 HAZLITT *supra* note 29, at 818–819.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 819 (detailing their conversation and plan).

⁴⁶⁷ *Id.* (“The sound of his own voice threw him into a cold sweat. He conceived it more than possible that they might have been overheard, and that they were betrayed . . . [H]e knew that there was only one method of escaping from the danger.”).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ See Harold M. Hyman, *Ulysses Grant I, Emperor of America?: Some Civil-Military Continuities and Strains of the Civil War and Reconstruction*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989 175, 178 (Richard H. Kohn ed., 1991).

⁴⁷¹ STEPHEN W. SEARS, GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON (1999).

⁴⁷² ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 2313 (David S. Heidler & Jeanne T. Heidler eds., 2000).

⁴⁷³ JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH 8 (2006) (explaining that after the Emancipation Proclamation, more Democrats joined in opposition against Lincoln because they were “deeply racist”).

⁴⁷⁴ *Id.* at 25.

⁴⁷⁵ *Id.* at 128.

⁴⁷⁶ *Id.* at 7–8.

⁴⁷⁷ *Id.* at 326–27 (1999); T. Harry Williams, *The Macs and the Ikes: America’s Two Military Traditions*, 75 AMERICAN MERCURY 37 (1952).

⁴⁷⁸ SEARS, *supra* note 471, at 326.

A few weeks later, General McClellan was relieved of command, and his career took a thoroughly constitutional course.⁴⁸⁰ McClellan won the Democratic nomination for President in 1864, promising to negotiate with the Confederacy. In a purely Northern election, Lincoln won in a landslide.⁴⁸¹

The third episode occurred in the 1970s. During the Watergate crisis, rumors circulated around Washington that President Nixon might call on the military for support against impeachment.⁴⁸² Nixon may have contemplated the idea, but the evidence is sketchy.

Admiral Elmo Zumwalt described an alarming meeting between President Nixon and the Joint Chiefs of Staff in December 1973. Nixon launched into a “big rambling monologue,” reported Zumwalt, about how “the Eastern liberal establishment was out to do us all in.” Nixon’s next suggestion was shocking. “We gentlemen here,” declared the President, “are the last hope, the last chance to resist . . .”⁴⁸³ Zumwalt recalled:

I got the impression, he was sort of testing the water with us, to see whether there would be support—any nodding of heads—at some of these things. One could well have come to the conclusion that here was the Commander-in-Chief trying to see what the reaction of the Chiefs might be if he did something unconstitutional He was trying to find out whether in a crunch there was support to keep him in power.⁴⁸⁴

Stunned, Admiral Zumwalt conferred with Army General Creighton Abrams. Abrams said he would act as though the episode never occurred.⁴⁸⁵

If Zumwalt’s depiction is accurate, President Nixon appears to have floated a trial balloon, to see whether the military brass would support him in a *coup d’état*. Like McClellan, however, Nixon remained cagey and ambiguous, so as to give him plausible deniability. In both cases, the trial balloons popped instantly, and both men backed away.

These episodes are consistent with the theory presented here. The anecdote from Venice illustrates how risk-reward calculations under rule-of-law systems promote the disclosure of coup conspiracies to relevant authorities. The “solicitation episodes” from the United States demonstrate that high-ranking officials are not so uniformly virtuous that they refuse to contemplate an extra-constitutional adventure. Instead, officials cannot orchestrate a *coup d’état* because they fear to raise the topic in conversation.

E. AVERTING POPULAR UPRISINGS

This theory also explains the absence of spontaneous mass revolutions. Like any other coup plotters, street revolutionaries must attract followers, and face the same trust dilemmas. Moreover, revolutionaries appear heroic—and galvanize imitators—when they sacrifice their own safety to oppose a monstrous regime. After weathering decades of grim surveillance, for example, Eastern Europeans poured into the streets during the fall of 1989. Sheer numbers inspired hope, creating momentum. When portions of the security services refused to crack down, the regimes stepped aside. Humane governments under the rule of law, however, do not kindle sufficient outrage. Instead, they make *revolutionaries* seem dangerous. It is not credible to most people that the revolutionary overthrow of a legitimate rule-of-law government would enhance their safety or well-being. In established democracies, the closest parallels to insurrectionary violence are urban riots, like those that burned in Los Angeles in 1992 and Paris in 2005. Many such

⁴⁷⁹ See Williams, *supra* note 477, at 37 (“[O]ne wonders what he [McClellan] would have done had they encouraged him.”); see also Hyman, *supra* note, at 470 (“[E]ven in the Army’s pro-McClellan circles, officers accepted their subordination to civilian overlords.”).

⁴⁸⁰ WILLIAM STARR MYERS, GENERAL GEORGE BRINTON MCCLELLAN 371 (1934).

⁴⁸¹ SEARS, *supra* note 471, at 371–86.

⁴⁸² See generally ANTHONY SUMMERS & ROBBYN SWAN, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON 463–81 (2000).

⁴⁸³ *Id.* at 463.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

episodes involve racial minorities, who feel aggrieved by systemic bias in the justice system. These rioters make cities momentarily ungovernable, but have no chance of toppling governments, partly because majority populations do not share their grievances.

Aside from public apathy, mass revolutions are impossible because no civilians—no matter how angry or militant—can effectively challenge the immense power of a united political-military establishment. Nineteenth-century British agitators, for example, simply lacked the organization or firepower to challenge the state.⁴⁸⁶ Popular revolutions, as many have argued, require factional divisions within the security forces. According to Lenin, “no revolution of the masses can triumph without the help of a portion of the armed forces.”⁴⁸⁷ A study of fifteen mass rebellions found that disloyalty and fragmentation within the security apparatus was critical for success.⁴⁸⁸ Unless the security forces divide, they can contain civilian unrest.

F. TESTING THE THEORY

If the theory articulated in this Article is correct (that rule-of-law institutions systematically attenuate personal-loyalty relationships within the military-political establishment, thereby inhibiting the formation of criminal conspiracies, up to and including a *coup d'état*), we would expect to find that states exhibiting long-term stability would also exhibit low levels of corruption. Transparency International (“TI”), a Berlin-based think tank, ranks countries by their levels of governmental corruption, as perceived by country analysts and business people.⁴⁸⁹ (Corruption cannot be measured directly, because it is an illicit and generally secretive behavior. The TI Corruption Index probably represents the best method for measuring relative corruption rates around the world.) The following page shows the 2008 Corruption Index, from the highest perceived corruption to the lowest perceived corruption.⁴⁹⁰ The 22 “coup-free states”—the states that experienced no coups or serious coup attempts from 1961 through 2010⁴⁹¹—are in **bold**.

⁴⁸⁶ THOMIS & HOLT, *supra* note 24, at 126–27.

⁴⁸⁷ EDWIN LIEUWEN, *ARMS AND POLITICS IN LATIN AMERICA* 134 (1961).

⁴⁸⁸ D.E.H. RUSSELL, *REBELLION, REVOLUTION, AND ARMED FORCE* (1974).

⁴⁸⁹ *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL (2008), http://www.transparency.org/policy_research/surveys_indices/cpi/2008.

⁴⁹⁰ Graphic by Ayelet Arbel, for this project.

⁴⁹¹ See *supra* notes 135–56 and accompanying text.

Corruption Levels and the Coup-Free Zone

Countries listed in descending order, from highest perceived corruption to lowest perceived corruption.

<i>Most corrupt</i>			Bold = Coup-free states
1 Somalia	46 Nicaragua	91 Senegal	136 Bhutan
2 Myanmar	47 Comoros	92 Panama	137 Macau
3 Iraq	48 Uganda	93 Montenegro	138 Bahrain
4 Haiti	49 Mozambique	94 Madagascar	139 Oman
5 Afghanistan	50 Libya	95 India	140 Mauritius
6 Sudan	51 Indonesia	96 Albania	141 South Korea
7 Guinea	52 Honduras	97 Thailand	142 Taiwan
8 Chad	53 Guyana	98 Saudi Arabia	143 Puerto Rico
9 Equatorial Guinea	54 Ethiopia	99 Morocco	144 Malta
10 Congo, Democratic Republic	55 Eritrea	100 Burkina Faso	145 Botswana
11 Zimbabwe	56 Vietnam	101 Brazil	146 United Arab Emirates
12 Uzbekistan	57 Togo	102 Trinidad and Tobago	147 Israel
13 Turkmenistan	58 Sao Tome and Principe	103 Swaziland	148 Dominica
14 Kyrgyzstan	59 Nigeria	104 Suriname	149 Portugal
15 Cambodia	60 Nepal	105 Peru	150 Cyprus
16 Venezuela	61 Zambia	106 Mexico	151 Spain
17 Sierra Leone	62 Niger	107 Macedonia	152 Saint Vincent and the Grenadines
18 Guinea-Bissau	63 Mauritania	108 China	153 Qatar
19 Gambia	64 Maldives	109 Bulgaria	154 Estonia
20 Congo, Republic	65 Malawi	110 Romania	155 Slovenia
21 Burundi	66 Egypt	111 Colombia	156 Uruguay
22 Azerbaijan	67 Vanuatu	112 Ghana	157 France
23 Angola	68 Solomon Islands	113 Georgia	158 Chile
24 Tajikistan	69 Moldova	114 El Salvador	159 Barbados
25 Papua New Guinea	70 Belize	115 Kuwait	160 Saint Lucia
26 Laos	71 Armenia	116 Cuba	161 United States of America
27 Ecuador	72 Argentina	117 Tunisia	162 Japan
28 Côte d'Ivoire	73 Tanzania	118 Samoa	163 Belgium
29 Central African Republic	74 Rwanda	119 Croatia	164 Britain
30 Belarus	75 Mongolia	120 Namibia	165 Ireland
31 Syria	76 Lebanon	121 Turkey	166 Norway
32 Russia	77 Dominican Republic	122 Poland	167 Germany
33 Kenya	78 Djibouti	123 Lithuania	168 Hong Kong
34 Bangladesh	79 Bolivia	124 Greece	169 Austria
35 Timor-Leste	80 Mali	125 Seychelles	170 Luxembourg
36 Kazakhstan	81 Kiribati	126 Italy	171 Canada
37 Yemen	82 Jamaica	127 South Africa	172 Australia
38 Philippines	83 Guatemala	128 Slovakia	173 Netherlands
39 Iran	84 Gabon	129 Latvia	174 Iceland
40 Cameroon	85 Benin	130 Malaysia	175 Switzerland
41 Tonga	86 Sri Lanka	131 Jordan	176 Finland
42 Paraguay	87 Lesotho	132 Hungary	177 Singapore
43 Liberia	88 Bosnia and Herzegovina	133 Costa Rica	178 New Zealand
44 Ukraine	89 Algeria	134 Cape Verde	179 Sweden
45 Pakistan	90 Serbia	135 Czech Republic	180 Denmark

Source: Transparency International, 2008 Corruption Perceptions Index

Least corrupt

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As we can see, most of the coup-free states are clustered at the very bottom of the corruption index. Moreover, *only* coup-free states appear there. (Singapore, which has experienced no coups or coup attempts, has not yet experienced fifty years of independence; Hong Kong has never been independent.)

Admittedly, the correlation between corruption and coups is not absolutely perfect. Four coup-free states have somewhat higher corruption scores: Israel, Costa Rica, South Africa, and Mexico. Notably, these states are recent entrants to what we might call the “coup-free zone.” South Africa gained independence from Great Britain in 1934;⁴⁹² Mexico saw a final coup attempt in 1938;⁴⁹³ Israel experienced one coup attempt in 1948, shortly after independence,⁴⁹⁴ and Costa Rica’s last coup attempt came in 1955.⁴⁹⁵ Costa

⁴⁹² Bureau of African Affairs, *Background Note: South Africa*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/r/pa/ei/bgn/2898.htm> (last visited Sept. 17, 2008).

⁴⁹³ See generally COTHRAN, *supra* note 153, at 34–48 (1994) (detailing the background leading up to the 1938 Mexican coup attempt).

⁴⁹⁴ Avner Yaniv, *An Imperfect Democracy?*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 227, 229–30 (Avner Yaniv ed., 1993).

⁴⁹⁵ Philip Mauceri, *Nine Cases of Transitions and Consolidations*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM 204, 205–07 (Robert A. Pastor ed., 1989); SETH ROLBEIN, NOBEL COSTA RICA: A TIMELY REPORT ON OUR PEACEFUL PRO-YANKEE, CENTRAL AMERICAN NEIGHBOR 193–96 (1989).

Rica, South Africa, and Mexico, moreover, are the most tenuous coup-free states. During the past fifty years, coup plots have been rumored in Mexico⁴⁹⁶ and Costa Rica,⁴⁹⁷ and black South Africans agitated for revolutionary change—but made no overt, highly plausible attempts to seize power.⁴⁹⁸ In 1994, South Africa's white oligarchy peacefully relinquished power.⁴⁹⁹ If any of these 22 stable states revert to coups, it will almost certainly be Mexico, Costa Rica, or South Africa.

Still, the relationship between corruption and coups is strong. Is it sheer coincidence? The following chi-square test assesses this possibility.⁵⁰⁰ This table only includes the states that have remained fully independent from 1961 through 2010, and thus potential coup-free states. If coups and corruption were not associated, we would expect the coup-free states in the second column to be distributed roughly evenly between the high-corruption and low-corruption boxes, as the “states with coup events” are. Instead, all of them are in the low-corruption box, and the odds of this pattern arising by chance are less than 1 in 10,000.

As we can see, corruption and coups are closely associated. They both derive from the same basic source: relationships of personal trust and allegiance that weaken, warp, and defeat impersonal rules.

Coups and Corruption		
	States with coup events 1961–2010	States without coup events 1961–2010
High corruption (Transparency International, 2008 Corruption Perceptions Index)	40 (Argentina, Benin, Bolivia, Cameroon, Central African Republic, Chad, Democratic Republic of Congo (Kinshasa), Republic of Congo (Brazzaville), Côte d'Ivoire, Ecuador, Egypt, Ethiopia, Gabon, Guatemala, Guinea, Haiti, Honduras, Indonesia, Iran, Laos, Liberia, Libya, Mali, Mauritania, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Paraguay, Philippines, USSR/Russia, Rwanda, Somalia, Sri Lanka, Sudan, Togo, Venezuela, North Yemen/Yemen)	0
Low corruption (Transparency International, 2008 Corruption Perceptions Index)	34 (Albania, Bhutan, Brazil, Bulgaria, Burkina Faso, Chile, China, Colombia, Cuba, Cyprus, El Salvador, France, Ghana, Greece, India, Italy, Jordan, South Korea, Madagascar, Malaysia, Morocco, Oman, Panama, Peru, Portugal, Romania, Saudi Arabia, Senegal, Yugoslavia/ Serbia, Spain, Thailand, Tunisia, Turkey, Uruguay)	22 (Australia, Austria, Belgium, Britain, Canada, Costa Rica, Denmark, Finland, Germany, Iceland, Ireland, Israel, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland, United States of America)

The probability of this pattern arising by chance is 1 in 10,000.

Chi square yielded $p = 0.0001$.

Only countries which functioned as effectively independent states during the entire period from 1961 to 2010, and which also appear on Transparency International's 2008 Corruption Perceptions Index, appear on the table. “High corruption” refers to states in the more corrupt half of the index; “low corruption” refers to states in the less corrupt half. “Coup event” refers to any coup, coup attempt, or executive coup.

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⁴⁹⁶ David F. Ronfeldt, *The Mexican Army and Political Order since 1940*, in *THE MODERN MEXICAN MILITARY: A REASSESSMENT* 63, 73 n.14 (David F. Ronfeldt ed., 1984).

⁴⁹⁷ See Robert Rinehart, *Historical Setting*, in *COSTA RICA: A COUNTRY STUDY*, 1, 63 (Harold D. Nelson ed., 1983) (noting that plots to overthrow the government had allegedly been uncovered).

⁴⁹⁸ ROBERT M. PRICE, *THE APARTHEID STATE IN CRISIS: POLITICAL TRANSFORMATION IN SOUTH AFRICA 1975–1990* 9–10 (1991); see also R.W. Johnson & Lawrence Schlemmer, *Introduction: The Transition to Democracy*, to *LAUNCHING DEMOCRACY IN SOUTH AFRICA: THE FIRST OPEN ELECTION, APRIL 1994* 1, 11–12 (R.W. Johnson & Lawrence Schlemmer eds., 1996) (describing the “political violence” of the region).

⁴⁹⁹ Johnson & Schlemmer, *supra* note 155, at 12.

⁵⁰⁰ Graphic by Ayelet Arbel, for this project.

VII. CONCLUSION

The Most Serene Republic astonished the world, and British tranquility has provoked similar perplexity. As Jean-Louis de Lolme asked in 1791, what is the “secret force” keeping Britain stable?⁵⁰¹ The mystery remains palpable, and now extends to a couple of dozen states around the world.⁵⁰²

The standard answer—internalization of professional military values—is weak. This theory places enormous weight on the ephemeral capacities for selfless generosity and public spirit. Virtue theory requires a perfect education, instilled throughout the leadership classes, that counteracts basic self-interest, and persists for centuries. Moreover, it simply pushes the explanation back another level: why have the militaries of Venice, Britain, and the United States internalized “professional” norms, but the militaries of Honduras, Pakistan, and Guinea, among many others, have failed to do so?

A better answer is that the rule of law systematically attenuates personal loyalties, making coup conspiracies inordinately difficult to organize. Within rule-of-law states, a collective action problem inhibits the formation of nascent coup conspiracies within the military-political establishment. Within a rule-of-law state, it is unlikely that any official will dare approach even *one* other official about a *coup d'état*. As a practical matter, the idea disappears: it grows outlandish and absurd. No one can alter this dynamic, and constitutional government persists for decades and centuries.

⁵⁰¹ DE LOLME, *supra* note 202, at 436.

⁵⁰² See Karsten, *supra* note 218, at 155 (“Call it socialization or tradition, something has been at work in certain competitive democracies to preclude military coups.”).

ARTICLE

Silent Partners: *Private Forces, Mercenaries, and International Humanitarian Law in the 21st Century*

Steven R. Kochheiser^{*}

ABSTRACT

In response to gritty accounts of firefights involving private forces like Blackwater in Iraq and Afghanistan, many legal scholars have addressed the rising use of private forces—or mercenaries—in the 21st century under international law. Remarkably, only a few have attempted to understand *why* these forces are so objectionable. This is not a new problem. Historically, attempts to control private forces by bringing them under international law have been utterly ineffective, such as Article 47 of Additional Protocol II to the Geneva Conventions. In *Silent Partners*, I propose utilizing the norm against mercenary use as a theoretical framework to understand at what point private forces become objectionable and then draft a provision of international humanitarian law to effectively control their use. Such a provision will encourage greater compliance with international law by these forces and reduce their negative externalities by ensuring legitimate control and attachment to a legitimate cause.

^{*} J.D. with *High Distinction*, Ohio Northern University, May 2011. Currently an Assistant Attorney General in the Ohio Attorney General's Office as well as a Technical Sergeant in the Ohio Air National Guard. I would like to thank Professor Michael Lewis of Ohio Northern University, Pettit College of Law for his valuable advice and guidance throughout the drafting of this article. Without his thoughtful critiques and insight, this article would not have been possible. Any opinions expressed or proposals offered in this article are solely those of the author and do not represent the views or positions of the above-mentioned individuals or organizations.

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I. PRIVATE FORCES

Considered a “silent partner” by Congressional leaders, private contractors became more visible in 2004 when combating a fledgling insurgency by “racing around Iraq in armored cars” and even forming diplomatic alliances with local clans.¹ The extensive role of private force in the reconstruction of Iraq was graphically brought to the attention of the public and policymakers after four Blackwater employees were killed and their bodies mutilated by an angry crowd in Fallujah.² As these silent partners started to directly engage in intense firefights with insurgents, legal scholars began debating the status of these private forces under international law.³

By 2007, there were nearly 180,000 private contractors in Iraq, approximately 20-30,000 of which were armed, supporting 165,000 U.S. soldiers.⁴ In September of that year, the controversy regarding the use of private contractors reached its pinnacle after Blackwater forces guarding a State Department convoy opened fire in Nisour Square in Baghdad and, according to an FBI investigation, killed fourteen civilians without cause.⁵ As U.S. forces gradually withdraw from Iraq, an important legacy of this conflict and the broader War on Terror will undoubtedly be the controversial presence of private force on the battlefield. A critical component of this legacy is understanding the challenges faced when attempting to construe international humanitarian law (IHL) to deal with the growing role of private forces in international armed conflicts.

It is important to note at the outset that some disagreement exists regarding whether the current armed conflicts in Iraq and Afghanistan are of an international character. If a conflict is not of an international character, then only the minimum provisions of the Geneva Conventions Common Article 3 apply.⁶ While the Department of Defense considers the Geneva Conventions to apply in their entirety to the conflicts in Iraq and Afghanistan as international armed conflicts pursuant to the Common Article 2, some scholars disagree with this view.⁷ These scholars argue that after sovereignty was turned over to the governments of Iraq and Afghanistan, the occupations officially ended and the conflicts were no longer of an international character between two parties to the Geneva Conventions.⁸ Rather, the conflicts in Iraq and Afghanistan now involve the United States aiding sovereign governments to fight a domestic insurgency, not another nation. Therefore, only the minimum provisions of Common Article 3 apply and possibly Additional Protocol II.⁹

¹ David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1, available at <http://www.nytimes.com/2004/04/19/world/security-companies-shadow-soldiers-in-iraq.html?pagewanted=all&src=pm> (quoting former Senate Armed Services Committee Chairman Jeff Warner as describing private security contracts as “silent partners in this struggle.”).

² Peter Singer, *Warriors for Hire in Iraq*, SALON.COM (Apr. 15, 2004), <http://archive.salon.com/news/feature/2004/04/15/warriors/print.html> (describing the general lack of awareness by the policymakers and even senior Pentagon officials of the growing role of private force in Iraq).

³ Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT’L L. 239, 241–42 (2009) (discussing the struggle by academics to deal with rising use of private forces in spite of a “vacuum of law that only serves to confirm accusations that international law is too weak to deal with the problem.”).

⁴ Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1310 (2008).

⁵ *Id.* at 1308–09; David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=all>.

⁶ Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 FORDHAM L. REV. 2607, 2625 (2005).

⁷ See Captain Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 A.F. L. REV. 199, 205 n.30 (2008) (discussing a Department of Defense General Counsel memorandum that concluded that the conflicts in Iraq and Afghanistan continued to remain international armed conflicts as ongoing hostilities are in the “transition, or stability operations” phase).

⁸ *Id.*, at 204–07.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 (Additional Protocol II supplements the

One could certainly argue, however, that these conflicts retain their international character as the *de facto* occupations that followed the initial invasions and continue to persist uninterrupted with tens of thousands of foreign soldiers occupying both nations.¹⁰ Still, scholars do not question the importance of considering the status of the private forces in Iraq and Afghanistan under the Geneva Conventions and IHL, as these forces are part of a “trend toward increasing privatization” that will undoubtedly be present in future international armed conflicts.¹¹ Thus, while the status of the conflicts in Iraq and Afghanistan under the Geneva Conventions is debatable, analyzing the use of private force in these conflicts is relevant when applying the theoretical framework of the norm against mercenarism to current IHL provisions as well as proposals that seek to ban or regulate the use of private force.¹²

The term “private force” encompasses what might traditionally be thought of as “mercenaries.”¹³ The use of the term mercenary is problematic when used to describe modern private military and security firms due in part to its negative connotation, but more importantly because it is a legal term of art describing a group that may be subject to criminal sanctions.¹⁴ Because this article will focus on these firms, the term “private force,” as described in Section II, will be used throughout. The term “mercenary” will only appear when used in a historical sense, predating its use as a legal term of art, and when used in IHL provisions or academic theories that provide a specific definition for the term.

II. BENDING THE SPEAR: EMERGENCE OF THE PRIVATE MILITARY INDUSTRY AND THE NORM AGAINST MERCENARY USE TO DEFINE “MERCENARY”

Private force has maintained a controversial presence on the battlefield for millennia. Biblical references from the sixth century BC by Jeremiah described mercenaries in Egypt as “fatted calves” that “will turn and flee together, they will not stand their ground, for the day of disaster is coming upon them, the time for them to be punished.”¹⁵ Over time, a norm against the use of private force evolved and it is said that “[f]or as long as there have been mercenaries, there has been a norm against mercenary use.”¹⁶ Despite this norm against mercenarism, IHL has been ineffective in proscribing the use of these controversial forces. Definitions of mercenary conduct in IHL are inflexible and focus on the nationality and motivation of fighters as the two primary components.¹⁷

The modern private force industry emerged in the early 1990s after the downsizing of post-Cold War militaries created an increased supply of former soldiers and “disengagement from select zones of influence (particularly Africa)” increased the demand for private forces.¹⁸ The use of private force

protections provided by Common Article 3 in non-international armed conflicts. However, the application of Protocol II is restricted to armed conflicts between a contracting party’s armed forces and insurgent groups that are “under responsible command” and exercise control over part of the party’s territory from which it is able to launch military operations. While certain periods during the conflicts in Iraq and Afghanistan might satisfy this definition, neither the United States nor Iraq are parties to Protocol II and Afghanistan only recently acceded to Protocol II in 2009.) [hereinafter Protocol II]; Ridlon, *supra* note 7, at 206–07.

¹⁰ Convention (III) relative to the Treatment of Prisoners of War, Geneva, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva III] (stating that “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

¹¹ Ridlon, *supra* note 7, at 207.

¹² See E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 221–22 (2008) (using the term “mercenarism” to generally describe the use of mercenaries).

¹³ Ridlon, *supra* note 7, at 208–09.

¹⁴ *Id.*

¹⁵ *Jeremiah* 46:21 (New International Version).

¹⁶ SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* 1 (2007).

¹⁷ *Id.* at 52.

¹⁸ Gaston, *supra* note 12, at 224 (stating that “[g]lobalization expanded opportunities for the growth of transnational business sectors like the private security industry, while neo-liberal trends toward outsourcing government functions to the private

allowed policymakers to avoid politically unpopular decisions, like instituting a draft, and to distance themselves from any mistakes made during a conflict.¹⁹ The private force industry “seems to have largely succeeded in portraying itself as a new phenomenon to which the old rules regarding mercenaries do not apply.”²⁰ Thus, using the theoretical framework of the norm against mercenary use to analyze the modern emergence of private force is an important initial step before evaluating IHL provisions and proposals purporting to ban or regulate its use.

A. THE NORM AGAINST MERCENARISM

Norms in international law result from a sense of constrained behavior or legal obligation that “is usually regarded as reaching the status of customary international law only when it is reflected by state practice and *opinio juris*, or the belief that a norm is accepted as law.”²¹ The norm against mercenarism historically comprises two elements: concerns regarding legitimate control and the notion of martial honor connected to serving a cause.²² Mercenaries are widely regarded as morally problematic because they operate outside the “legitimate, authoritative control” of a sovereign and because they are motivated by “selfish, financial reasons as opposed to ... some kind of larger conception of common good” or “cause.”²³ The two elements that comprise the norm against mercenarism are legitimate control and degree of attachment to a cause. These elements are the product of two gradual shifts away from the use of mercenaries.²⁴

From the twelfth to seventeenth centuries, mercenaries were brought under “legitimate control” of sovereigns and thereby became less objectionable.²⁵ However, late in this same period and continuing into the nineteenth century, the rise of the nation-state cast mercenaries in an increasingly negative light. Many considered them to be immoral because they were not fighting for an “appropriate cause.”²⁶ It was generally believed that only citizens under control of and fighting for the state had the proper motivation to wage war.²⁷ Writing in the sixteenth century, Machiavelli described this attitudinal shift when he provided a normative analysis of mercenary use that illustrated both the legitimate control and appropriate cause elements. Machiavelli described the sovereign as fulfilling his duty to defend the state by using his own subjects in defense of the state as they are best motivated to fight for the common cause of the state.²⁸ He stated that “when arms have to be resorted to . . . then the prince ought to go in person and perform the duty of a captain; the republic has to send its citizens . . . [a]nd experience has shown princes and republics, single-handed, making the greatest progress, and mercenaries doing nothing except damage”²⁹ This view is indicative of the shift of both elements of the norm against mercenary use during the rise of the nation-state.

Despite the rise of nation-states and citizen armies, mercenaries continued to supplement militaries.³⁰ In the nineteenth century, however, the use of mercenaries suddenly went “out of style.”³¹ Scholars struggle

sector rationalized the outsourcing of military and security functions that previously had been guarded as the exclusive province of the state.”).

¹⁹ Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 869 (2008).

²⁰ *Id.* at 856.

²¹ PERCY, *supra* note 16, at 18–19.

²² *Id.* at 1.

²³ *Id.*

²⁴ *Id.* at 59, 65–66.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 66; see also Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L. J. 1, 6 (1999) (discussing the ideology of the use of military force as the “preeminent cultural construction of ‘appropriate’ violence”).

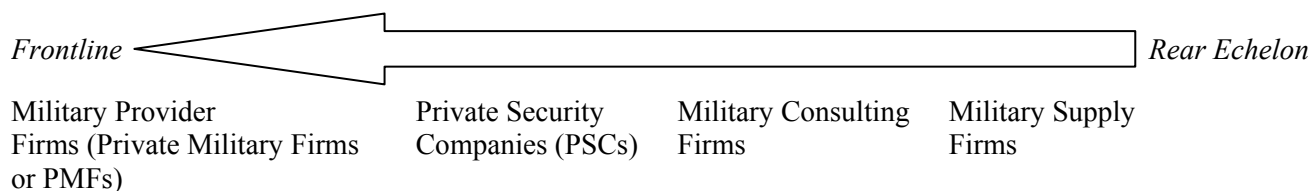
²⁸ NICOLÒ MACHIAVELLI, *THE PRINCE*, Chapter XII, available at: <http://www.fordham.edu/halsall/basis/machiavelli-prince.html>.

²⁹ *Id.*

³⁰ Michael Scheimer, *Separating Private Military Companies from Illegal Mercenaries in International Law*, 24 AM. U. INT’L L. REV. 609, 615 (2009).

with this phenomenon as up until that time “states had successfully *controlled* the mercenary problem.”³² Greater control over mercenaries seemed to at least partially satisfy the legal obligation underlying the norm against mercenarism for legitimate control over force. Yet in spite of this control, a norm against mercenarism emerged.³³ During the period from the Crimean War to the 1960s, the norm against mercenarism was so absolute that the reemergence of mercenaries in multiple African civil wars following decolonization was extremely controversial and unsettling.³⁴ In response, numerous attempts were made under international law to limit or prohibit their use.³⁵ The absence of mercenaries during this period and the negative response to their return serves as evidence of the commonly shared sense that a legal obligation against mercenarism underlies this norm. To better understand how the norm against mercenarism might influence the application of IHL to private forces, one must first analyze the range of services and types of firms that have recently emerged.

B. PETER SINGER’S “TIP OF THE SPEAR TYPOLOGY”



Many scholars rely on Peter Singer’s “tip of the spear typology” which provides a linear classification of firms in the private force industry according to their services.³⁶ This typology is helpful in understanding the broad range of services provided by modern private forces that range from frontline combat to rear echelon support and the variety of tasks in between. Singer divides all private force into the three broad sectors of military provider firms – more commonly referred to as private military firms (PMFs)³⁷ – military consulting firms, and military support firms.³⁸ PMFs generally have a “focus on the tactical environment” providing actual combat as well as direct command and control.³⁹ Executive Outcomes is an example of a PMF. It operated in Sierra Leone at the request of the government in 1995, providing a battalion of ground troops supported by artillery and air units that successfully outmaneuvered and defeated a rebel army invasion.⁴⁰ Military consulting firms, like MPRI, “provide advisory and training services” frequently employing a staff of former military officers.⁴¹ MPRI (a wholly-owned subsidiary of L-3 Communications) operates many U.S. military officer training programs including the ROTC courses at hundreds of college campuses as well as training foreign

³¹ Deborah Avant, *Mercenary to Citizen Armies: Explaining Change in the Practice of War*, INTERNATIONAL ORGANIZATION, Winter 2000 at 41.

³² PERCY, *supra* note 16, at 94–95.

³³ *See id.* (arguing that “The long history of moral dislike of mercenaries, and attempts to control them, makes the nineteenth century shift away from mercenary armies even more puzzling”).

³⁴ *Id.* at 167.

³⁵ *Id.*

³⁶ PETER SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 90–98 (2008); *see Jones, supra* note 3, at 245 (describing Singer’s typology as “widely used and supported in existing literage as a method of dividing firms by the function they perform.”); Salzman, *supra* note 19, at 857 (discussing Singer’s breakdown of the types of firms of the private military industry); Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT’L L. 213, 217 (2008) (advocating relying on the more relevant distinction regarding whether a private firm has the “capability to engage in hostilities, either offensively or defensively”).

³⁷ Gaston, *supra* note 12, at 224–25 (referring to military provider firms as private military firms).

³⁸ SINGER, *supra* note 36, at 90–98.

³⁹ *Id.* at 99–116.

⁴⁰ *Id.*

⁴¹ *Id.* at 117–33.

militaries and security forces.⁴² Singer notes that the line can become “quite fuzzy” between advising and implementing, citing the consulting firm Vinnell fighting alongside Saudi National Guard troops in combat during the first Gulf War.⁴³ Military support firms, like KBR (formerly a subsidiary of Halliburton), provide “non-lethal aid and assistance” such as logistical support, intelligence, and transportation.⁴⁴ KBR has been involved in a broad range of activities from building facilities for War on Terror detainees at Guantanamo Bay, Cuba to assisting in the dismantling of intercontinental ballistic missiles (ICBMs) in Russia.⁴⁵

The “single unifying factor for the privatized military industry” in Singer’s analysis is that all firms at least provide “services that fall within the military domain.”⁴⁶ Singer admits that these categories are a “conceptual framework” as some firms will fall within one category while others will span several but may still have internal divisions that fit more comfortably into one category.⁴⁷ The visual aid of a spear is used to demonstrate the spectrum of private force from the “tip of the spear” front line forces to rear echelon support forces.⁴⁸ According to the spear visual aid, firms characterized as PMFs that provide direct combat functions sit at the “tip of the spear,” firms providing logistical support are located toward the “base of the spear,” and firms providing consultant services fall somewhere in the middle.⁴⁹ Private Security Companies (PSCs) are a notable addition to the spectrum, particularly following the conflicts in Iraq and Afghanistan.⁵⁰ PSCs seem to belong somewhere between PMFs and consulting firms as they provide services such as security protection, covert operations, and interrogation.⁵¹ PSCs fill this area of the spectrum as they may not “engage in direct combat” but perform duties such as guarding military bases, embassies, checkpoints, or convoys that are “likely to draw fire.”⁵²

While it is tempting to provide each new evolution of private force with a spot along the “tip of the spear” spectrum and draw a line where conduct is unacceptable as constituting mercenarism, this approach is insufficient. Such a distinction between types of private firms seems tenuous as even those providing traditionally rear echelon support sustained relatively high casualties in Iraq.⁵³ The dynamic nature of asymmetric warfare demonstrated that private forces could suddenly become objectionable even when their position along the spear does not change. For example, the firm Blackwater performed largely the same role of providing security throughout its time in Iraq; however, its presence eventually became unacceptable over the course of the conflict. At no point did Blackwater’s role shift any closer to the tip of the spear. Thus, to explain why the presence of Blackwater became objectionable in Iraq, the tip of the spear typology must be considered in conjunction with the norm against mercenarism to understand at what point firms like Blackwater and their activities become unacceptable as mercenarism.

⁴² *Id.*

⁴³ *Id.* at 95.

⁴⁴ *Id.* at 134–45.

⁴⁵ *Id.*

⁴⁶ SINGER, *supra* note 36, at 88.

⁴⁷ *Id.* at 90–93; *see also* Gaston, *supra* note 12, at 225 n.11 (describing the lines in Singer’s typology as “blurred,” making classification of a firm into any single category based on services difficult).

⁴⁸ SINGER, *supra* note 36, at 90–93.

⁴⁹ *Id.*; *see also* Gaston, *supra* note 12, at 225 n.11 (citing Singer’s “tip-of-the-spear” typology).

⁵⁰ Gaston, *supra* note 12, at 226.

⁵¹ *See id.* at 226–28 (discussing PSCs emerging as a result of increased demand for their services in Iraq and Afghanistan in addition to more traditional PSC services in the 1990s to organizations such as the UN and NATO by protecting refugees or border monitoring).

⁵² *Id.*

⁵³ *See* David Ivanovich, *Contract Deaths Up 17 Percent Across Iraq in 2007*, HOUS. CHRON., Feb. 9, 2008, <http://www.chron.com/disp/story.mpl/front/5528613.html> (stating that ninety-seven KBR workers had died in Iraq by the end of 2007 and at least 1,123 contractors had died as well, according to Department of Labor statistics).

C. BENDING THE SPEAR: DEFINING MODERN PRIVATE FORCE IN ACCORDANCE WITH THE NORM AGAINST MERCENARISM

Some firms that provide “tip of the spear” services are acceptable when operating under legitimate control and serving a proper cause, but are objectionable when the control element shifts.⁵⁴ Blackwater engaged in a particularly intense and highly controversial firefight with an Iraqi crowd in Najaf alongside Coalition forces to defend a Coalition Provisional Authority (CPA) headquarters in April 2004.⁵⁵ Yet, the firm continued to play an active role in Iraq until the Nisour Square incident in Baghdad in September 2007.⁵⁶ Its role then diminished following Iraqi demands that the firm leave and the State department refused to renew its contract.⁵⁷ The norm against mercenarism would explain why Blackwater forces engaging in a firefight alongside Coalition forces to defend a Coalition installation was less objectionable than Blackwater forces engaging in a firefight alone to defend a Coalition convoy. While the firm was performing the same role as a PSC during both incidents, the apparent lack of legitimate control and accountability during the Nisour Square incident made Blackwater’s conduct objectionable as mercenarism.

The shortfall of most IHL definitions of mercenarism is that they ignore “[t]he element of accountability [as] the tacit standard that underlies the international antipathy for mercenary activity and truly determines mercenary status.”⁵⁸ While accountability is important, the norm also prohibits force not justified by attachment to a cause.⁵⁹ Thus, a definition of mercenarism needs to encompass the legal obligation that private force must fall within a specific range on the spectrum of both legitimate control and attachment to a cause.

Sarah Percy provides the “Spectrum of Private Violence” based on the norm against mercenarism with “Legitimate control” as the y-axis and “Degree of attachment to a cause” as the x-axis.⁶⁰ This approach helps predict what private force might be proscribed pursuant to the norm against mercenarism rather than Singer’s linear classification based on the services that private forces provide. The norm-based spectrum evolves with time and prevents private firms from engineering their functions or even names to escape accountability as a private actor.

⁵⁴ See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* 195 (2007) (describing the United States news headlines debating the use of private forces after Blackwater, private contractors, had a large involvement in Fallujah and Najaf).

⁵⁵ *Id.* at 186–96 (describing the firefight in detail, including Blackwater contractors directing Coalition forces as well as directly fighting insurgents).

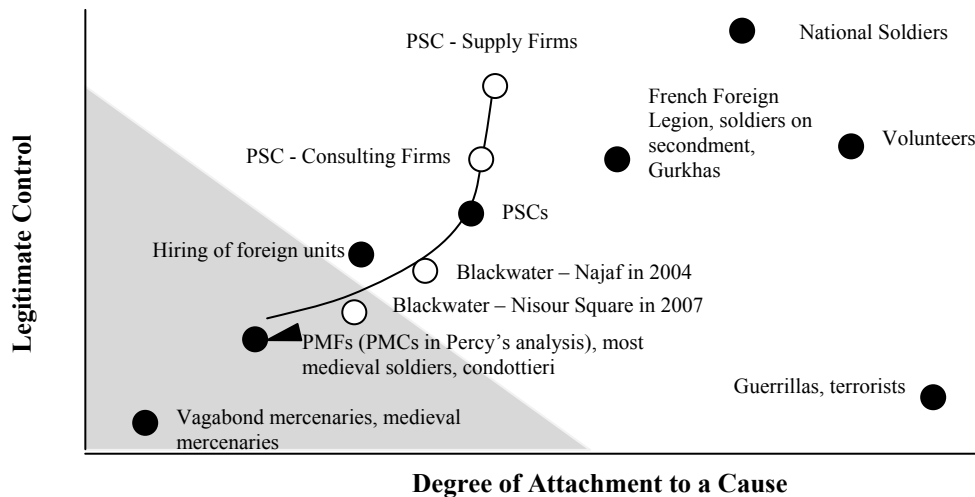
⁵⁶ See Hurst, *supra* note 4, at 1308–09 (describing the Nisour Square incident).

⁵⁷ *Id.*; see Johnston & Broder, *supra* note 5, at A1 (addressing the investigation into Blackwater’s actions in Nisour Square); James Risen & Timothy Williams, *U.S. Looks for Blackwater Replacement in Iraq*, N.Y. TIMES, Jan. 30, 2009, at A8, available at <http://www.nytimes.com/2009/01/30/world/middleeast/30blackwater.html> (discussing Iraq’s refusal to grant Blackwater a license to operate within the country, forcing the State Department to seek a new security firm).

⁵⁸ Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 122 (1998).

⁵⁹ *Id.* at 121–22.

⁶⁰ PERCY, *supra* note 16, at 59.



Modified version of Sarah Percy's *Spectrum of Private Violence*.⁶¹ White-circle points and the "bent spear" were added by the author. Shaded-area, also added, signifies conduct generally considered mercenarism.

Locating a firm and its activities on Percy's norm-based spectrum first requires defining mercenaries in accordance with their motivation to fight for a cause, "encapsulat[ing] both the idea that mercenaries are external to a conflict and that they fight for financial gain, and furthermore recognizes that foreigners can fight without being considered mercenaries[.]"⁶² Whether motivated by religious, ideological, or ethnic causes, foreigners fighting for more than a financial gain receive some recognition of legitimacy under this definition.⁶³ The second element of "legitimate control" then ensures fighters remain "under the control of the entity which is understood to have the legitimate right to wage war" resulting in sanctions for misbehavior and other aspects of control.⁶⁴ Thus, entities exhibiting no legitimate control and only fighting for personal gain serve as the clearest example of mercenaries.⁶⁵

The tip of the spear typology is useful when applied to Percy's spectrum as it aids in expanding the scope of modern private force analyzed in accordance with the norm against mercenarism. Percy's analysis focuses on historic uses of private force from the Middle Ages to the present day, but tends to combine most forms of modern private force into the categories of PSCs and PMFs.⁶⁶ This approach does not distinguish PSCs from more support oriented private supply firms or consulting firms.⁶⁷ Such a distinction is important as PMFs have largely disappeared from the international stage while the market for PSCs is growing rapidly.⁶⁸ Thus, a spear more fully populated with modern variations in private force provides for a more thorough analysis of when these become objectionable pursuant to the norm against mercenarism.

Supply and consulting firms do not present the same control concerns as PSCs as they tend to be unarmed and their services are directed by a state party to the conflict.⁶⁹ Both sets of firms are still generally

⁶¹ PERCY, *supra* note 16, Figure 2.1.

⁶² *Id.* at 54.

⁶³ *Id.*

⁶⁴ *Id.* at 57.

⁶⁵ See *Id.* at 59 (explaining through reference to the diagram that those who fight only for themselves are placed in the lowest corner of the diagram).

⁶⁶ See *id.* at 58–64 (Noting that Percy refers to PMFs as Private Military Companies or PMCs. Percy's use of the term Private Military Company is essentially the same as Private Military Firm as defined above and will be used throughout for consistency.).

⁶⁷ See *id.* at 60–61, 225 (noting PSCs offer similar services as PMFs, or PMCs, such as military advice, training, and guarding facilities but differentiating PSCs from PMFs based on their unwillingness to engage in combat and higher degree of state control).

⁶⁸ See *id.* at 225 (attributing the disappearance of PMFs to pressures from the norm against mercenarism).

⁶⁹ SINGER, *supra* note 36, at 95–97 (explaining that employees of consulting firms may not engage in combat, but their knowledge and training can be equally as important).

motivated by the same cause as the forces they support.⁷⁰ PSCs guarding a military base or diplomatic convoy do present some control concerns as they are armed and operate with a degree of tactical independence.⁷¹ As this independence increases, however, PSCs tend to become more objectionable. For example, when Blackwater contractors engaged in the Najaf firefight, it did so, arguably, under greater control of the Coalition and for the purpose of defending the Coalition headquarters as they fought alongside Coalition soldiers.⁷² However, when Blackwater engaged in the Nisour Square incident, killing Iraqi citizens without cause, it did so apart from Coalition forces and undermined the cause of the Coalition to defend Iraqi citizens and strengthen the Iraqi government.⁷³ While Blackwater's security role in Iraq did not change significantly, the lack of control and attachment to an appropriate cause did shift. Thus, when the tip of the spear typology is applied to Percy's norm-based spectrum, the elements of legitimate control and degree of attachment to a cause seem to bend the spear.

While no bright line standard is provided using Percy's spectrum, the legal obligation imposed by the norm on the use of modern private forces is more predictable. The spectrum illustrates the range of behavior by modern private forces prohibited by the norm against mercenarism and demonstrates the difficulty in precisely defining what behavior is prohibited by the norm. Incorporating the legal obligation underlying this norm into positive law poses a significant challenge and explains the ineffectiveness of recent attempts to prohibit or regulate mercenarism in IHL.

III. PRIVATE FORCE UNDER IHL

Although early IHL provisions such as The Hague Conventions and the Geneva Conventions of 1949 contained no express mention of mercenaries or private forces, they can be interpreted as applying to private force.⁷⁴ Later IHL provisions like Additional Protocol I purport to directly regulate private force, however, these provisions are controversial and difficult to apply primarily due to their definitions of "mercenary."⁷⁵ One expert is quoted as stating that "any mercenary who cannot exclude himself from this definition [under Article 47, Additional Protocol I of the Geneva Conventions 1977 defining mercenaries] . . . deserves to be shot – and his lawyer with him!"⁷⁶ Treaties and conventions that attempt to regulate mercenaries "operate on a flawed definition of the concept[,] failing to consider developments over time and address the fundamental problems of mercenaries."⁷⁷ The norm against mercenary use along with its historical context enables one to analyze these provisions and determine their potential impact, if any, on the use of private force in the twenty-first century.

A. HAGUE CONVENTIONS

The first attempt to incorporate private force into IHL is found in Article 4 of the Hague Conventions, stating: "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral

⁷⁰ PERCY, *supra* note 16, at 61.

⁷¹ *See id.* (explaining that while PCS's are under state control, they are not under popular control and are often criticized for being "poorly monitored and under regulated").

⁷² *See generally* Scahill, *supra* note 54 (describing the Najaf battle, the lack of military command, and Blackwater's defense of the Coalition headquarters).

⁷³ *See* Risen & Williams, *supra* note 57 (describing the Nisour Square incident as "one of the bloodiest" involving Blackwater and explaining that it "stoked anger and resentment among Iraqis").

⁷⁴ Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in the Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf> [hereinafter Hague Conventions]; *see* Kevin Govern & Eric Bales, *Taking Shots at Private Military Firms: International Law Misses its Mark (Again)*, 32 FORDHAM INT'L L.J. 55, 68 (2008) (describing this convention as the "first attempt to codify customary international law on the use of mercenaries").

⁷⁵ *See* Geoffrey Best, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 328, 374–75 n.83 (1980) (explaining that the definition of mercenary is constructed narrowly and therefore it applies to "hardly anyone").

⁷⁶ *Id.*

⁷⁷ Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary,"* 37 GEO. J. INT'L L. 541 (2006).

Power to assist the belligerents.”⁷⁸ Read in conjunction with Article 6,⁷⁹ a state also has no affirmative obligation to prevent individuals from leaving or passing through its territory to join the conflict as a private fighter.⁸⁰ Thus, the Hague Conventions provide no direct restriction on the use of private force by parties to a conflict or the participation by individual private fighters, only providing an obligation for neutral states regarding recruitment and organization. Whether this is an affirmative obligation to prevent recruitment or organization within the neutral state or merely to refrain from these activities is debatable. Some scholars reject any obligation by neutral states other than refraining from “the establishment of a wholly-owned PMF corporation by a nation’s government,”⁸¹ while others interpret this as an obligation to prevent the “organization or staging activities” of private forces within its borders.⁸² Although these provisions have largely been overshadowed by the subsequent Geneva Conventions, it is significant to note that the Hague Conventions impose virtually no limitation on individual or state combatants.⁸³

B. GENEVA CONVENTIONS OF 1949

None of the four Geneva Conventions directly address private force.⁸⁴ Some scholars argue that this silence, particularly with respect to Geneva III, should be interpreted as refusing to recognize private fighters as lawful combatants thereby denying them prisoner of war status.⁸⁵ However, “[m]ost agree that the Conventions’ drafters intended to treat [private fighters] no differently than other combatants.”⁸⁶ Geneva III clearly does not criminalize “mercenary activity” or private force, but would still seem to require states to hold members of a private force accountable for breaches of IHL.⁸⁷

Several provisions may even establish grounds for providing prisoner of war status to members of private forces. Article 4(A)(1) provides prisoner of war status to members of armed forces of a party to the conflict, so if private forces are incorporated into these armed forces, which is unlikely, they are covered by this provision.⁸⁸ Article 4(A)(2) also provides prisoner of war status for members of militias or volunteer corps that are “commanded by a person responsible for his subordinates . . . [that have] a fixed distinctive sign recognizable at a distance . . . [that carry] arms openly . . . [and that conduct] their operation in accordance with the law and customs of war.”⁸⁹ A fifth requirement includes a *de facto* link “with the state for which the group is fighting.”⁹⁰ Those meeting these qualifications are considered “legal combatants,” entitled to receive the protections of prisoner of war status if captured.⁹¹ Some argue application of this provision to modern private forces is contrary to Geneva III’s “historical purpose” to support “partisan fighting by ‘remnants of a defeated force or groups to

⁷⁸ Hague Conventions, *supra* note 74, art. 4.

⁷⁹ *Id.* art. 6 (“The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.”).

⁸⁰ Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 20–21 (2003); *see also* PERCY, *supra* note 16, at 197 (discussing the rejection of a proposal to incorporate a ban of mercenary use reportedly failed due to concerns of violating individuals’ freedom of movement).

⁸¹ Govern & Bales, *supra* note 74, at 69.

⁸² Milliard, *supra* note 80, at 24.

⁸³ *Id.* (explaining that the Hague Conventions order a state to prevent domestic mercenary activity but does not require completely outlawing mercenarism).

⁸⁴ Geneva III, *supra* note 10, art. 4.

⁸⁵ Milliard, *supra* note 80, at 25.

⁸⁶ *Id.*

⁸⁷ Frye, *supra* note 6, at 2625; *see* Milliard, *supra* note 80, at 25 (explaining that state parties were still required “to hold mercenaries accountable for combatant actions amounting to grave breaches of the Conventions’ provisions”).

⁸⁸ Louise Doswald-Beck, *PMCs Under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 118 (Simon Chesterman & Chia Lehnardt eds., 2007).

⁸⁹ Geneva III, *supra* note 10, art. 4(A)(2).

⁹⁰ Doswald-Beck, *supra* note 88, at 118–19.

⁹¹ Ridlon, *supra* note 7, at 219.

liberate an occupied territory.”⁹² This argument is supported by the commentary accompanying Geneva III that specifically excluded from the definition of “partisan,” groups like the “Great Companies” that “devastated France in the fourteenth century, during the peaceful periods of the Hundred Years War.”⁹³ Despite concerns that private firms operating in Iraq may not be able to claim status as “lawful combatants,” some scholars advocate extending protections to them under IHL as a matter of public policy to avoid creating a “disincentive” for those firms to observe IHL provisions in return.⁹⁴

Following a very thorough analysis of Article 4(A)(2), one JAG officer concluded that most private firms operating in Iraq would likely not meet the definition of militias or volunteer corps.⁹⁵ Although some private security forces “carry arms openly,” their status is “questionable” due to their command structure and failure to wear distinctive symbols or emblems that would help “differentiate” them from the civilian population.⁹⁶ While failing to wear a distinctive symbol is easily corrected, scholars are divided regarding whether the corporate structure of modern private forces is sufficient to meet the requirements of Article 4(A)(2).⁹⁷ Thus, Article 4(A)(2) does not appear to provide prisoner of war status for most modern private forces.

Article 4(A)(4) provides civilians accompanying armed forces with prisoner of war status to the extent that they fill traditional civilian roles such as war correspondents or supply contractors, operate under the authorization of the armed forces, and are issued an identification card.⁹⁸ Although civilians in this category are not legal combatants, they may still receive prisoner of war status but they are not entitled to receive combatant privilege.⁹⁹ Combatant privilege generally relieves combatants from criminal responsibility for lawful acts of war such as killing enemy soldiers in battle. Without this privilege, private forces may be held criminally liable for directly participating in hostilities.¹⁰⁰ Private contractors that merely provide a service to the military and are “not expected to fight” will typically qualify under this provision, but those that are expected to fight would likely not benefit from its protection.¹⁰¹ This provision would seem to include firms at the “base of the spear” like KBR that provide logistical support while disqualifying PSCs like Blackwater and other firms nearer the “tip of the spear” as it is anticipated that they will engage in combat. Another limitation on private firms in Iraq is that only a limited number of contractors accompany the armed forces while the vast majority accompanies other government agencies or even other contractors.¹⁰²

An obvious explanation for the omission of private forces from the 1949 Geneva Conventions is that they were largely absent from international conflict at the time of drafting. Members of the private forces in

⁹² Govern & Bales, *supra* note 74, at 71 (quoting Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 88 INT’L REV. RED CROSS 573, 586 (2006), available at http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf).

⁹³ Govern & Bales, *supra* note 74, at 71 (quoting Int’l Comm. Of the Red Cross, *Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War*, 63 (1960), available at <http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=375&t=com>).

⁹⁴ Govern & Bales, *supra* note 74, at 71 (quoting Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 88 INT’L REV. RED CROSS 573, 586 (2006), available at http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf).

⁹⁵ Ridlon, *supra* note 7, at 228.

⁹⁶ *Id.*

⁹⁷ *See id.* at 225–26 (explaining that meeting the requirements of wearing distinctive symbols can be difficult because military personnel wear many different types of clothing and in order to satisfy article 4, the uniforms would have to be “sufficiently standardized”).

⁹⁸ Geneva III, *supra* note 10, art. 4(A)(4) (“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy . . . Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany . . .”).

⁹⁹ Ridlon, *supra* note 7, at 228, 243.

¹⁰⁰ *Id.*

¹⁰¹ Doswald-Beck, *supra* note 88, at 124.

¹⁰² Ridlon, *supra* note 7, at 228–29.

existence at the time were typically incorporated into state armed forces, satisfying both the legitimate control and cause elements of the norm against mercenary use.¹⁰³ The use of private force would soon make an explosive reemergence in decolonized Africa, threatening other values such as national liberation and self-determination by supporting both legitimate governments and factions during coups.¹⁰⁴ The result was a reaction to defend these values by creating a legal prohibition against mercenary use. The belief emerged that mercenary use “correlate[s] with human rights abuses, threatens state sovereignty, and contributes to various forms of international criminal activity.”¹⁰⁵ This view failed to recognize that these negative externalities are “only secondary manifestations of the fundamental problem . . . [that] they are not state-accountable actors.”¹⁰⁶ Additional Protocol I exemplifies this negative reaction to the reemergence of private forces by depriving those defined as “mercenary” of the protections provided by combatant and prisoner of war status. However, Additional Protocol I fails to effectively address the underlying concerns regarding lack of legitimate control and improper cause.

C. ADDITIONAL PROTOCOL I OF 1977

Additional Protocol I, drafted after the reemergence of private force, complements the Geneva Conventions that were drafted at a time when private forces were largely not present on the world stage. Nevertheless, the two must be analyzed together.¹⁰⁷ It is important to note that Protocol I has not been ratified by India, Indonesia, Iran, Israel, Pakistan, Turkey, and the United States, although Afghanistan recently acceded to Protocol I in 2009 and Iraq in 2010.¹⁰⁸ While provisions of Protocol I may be construed to apply to private forces, Article 47 in particular bans the use of mercenaries altogether.¹⁰⁹ Thus, despite its potentially significant implications for private forces, Protocol I has not yet been ratified by several states that either export or employ private force.

Provisions in Protocol I that define armed forces and provide them with prisoner of war status may be construed to include some private forces. Protocol I Article 43 defines “armed forces” and removes the distinction in Geneva III Article 4 between regular armed forces and other armed groups such as volunteer corps or militias while Article 44 provides prisoner of war status to these forces.¹¹⁰ Some scholars argue that for private forces to receive prisoner of war status under Protocol I Article 44, the party to the conflict must exercise some form of responsibility over the private forces, such as criminal jurisdiction, or even formally incorporate the private forces into the party’s armed forces’ chain of command.¹¹¹ While many private forces might not satisfy such a narrow interpretation, contractors for the U.S. Defense Department in Iraq are subject to the Uniform Code of Military Justice as well as federal court jurisdiction and would still seem to qualify for the protections of Article 44.¹¹² A broader interpretation views Article 43 as a fusion of Geneva III Article 4(A)(1) and (2), merely requiring a “factual link” to the party of the conflict to receive combatant

¹⁰³ See Govern & Bales, *supra* note 74, at 70 (discussing mercenaries incorporated into state armed forces at time of 1949 Geneva Convention).

¹⁰⁴ PERCY, *supra* note 16, at 183–85.

¹⁰⁵ Scoville, *supra* note 77, at 544–45.

¹⁰⁶ *Id.*

¹⁰⁷ Govern & Bales, *supra* note 74, at 70.

¹⁰⁸ Doswald-Beck, *supra* note 88, at 118 n.7; see also News Release, Afghanistan Accedes to Additional Protocols I and II in Historic Step to Limit Wartime Suffering, I.C.R.C. News Release 129/09 (Jun. 24, 2009) (discussing Afghanistan’s accession to Protocols I and II).

¹⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 47, Jun. 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf> [hereinafter Protocol I].

¹¹⁰ Doswald-Beck, *supra* note 88, at 120.

¹¹¹ *Id.* at 120–21.

¹¹² Scheimer, *supra* note 30, at 620; see also 10 U.S.C.S. § 802(a)(10) (2009) (“In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”); see generally *Military Extraterritorial Jurisdiction Act (MEJA) of 2000*, 18 U.S.C.S. § 3261–67 (2009) (describing military procedure in response to criminal action committed by people accompanying, or under the employment of, the Armed Forces outside the United States).

status.¹¹³ The requirement in Article 43 that armed forces be “responsible” to the party to the conflict could present problems for such an interpretation, particularly for private forces that are from a different state and likely outside civil and criminal jurisdiction.¹¹⁴ Although some private forces might qualify for prisoner of war status under Articles 43 and 44, it is Article 47 that most directly addresses private forces and mercenarism.

Article 47 provides significant consequences for those defined as “mercenaries” and may even have attained status as customary international law, reaching those conflicts between states that are not parties to Protocol I.¹¹⁵ Under Article 47, those defined as mercenaries lose their combatant status as well as the right to treatment as prisoners of war and can potentially face criminal sanctions for their conduct.¹¹⁶ Article 47 is titled “Mercenaries” and states:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹¹⁷

This definition of “mercenary,” however, is very difficult to apply as each element must be met, including the particularly subjective element of motivation.¹¹⁸ The motivation element is considered “practically unworkable” and “reflects a profound belief that it is wrong to be motivated by money rather than an appropriate cause, and that an inappropriate motivation is what makes a mercenary.”¹¹⁹ Scholars have discovered numerous alleged weaknesses in the Article 47 definition of “mercenary.” For example, Article 47(2)(a) would not seem to apply to the firms operating in Iraq that are recruited not to fight but rather to provide security.¹²⁰ Others argue that this provision is designed to exempt permanently incorporated foreign services like the French Foreign Legion or Nepalese Ghurkhas and not private firms that only enter into contracts for a term of several years.¹²¹ One scholar explains that these apparent loopholes and weaknesses of Article 47 are merely evidence of the “strongly influential” but difficult to translate norm against mercenarism.¹²² Although the motivation element in Article 47(2)(c) was very likely

¹¹³ Doswald-Beck, *supra* note 88, at 121.

¹¹⁴ *Id.* at 120–21 (stating that most private forces would be liable for breach of contract to the contracting state, establishing at least some responsibility).

¹¹⁵ See Protocol I, *supra* note 109, art. 47.

¹¹⁶ See *Id.* (establishing rights and criminal sanctions for mercenaries).

¹¹⁷ *Id.*

¹¹⁸ Govern & Bales, *supra* note 74, at 83.

¹¹⁹ PERCY, *supra* note 16, at 179.

¹²⁰ Govern & Bales, *supra* note 74, at 84.

¹²¹ Salzman, *supra* note 19, at 880–81.

¹²² PERCY, *supra* note 16, at 170.

to be problematic, it was included because the drafters believed it “was the defining characteristic of a mercenary.”¹²³ Rather than merely regulating mercenary conduct under IHL, the drafters undertook the much more difficult task of regulating mercenaries based on their status and motivation.¹²⁴

In fact, Article 47 seems out of place in Protocol I, “which is predicated on the idea that fighters should not be discriminated against on the basis of their motivation [and that IHL] ought to be universal and apply to all those in a theatre of war.”¹²⁵ This discrimination based on status is even clearer considering the potential disparate treatment of mercenaries compared to that of other non-state fighters like terrorists. Article 45 provides the presumption that those taking part in hostilities are prisoners of war until their status is determined otherwise by a tribunal.¹²⁶ Arguably, members of al Qaeda qualify for prisoner of war status upon capture and until tried while private forces like Blackwater risk immediate and arbitrary classification as mercenaries. Although mercenaries are still entitled to a fair trial prior to any punishment along with the fundamental guarantees provided in Article 75, this potential difference in treatment between terrorists and private contractors is indicative of the relative severity of Article 47.¹²⁷ Thus, despite Article 47’s possible status as customary international law, its vagueness and the subjectivity inherent in the determination of proper motivation means that it fails to establish a well-defined and effective principle of IHL that is sufficient for regulating the use of modern private forces.

Although Protocol I has not been ratified by some states that export or employ private force like the United States, the International Committee of the Red Cross (ICRC) has determined that Article 47 has reached status as customary international law. The ICRC’s *Customary International Humanitarian Law*, “intended to articulate and justify the rules of customary [IHL]”¹²⁸ has determined that: “Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status.”¹²⁹ Although the ICRC Report is not dispositive of customary international law, the authors identify numerous military manuals, including that of Israel, which is not a party to Protocol I, supporting the deprivation of prisoner of war status for mercenaries while noting protests from the United States.¹³⁰ But the authors carefully narrow this deprivation of status under customary international law to only those individuals who meet the definition of “mercenary” in Protocol I.¹³¹ Some scholars question this deprivation of status as a “significant departure from customary international law, which traditionally gave ‘mercenaries the same status as the members of the belligerent force for which they were fighting.’”¹³² They argue that “Protocol I singled out mercenaries based on a seemingly visceral reaction against their use during two decades in post-colonial Africa” rather than a codification of customary international law.¹³³ The ICRC Report recognizes that Article 47

¹²³ *Id.* at 178.

¹²⁴ *Id.* at 178–79.

¹²⁵ *Id.* at 178.

¹²⁶ Protocol I, *supra* note 109, art. 45; *see also id.* art. 46 (providing that spies are also not provided with prisoner of war status).

¹²⁷ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 393–94 (2005) [hereinafter ICRC Report] (providing that states may also choose to provide mercenaries with prisoner of war status).

¹²⁸ Leah Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT’L L. 223–25 (2006) (“Customary law is an ‘international custom, as evidence of a general practice accepted as law,’ resulting from ‘a general and consistent practice of states followed by them from a sense of legal obligation.’ Thus, a principle is considered customary law if many states across the world feel legally obliged to follow that principle. This sense of legal obligation is commonly referred to as *opinio juris*.” (quoting Statute of the International Court of Justice art. 38(b), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993) and (quoting Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987)).

¹²⁹ ICRC Report, *supra* note 127, at 393–94.

¹³⁰ *Id.* at 391–92.

¹³¹ *Id.* at 393.

¹³² Milliard, *supra* note 80, at 35–36 (quoting H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflict*, 72 AM. J. INT’L L. 37, 55 (1978)).

¹³³ *Id.* at 38 (“Regarding moral legitimacy and foreign intervention, however, it may be unfair to characterize mercenaries as fighting with unclean hands vis-a-vis local guerillas and national armies.”).

was a response to mercenary involvement in Africa and that it since has “lost much of its meaning because the [Protocol I] definition . . . is very restrictive” and that recently “mercenaries have been less stigmatized.”¹³⁴ Still, even if Article 47 has reached customary law status, its narrow definition is very difficult to apply to modern private forces.

D. THE CRIME OF MERCENARISM: ORGANIZATION OF AFRICAN UNITY AND UNITED NATIONS

Similar to Protocol I, the Convention of the Organization of African Unity (OAU) for the Elimination of Mercenarism in Africa¹³⁵ and the UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries¹³⁶ sought to regulate the status of mercenaries rather than address the underlying normative concerns. These provisions were also responses to the controversial reemergence of private force in post-colonial Africa.¹³⁷ Although the implications of these provisions are limited due to their regional nature or limited ratification, they are significant as they establish the crime of mercenarism and could have significant consequences for an individual captured within the nations and regions in which the provisions are effective.¹³⁸

Although the OAU Convention is one of the strongest conventions regarding private force, it has been largely disregarded as a “Cold War relic,” particularly for the lack of enforcement mechanisms and its failure to anticipate or restrict the hiring of private forces by African state governments seeking to maintain sovereignty.¹³⁹ The OAU Convention criminalizes being a mercenary and denies mercenaries the status as lawful combatants or prisoners of war.¹⁴⁰ In addition, it suffers from a weak legal framework due to an inadequate definition and loopholes for mercenaries that operate on the behalf of African governments.¹⁴¹ Thus, it would have even been difficult to enforce against the private firm Executive Outcomes that operated under contract for the government of Sierra Leone in 1995.

The UN Convention is significant because it also criminalizes the act of being a mercenary and establishes that mercenaries are not entitled to prisoner of war status.¹⁴² This convention represents an “elaborate hybrid of a mercenary definition . . . from predecessors of questionable legal lineage” including Article 47 of Additional Protocol I and the OAU Convention.¹⁴³ Growing out of these provisions and UN Resolutions seeking to defend the norms of national liberation and self-determination,¹⁴⁴ the UN Convention was drafted in 1989 but did not receive the required twenty-two state ratification until 2001 and still lacks support from most western states.¹⁴⁵ It is criticized as offering merely “an amalgamation of legal concepts

¹³⁴ ICRC Report, *supra* note 127, at 393–94.

¹³⁵ Convention of the OAU for the Elimination of Mercenarism in Africa, Jul. 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972) [hereinafter OAU Convention], available at <http://www.icrc.org/ihl.nsf>.

¹³⁶ International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Convention Against Recruitment].

¹³⁷ See PERCY, *supra* note 16, at 167 (explaining how the role of mercenaries in Africa in the 1960’s contributed to international law mercenary law regulations).

¹³⁸ Doswald-Beck, *supra* note 88, at 123.

¹³⁹ Abdel-Fatau Musah & J. ‘Kayode Fayemi, *Africa in Search of Security: Mercenaries and Conflicts—An Overview*, in *MERCENARIES: AN AFRICAN SECURITY DILEMMA* 34–36 (Abdel-Fatau Musah & J. ‘Kayode Fayemi eds., 2000) (citing mercenary use by the governments of Angola, Congo, and Sierra Leone).

¹⁴⁰ Milliard, *supra* note 80, at 53–54.

¹⁴¹ See *id.* at 55–56 (discussing how a private soldier, fighting for profit and serving in a mercenary group, can escape prosecution as a mercenary because he contracts to fight for an OAU state).

¹⁴² See Doswald-Beck, *supra* note 88, at 122 (explaining that PMC’s that are captured and denied POW status risk being tried for mercenarism).

¹⁴³ Milliard, *supra* note 80, at 58.

¹⁴⁴ See Frye, *supra* note 6, at 2626 (discussing five resolutions on sovereignty and the use of mercenaries adopted by the U.N. General Assembly).

¹⁴⁵ *Id.* at 2631; see PERCY, *supra* note 16 at 194–202 (describing the fear among Western states that: 1) the U.N. Convention would require states to arbitrarily restrict movement of their citizens, possibly in violation of human rights; and 2) they would be held responsible for their citizens’ actions abroad absolutely, despite practical concerns and customary law that private individuals, not states, are typically responsible for their actions abroad).

found in the OAU Mercenary Convention and Article 47.”¹⁴⁶ The UN Convention uses a similar definition of mercenary as that found in Protocol I, but it also adds a second more expansive definition that sanctions a person for participating in an “act of violence” rather than participating in an armed conflict.¹⁴⁷ This is significant as many private firms operate in states with no international armed conflict.¹⁴⁸ This requirement is qualified however, by the act of violence being aimed at “[o]verthrowing a government” or “[u]ndermining the territorial integrity of a State,” which would likely eliminate many private firms operating in Iraq or Afghanistan seeking to protect the government and territorial integrity of the state in which they operate.¹⁴⁹ The second definition also requires that the person be motivated by “private gain” and “prompted by the promise or payment of material compensation.”¹⁵⁰ While this requirement is easier to satisfy than proving “excess” compensation relative to armed forces as required in Article 47, the second definition also exempts those sent on official duty by a state, allowing for those contracted by a state agency to escape the definition.¹⁵¹ Thus, attempts by both the UN and OAU to criminalize mercenarism fail to include the operations of modern private forces in the states that are parties to these conventions. Despite the failure of the UN and OAU provisions to effectively criminalize the operations of private forces, it is important to consider the implications for members of private forces that might fail to qualify for prisoner of war status under IHL.

E. CAPTURED PRIVATE FORCES NOT QUALIFYING FOR POW STATUS

If a member of a private force is captured and determined to not qualify for prisoner of war status, they qualify for protection under the Fourth Geneva Convention of 1949 (Geneva IV) as civilians.¹⁵² Geneva IV provides “protected persons” status to those who do not qualify for prisoner of war status and are from neutral or co-belligerent states with normal diplomatic representation.¹⁵³ Those who fall outside Geneva IV and without prisoner of war status would “still have the benefit of fundamental customary rules relating to the prohibition of torture, inhumane treatment, and hostage-taking, as well as the right to a fair trial.”¹⁵⁴ Although those who qualify under Geneva IV as “protected persons” qualify for registration and visitation with the International Committee of the Red Cross as well as correspondence with family, they are not combatants and may be tried for violations of domestic law, such as murder, committed during the conflict.¹⁵⁵ They may also be interned without trial “if the security of the Detaining Power makes it absolutely necessary” while remaining subject to human rights law, but they must to be released “as soon as the reasons which necessitated his internment no longer exist.”¹⁵⁶ Thus, if members of private forces do not qualify for prisoner of war status, Geneva IV does provide some protection while in captivity despite potentially facing trial and punishment for their conduct in the conflict.

¹⁴⁶ Milliard, *supra* note 80, at 56–57.

¹⁴⁷ Scheimer, *supra* note 30, at 629–30.

¹⁴⁸ *Id.* at 630 (“The U.N. convention’s broader coverage of acts of violence, instead of just armed conflicts, would cover PMC’s because PMCs often provide security and support in countries not currently engaged in international armed conflict.”).

¹⁴⁹ UN Convention Against Recruitment, *supra* note 136, art. 1(2)(a)(i)–(ii); *see id.* at 630 (“Overall, the second definition in the U.N. Convention has broader language that could apply to PMCs where Article 47 does not, but in the end, the requirement that mercenary actions must involve undermining a government limits the entire definition.”).

¹⁵⁰ UN Convention Against Recruitment, *supra* note 136, art. 1(2)(b).

¹⁵¹ *See* Scheimer, *supra* note 30, at 630–31 (comparing the U.N. Convention to Article 47).

¹⁵² Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV], available at <http://www.unhcr.org/refworld/docid/3ae6b36d.html>; *See* Doswald-Beck, *supra* note 88, at 125 (“Those that do not benefit from POW status under the Third Geneva Convention are protected by the Fourth Geneva Convention of 1949 unless they are nationals of a neutral state or a co-belligerent state that has normal diplomatic representation in the state in whose hands they are.”).

¹⁵³ Doswald-Beck, *supra* note 88, at 125 n. 37 (discussing that those captured citizens from states with diplomatic representation would be protected by their home state).

¹⁵⁴ *Id.* at 125 n. 38 (discussing that these rights are codified in Article 75 of Protocol I).

¹⁵⁵ *Id.* at 125–26.

¹⁵⁶ *Id.* at 126 (quoting Geneva IV arts. 42 and 132–33).

F. ATTACKING PRIVATE FORCES

Although private forces that qualify as combatants may clearly be attacked, the legality of attacking private forces that qualify as civilians is debatable.¹⁵⁷ According to Protocol I Article 51 (3), “[c]ivilians shall enjoy protection [from attack] unless and for such time as they take part in hostilities.”¹⁵⁸ A civilian’s “mere participation in the war effort is not meant to be included” in the taking part in hostilities.¹⁵⁹ While interpretations may vary regarding what constitutes taking part in the hostilities, one scholar would prefer to narrow the definition to only direct acts of violence against civilians as the purpose is to “avoid deliberate attacks on civilians.”¹⁶⁰ One scenario that might satisfy this narrow definition would seem to include collateral damage to a civilian private contractor resulting from an attack on military equipment on which the contractor is working.

Since the emergence of private forces in recent conflicts, two documents – the ICRC’s Interpretative Guidance on the Notion of Direct Participation in Hostilities and the Montreux Document – have specifically considered the legality of attacking private force. The ICRC’s Interpretative Guidance recommends that:

Private contractors and employees of a party to an armed conflict who are civilians are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.¹⁶¹

The ICRC’s Interpretative Guidance had initially focused on private forces, seeking “to define the legal status of contractors and to create systems whereby they can be held accountable for abuses they commit.”¹⁶² However, the development of status of force agreements (like the one entered into between the United States and Iraq in 2008) and “best practices” for private force use suggested by the ICRC- and Swiss-sponsored Montreux Document led to a focus on “irregular” forces like Hamas and Hezbollah which had become a greater concern.¹⁶³ Under the Montreux Document – entered into by seventeen states in 2008 including the United States, United Kingdom, China, Iraq, Sierra Leone, Afghanistan, and South Africa – the status of private forces “is to be determined by International Humanitarian Law on a case-by-case basis, with particular regard to the nature and circumstances of the functions in which they are involved.”¹⁶⁴ Private forces, however, are presumed to be protected “as civilians under IHL unless they are incorporated into the regular armed forces of a state or are members of organized armed forces” and, “[a]s with other civilians under IHL . . . [private forces] may not be the object of attack, unless and for such time as they directly participate in hostilities.”¹⁶⁵ Thus, under both documents, private forces may only be targeted to the extent that they are directly participating in hostilities. A case-by-case analysis, however, would likely be required to determine whether attacks on private forces that qualify as civilians were appropriate under IHL.

¹⁵⁷ *Id.* at 127–28.

¹⁵⁸ Protocol I, *supra* note 109, art. 51(3).

¹⁵⁹ Doswald-Beck, *supra* note 88, at 128.

¹⁶⁰ *Id.* at 128–29 (discussing the legality of attacking civilians involved in logistical support or serving as guards).

¹⁶¹ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 872 INT’L REV. OF THE RED CROSS 991, 995 (2009) (Direct Participation in hostilities is defined as “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”) *available at*, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

¹⁶² Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 10 (2010).

¹⁶³ *Id.* at 10–11 (2010); Permanent Representative of Switzerland, Letter dated Oct. 2, 2008 from the Permanent Representative of Switzerland addressed to the Secretary-General of the Security Council, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document].

¹⁶⁴ Jamie A. Williamson, *Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities*, 20 DUKE J. COMP. & INT’L L. 457, 465 (2010).

¹⁶⁵ *Id.*

IV. PROPOSALS FOR REFORM

Just as the emergence of private forces in Africa in the 1960s resulted in numerous proposals and provisions attempting to utilize IHL to proscribe mercenarism, the prevalence of private forces in Africa in the 1990s and recently in Iraq and Afghanistan has resulted in a variety of proposals from scholars to regulate or even ban private force. All of these proposals reflect the influence of the norm against mercenarism and the desire to exert legitimate control over private forces and restrict their use to an appropriate cause.¹⁶⁶ Due to the transnational and mobile nature of private forces, purely domestic regulations tend to run into enforcement or jurisdictional issues and may result in a “race to the bottom” when domestic regulations of one state exceed those offered by another, causing a firm to relocate.¹⁶⁷ Just as many American corporations seek incorporation in Delaware, private forces would seek the most advantageous and least regulated jurisdiction. For this reason, a coordinated international response to regulate private force is required. If and when any attempt to regulate private force is undertaken, support from the United States – not only as a superpower but also as major a client and employer of private force – is critical to avoid undermining the scheme in a similar fashion to those included in Protocol I and the UN Convention.¹⁶⁸ Thus, while proposals to extend International Criminal Court (ICC) jurisdiction or to create a licensing scheme to regulate private force are reasonable, an IHL provision that seeks to regulate private force in accordance with the norm against mercenarism is the only proposal that is likely to ultimately succeed.

A. ICC JURISDICTION

One proposal is to provide the ICC with jurisdiction over the crime of mercenarism, specifically under Article 5(d) of the Rome Statute as a “crime of aggression.”¹⁶⁹ The jurisdiction of the ICC is derived from the consent of its treaty members, a list that does not include the United States.¹⁷⁰ Until recently, no “crime of aggression” was defined in the Rome Statute, which must first be amended for the crime to be included in the Court’s jurisdiction.¹⁷¹ In June 2010, delegates from state parties and non-state parties to the Rome Statute met in Kampala, Uganda for the Review Conference of the Rome Statute and approved an amendment defining the crime of aggression and its jurisdiction.¹⁷² It defined the crime of aggression as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression”¹⁷³ One such act is

¹⁶⁶ PERCY, *supra* note 16, at 195 (explaining the rationale behind the U.N. Convention as an almost universal condemnation of mercenaries).

¹⁶⁷ Gaston, *supra* note 12, at 241; *see also* Milliard, *supra* note 80, at 84 (comparing firm movement to jurisdictions with less regulation to the gravitating of U.S. corporations to Delaware and shipping firms to Panama).

¹⁶⁸ *See* Scheimer, *supra* note 30, at 643–44 (describing the weakened impact of international conventions due to an absence of U.S. support for regulating private force); *see also* Press Release, Security Council, U.N. Experts Visit the U.S. to Discuss Use of Private Military and Security Contractors, U.N. Press Release (July 17, 2009), *available at* <http://www.unhchr.ch/huricane/hurricane.nsf/0/68E03AFA0761EEB2C12575F6002DEC30> (“It is crucial that the U.S. Government, as a major client of these companies, demonstrates its commitment to ensure full accountability of private military and security contractors for any possible violations of international human rights and humanitarian law.”).

¹⁶⁹ Milliard, *supra* note 80, at 66–67; *see* Rome Statute of the International Criminal Court art. 5(1)(d), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] art. 5(1)(d) (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes . . . The crime of aggression.”) *available at* <http://www.icrc.org/ihl.nsf/FULL/585>.

¹⁷⁰ Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 331 (2009).

¹⁷¹ Milliard, *supra* note 80, at 67; *see* Rome Statute, *supra* note 148, art. 5(2) (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”).

¹⁷² David Scheffer, *State Parties Approve New Crimes for International Criminal Court*, ASIL INSIGHT, June 22, 2010, *available at* <http://www.asil.org/files/insight100622pdf.pdf>.

¹⁷³ Review Conference of the Rome Statute, Kampala, Uganda, May 31 – June 11, 2010, The Crime of Aggression, ¶ 2, art. 8bis(1) RC/11, Annex I (June 11, 2010) [hereinafter Kampala Amendment].

specifically identified as “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”¹⁷⁴ Although the ICC will not be able to exercise jurisdiction over this crime until at least the year 2017 or one year after ratification by thirty State parties, whichever is later, scholars have already noted the significant long-term impact of this provision.¹⁷⁵

The drafters of the Kampala Amendment looked to General Assembly Resolution 3314, which similarly defines aggression as “state – but not individual – participation in the use of force by militarily organized unofficial groups, such as mercenaries, ‘which carry out acts of armed force against another state.’”¹⁷⁶ Notably, no definition of “mercenary” is provided, so the Court would likely consider the UN Mercenary Convention, “which delineates states’ responsibilities and makes it a crime for any person to recruit, use, finance, or train ‘mercenaries, as defined’” therefore extending jurisdiction to state actors, including individuals acting in an official capacity.¹⁷⁷ Although the UN Mercenary Convention would provide a readily available framework for the ICC, the lack of broad ratification and failure to adequately define “mercenary” in accordance with the norm against mercenary use seriously undermines its authority. The obvious problems remain of extending jurisdiction to citizens of states that are not parties to the Rome Statute such as the United States, Russia, China, India, and Indonesia.

The Kampala Amendment does not provide the Court with jurisdiction over the crime of aggression when committed by a national of a non-party State or on a non-party State’s territory.¹⁷⁸ Also, the Kampala Amendment allows a State party to choose not to accept the Court’s jurisdiction for this crime, excluding its nationals and territory from the Court’s jurisdiction for this crime.¹⁷⁹ However, the United Nations Security Council may still refer any crime of aggression to the Court, thus bringing the crime within the Court’s jurisdiction.¹⁸⁰ Because many states that export or employ private force are not parties to the Rome Statute or may choose to not accept the Court’s jurisdiction for the crime of aggression, some scholars have attempted to craft theories that would extend the Court’s jurisdiction for this crime.¹⁸¹ One theory of extending jurisdiction to non-party State nationals includes the concept that “all states may exercise criminal jurisdiction over certain crimes if the crime is considered ‘prejudicial to the interest of the international community as a whole.’”¹⁸² Regardless of the validity of this theory based on “collective values” shared by the international community that results in “universal jurisdiction,” such a view has never been applied to private forces.¹⁸³ For these reasons, any attempt to use the ICC to regulate private force will be undermined by jurisdictional issues and an inadequate criminal provision to apply to those who might come before the court.

¹⁷⁴ *Id.* art. 8bis(2)(g).

¹⁷⁵ *Id.* art. 15bis(2)–(3); see Scheffer, *supra* note 172 (explaining that the new agreement’s ratification procedure may cause jurisdictional issues over crimes of aggression).

¹⁷⁶ Milliard, *supra* note 80, at 68; Kampala Amendment, *supra* note 152 art. 8bis(2) (“Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression[.]”).

¹⁷⁷ Milliard, *supra* note 80, at 68–69.

¹⁷⁸ Kampala Amendment, *supra* note 173 art. 15bis(5).

¹⁷⁹ *Id.* art. 15bis(4); see also Scheffer, *supra* note 172 (explaining that the Court does not have jurisdiction when a non-party State commits a crime of aggression).

¹⁸⁰ Scheffer, *supra* note 172.

¹⁸¹ See Jordan, *supra* note 170, at 332 (explaining how some scholars have hypothesized that anti-terrorism laws may allow the court to exercise jurisdiction over non-party nationals).

¹⁸² *Id.* at 332–33 (discussing objections by the United States to extension of jurisdiction over non-party nationals).

¹⁸³ *Id.* at 333.

B. LICENSING SCHEME

Another approach toward regulation of private force is the establishment of an international licensing scheme that would license and then regulate private forces.¹⁸⁴ Any such attempts, however, would likely be undermined by the lack of funding and consensus among states. This system would “distinguish legitimate [private forces] from the lone mercenary,” attaching a stigma to those firms that fail to become licensed as well as to those that hire unlicensed contractors.¹⁸⁵ If enacted, such a scheme might have some influence on private forces with major states or large corporate clients seeking to avoid this stigma and lead the industry as a whole toward higher standards of conduct.¹⁸⁶ While stigma may be an effective disincentive for those considering the prospect of bypassing regulation, the success of licensing schemes will ultimately depend upon oversight and enforcement mechanisms that require valuable resources to maintain.¹⁸⁷ One scholar argues that it is “unrealistic” to even consider implementation of a “large and expensive” international regime similar to the International Civil Aviation Organization (ICAO).¹⁸⁸ For this reason, inadequate funding will likely be a significant hurdle for any international licensing scheme to effectively regulate private force.

Domestic politics would also present a major hurdle for a private force licensing proposal, resulting in a failure to reach a consensus among states. The difficulty of establishing a licensing or regulatory scheme involves reaching a consensus in light of the “highly divergent interests” among those advocating for a highly restrictive regime and the business interests of private forces in client or host states such as the United States or Great Britain.¹⁸⁹ Client and host states of private force will likely not support a restrictive regulatory regime due to the strength and influence of politically powerful private force clients – both in corporations and government – as well as industry interest groups.¹⁹⁰ Conversely, states that have ratified the UN Mercenary Convention or the OAU Convention where the norm against mercenarism is strongest, will likely seek to impose a very restrictive licensing or regulatory scheme, if they even approve of a plan that openly permits the use of private force at all.¹⁹¹ States influenced by these two divergent interests are unlikely to compromise to establish and implement a functional regulatory regime or even gather sufficient funding for such an expensive venture.¹⁹² As a result, a lack of funding and consensus among states would likely undermine any attempt to establish a licensing scheme for private force.

C. IHL PROVISION

An IHL provision that seeks to regulate private force and incorporate a definition based on the norm against mercenarism is the proposal most likely to regulate private force successfully. Some scholars have promoted an IHL provision “that openly recognizes the practice of outsourcing to [private forces] for what it

¹⁸⁴ Scheimer, *supra* note 30, at 642–43.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* (explaining that under the licensing scheme countries could choose to hire illegal PMC’s but they would risk “becoming tainted” and “the stigma of being unaccredited would have an impact on their global business”).

¹⁸⁷ Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 245, 245 (Simon Chesterman & Chia Lehnardt eds., 2007).

¹⁸⁸ *Id.* at 243–44 (stating that “no grouping of global powers will be willing to invest large amounts of money and manpower in the creation and maintenance of a major regulatory body.”).

¹⁸⁹ *Id.* at 245; *see also* Gaston, *supra* note 12, at 243 (discussing inconsistencies among states such as the United States and United Kingdom seeking to regulate private force while states like South Africa seek to ban them).

¹⁹⁰ *See* INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, [http://www.ipoaworld.org/eng/\(non-profit trade association that engages in advocacy on behalf private security industry, lobbying legislatures in the United States, Europe, and Africa as well as maintaining contact with international organizations such as the UN, NATO, and African Union\) \(last visited Sep. 30, 2011\)](http://www.ipoaworld.org/eng/(non-profit+trade+association+that+engages+in+advocacy+on+behalf+private+security+industry,+lobbying+legislatures+in+the+United+States,+Europe,+and+Africa+as+well+as+maintaining+contact+with+international+organizations+such+as+the+UN,+NATO,+and+African+Union)+%28last+visited+Sep.+30,+2011%29).

¹⁹¹ *See* PERCY, *supra* note 16, at 218, 220 (describing the norm against mercenary use as a “puritanical norm” or one that causes international actors to make “an unreflective condemnation without attention to the facts”).

¹⁹² Bearpark & Schulz, *supra* note 187, at 245 (explaining that the licensing process would be extremely difficult due to diverse interests among “the stakeholders”).

is – a strategic tactic of warfare – and requires states to develop accountability and control mechanisms that can address some of the threats posed by modern [private forces].”¹⁹³ Such an IHL provision would require “states that [use] nonstate actors as complements to military operations to establish oversight and control mechanisms that would ensure their compliance with international and domestic laws to the extent possible.”¹⁹⁴ By addressing the underlying sense of legal obligation that states only utilize private force under legitimate control and when attached to an appropriate cause, this IHL provision would likely receive greater international support and ensure that the use of private force does not become objectionable.¹⁹⁵ On the modified version of Percy’s norm-based spectrum of private force, this IHL provision would seem to permit uses of private force in the white area and ban those in the gray area as mercenarism.¹⁹⁶ Although a visual depiction of the norm against mercenarism is not exact and is subject to regional variations in the strength of the norm, the flexible application of this IHL provision would fall roughly along these lines. States would have the flexibility to address greater concerns regarding private forces in their region and other states could regulate the use of private force while still complying with IHL.¹⁹⁷ Because the permitted uses of private force in an IHL provision would be exercised under some form of legitimate control and with an elevated degree of attachment to an appropriate cause, they would be less objectionable and encourage greater compliance with IHL.

Improving private force compliance with other IHL provisions by private forces would reduce the degree to which private force is objectionable. An IHL provision regulating private force would likely provide private forces with combatant status and the right to treatment as prisoners of war. Providing this status would incentivize private forces to comply with IHL as they would also benefit from its protections.¹⁹⁸ The additional degree of oversight by armed forces or a government agency would provide an enforcement mechanism to ensure IHL compliance by private forces. The effect of greater compliance with IHL would further improve the acceptance of private forces under greater control as a legitimate use of force. Despite the potential benefits of an IHL provision regulating private force, substantial obstacles still remain that might impede ratification and implementation.

Although the same divergent interests that might impede the establishment of an international licensing scheme would also be present during the crafting of an IHL provision regulating private force, successful implementation is still possible. An IHL provision regulating private forces provides states with the “flexibility to oversee and regulate the unique contracting, outsourcing, and registration requirements of their own domestic laws.”¹⁹⁹ While some states will still be able to place significant restrictions on private force under domestic law, major exporters of private force like the United States have already taken steps toward establishing regulation that asserts greater control over private forces.²⁰⁰ This demonstrates the potential for broad support of an IHL provision that addresses the divergent interests regarding the use of private force by allowing flexible state implementation. The ICRC-sponsored Montreux Document was joined in 2008 by seventeen states – including the United States, United Kingdom, Iraq, and Afghanistan – further indicating that a consensus exists to apply IHL to private forces as well as use IHL to control private

¹⁹³ Gaston, *supra* note 12, at 240.

¹⁹⁴ *Id.* at 243.

¹⁹⁵ *Id.* at 243 (discussing the possibility that control and oversight of private force may eliminate some of the inconsistencies and disagreement).

¹⁹⁶ See SCAHILL *supra* note 54, at 230–31.

¹⁹⁷ See Gaston, *supra* note 12, at 243 (explaining that the oversight procedure “would ensure that states take a more collective approach toward the global PMSC problem . . . but still allow states a degree of flexibility”).

¹⁹⁸ See Govern & Bales, *supra* note 74, at 71 (cautioning that denying these protections, like prison of war status, might “create a disincentive to continued observance of humanitarian law . . .”).

¹⁹⁹ Gaston, *supra* note 12, at 243.

²⁰⁰ Scheimer, *supra* note 30, at 620; see also 10 U.S.C.S. § 802(a)(10) (“In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”); see also 18 U.S.C.S. § 3261-67 (*Military Extraterritorial Jurisdiction Act*).

forces in accordance with the norm against mercenary use.²⁰¹ Although some might argue that state implementation of IHL provisions involving controversial or politically sensitive issues is frequently weak, “an IHL provision [regulating private force] may still be useful in driving the issue, solidifying emerging norms, and coordinating state approaches.”²⁰² At the very least, an IHL provision would establish that private force is permissible as long as it is utilized in accordance with the norm against mercenarism. Still, implementation might not be as weak as previous IHL provisions. A movement toward regulation – rather than an outright ban – in Iraq and Afghanistan demonstrates a willingness by states in which private forces operate to recognize the legitimate uses of private force and allow their continued operation with greater accountability.²⁰³ Thus, although ratification and implementation concerns still exist, an IHL provision that addresses the underlying concerns of the norm against mercenarism presents the proposal most likely to ensure successful regulation of private force.

V. CONCLUSION

Because private forces are likely to maintain a critical role as “silent partners” to the parties in armed conflicts of the twenty-first century, an IHL provision is needed that defines “mercenary” in accordance with the norm against mercenarism and regulates the conduct of private forces in accordance with the norm. Of the existing IHL provisions and the many additional proposals offered by scholars that seek to regulate or ban mercenarism, few address the normative concerns underlying these provisions and proposals. The ineffective definitions of “mercenary” in Protocol I, the UN Convention, and the OAU Convention reflect misguided state attempts to ban the characteristics of private force perceived to be objectionable as mercenarism. The more effective answer lies in creating an IHL provision addressing this problem.

For an IHL provision to effectively regulate the use of private force and ban mercenarism, it must ensure legitimate control is exerted over private force and that private force is only utilized when it is attached to some appropriate cause. This IHL provision would therefore permit the use of Blackwater forces in Najaf in 2004, but would find the conduct in Nisour Square in 2007 objectionable and require that the private fighters be held accountable by the United States. Thus, an IHL provision based on the norm against mercenarism, rather than a linear classification of private force or a narrow definition, is the most likely proposal to receive broad international support and to effectively regulate modern private force.

²⁰¹ Montreux Document, *supra* note 163.

²⁰² Gaston, *supra* note 12, at 244.

²⁰³ *See id.* at 242. (explaining how PMSCs have some accountability to abide by regulations).

ARTICLE

PNR in 2011: *Recalling Ten Years of Transatlantic Cooperation in PNR Information Management*

Valentin M. Pfisterer*

ABSTRACT

In Fall 2011, U.S. and EU negotiators agreed on new parameters for the collection, processing, use, storage and crossborder transfer of Passenger Name Record (PNR) data. 2011 also marks the tenth anniversary of the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington D.C., which provides the historic reason for the cooperation in this area. These two events thus provide a timely basis and background against which to review the ten year history of the cooperation between the U.S. and the EU in PNR information management.

This article maps the evolution of collaboration between the U.S. and the EU with respect to the PNR program by presenting the major dimensions involved. Moreover, it provides a comprehensive framework with a particular focus on the constant struggle for a consistent EU policy as well as the creation of the U.S.-EU Agreements in 2004 and 2007. It furthermore sketches major legal and political developments that have most likely had a significant impact on the negotiations and are, as a consequence, reflected in the concrete design of the new PNR Agreement. All this leads the author to the conclusion that—as thoroughly as it may have been designed and as complete as it may seem—the new PNR Agreement will not be the end of the transatlantic PNR saga, but rather the beginning of another intriguing chapter.

* Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Prof. Armin von Bogdandy); Doctoral Candidate at the Law Faculty of the University of Leipzig (Prof. Markus Kotzur, LL.M. (Duke Univ.)). The article is based on a presentation held at the Max Planck Institute in April 2011 and was completed in the course of a research stay at University of Miami School of Law in fall 2011. The author wants to thank the University of Miami School of Law and, in particular, Professor David Abraham, for his hospitality and generosity.

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I. INTRODUCTION: TEN YEARS AFTER 9/11 AND A NEW AGREEMENT WITHIN REACH

The cooperation between the United States and the European Union in the area of counterterrorism has many faces—political, institutional, economic, social, technological, and legal, among others. Its legal dimension alone is highly complex as it covers a vast array of issues such as the use of force in armed conflicts (especially Afghanistan) and the cooperative management of information for law enforcement purposes. The cooperation in this latter area further comprises at least two loosely connected storylines, each one reflected in an acronym: SWIFT and PNR.

The former stands for Society for Worldwide Interbank Financial Telecommunication, a Belgium-based financial institution, and relates to the transatlantic transfer of financial messaging data for law enforcement purposes. The most visible elements of this storyline are the two corresponding agreements between the U.S. and the EU of 2009 and 2010.¹ The latter stands for Passenger Name Record data, specific files on every passenger and journey created by air carriers, and relates to the transatlantic transfer of information contained in these files for law enforcement purposes.² This storyline has equally gained visibility in the form of two corresponding agreements between the U.S. and the EU in 2004 and 2007.³

Although the 2007 PNR Agreement is envisaged to expire in a few years, the competent U.S. authorities and the European Commission (“Commission”), decided to renegotiate the Agreement.⁴ Only recently, these negotiations have come to an end, and a new PNR Agreement will be produced in the near future.⁵ This is, in itself, reason enough to bring transatlantic cooperation in the sharing of PNR information back to the academic and political agenda. Another reason is that the tenth anniversary of the historical reason that underlies this particular area of cooperation was to be commemorated only a short while ago. Against this backdrop, and although certainly developed from a European perspective, the present article tries to recall the cooperation between the U.S. and the EU in the context of PNR information sharing.

¹ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, 2010 O.J. (L 8) 11 [hereinafter 2009 SWIFT Agreement]; Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program 2010 O.J. (L 195) 5 [hereinafter 2010 SWIFT Agreement]. *See also* Valentin Pfisterer, *The Second SWIFT Agreement Between the European Union and the United States of America – An Overview*, 11 GER. L. J. 1173 (2010). Only recently, a first report on the implementation of the 2010 SWIFT Agreement was released by the European Commission, *Report on the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program*, Mar. 16 2011, available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/10_tftpjointreview2011/10_tftpjointreview2011en.pdf.

² For more general information on PNR data, *see* Press Release, Eur. Comm’n, (July 13, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/294&format=HTML&aged=0&language=EN>.

³ Agreement between the European Community and the United States of America on the processing and transfer of Passenger Name Record data by air carriers to the United States Department of Homeland Security 2004 O.J. (L 183) 84 [hereinafter 2004 PNR Agreement]; Agreement between the European Community and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security 2007 O.J. (L 204) 18 [hereinafter 2007 PNR Agreement].

⁴ 2007 PNR Agreement, *supra* note 3, at ¶ 9 (“This Agreement and any obligations there under will expire and cease to have effect seven years after the date of signature unless the parties mutually agree to replace it.”).

⁵ *See* Press Release, Eur. Comm’n, New EU-US agreement on PNR improves data protection and fights crime and terrorism (Nov. 17, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1368&format=HTML&aged=0&language=EN&guiLanguage=de>; as to the media coverage, *see* Nikolas Busse, *Neues Abkommen zu Fluggastdaten*, FRANKFURTER ALLGEMEINE [F.A.Z.], Nov. 9, 2011, available at <http://www.faz.net/aktuell/politik/eu-einigt-sich-mit-amerika-neues-abkommen-zu-fluggastdaten-11523193.html> (Ger.).

To this end, it will first map the scene with a particular focus on the substantive legal dimension (II). Second, it will provide a comprehensive retrospect with an emphasis on the two PNR Agreements (III). Third, it will address some selected recent developments that are likely to have determined the negotiations of the new PNR Agreement (IV). Finally, it will conclude and dare to make an outlook to the future (V).

II. MAPPING THE SCENE

Transatlantic cooperation in the context of PNR information sharing basically translates to the collection, processing, use, storage, and—most paradigmatically—crossborder transfer of PNR data. In the face of the complexity of this enterprise, the following chapter will first outline the aspects that were considered of major importance by the Commission as reflected in the corresponding Communications (A). After that, it will sketch its major controversy as far as substantial law is concerned (B).

A. MAJOR CONSIDERATIONS

When it comes to the major concerns that most likely framed the political debate on the transatlantic cooperation on PNR, two Communications released by the Commission can give some guidance.⁶ To a certain degree, they shed light on the considerations that determined and still determine the decision-making of the Commission in this context.

In December 2003, the Commission transmitted a communication on the transfer of air passenger name record data (“2003 PNR Communication”) to the Council of the European Union (“Council”) and the European Parliament (“Parliament”).⁷ In this document, it identified seven overarching aspects that were to be given due weight in the PNR context.⁸ These aspects were:

[T]he fight against terrorism and international crime, the right to privacy and the protection of fundamental civil rights, the need for airlines to be able to comply with diverse legal requirements at an acceptable cost, the broader EU-U.S. relationship, the security and convenience of air travellers, border security concerns, [and] the truly international, indeed world-wide, scope of these issues.⁹

In its communication on the global approach to transfers of passenger name record data to third countries from September 2010 (“2010 PNR Communication”),¹⁰ the Commission basically confirmed the validity of these concerns.¹¹ It listed the five reasons underlying it revised its global approach as follows: the “[f]ight against terrorism and serious transnational crime,”¹² the effort to “[e]nsure the protection of personal data and privacy,”¹³ the “[n]eed to provide legal certainty and streamline the obligations on air carriers,”¹⁴ the attempt to “[e]stablish general conditions aimed at ensuring coherence and further developing an international approach,”¹⁵ and the “[c]ontribution in increasing passenger

⁶ See Commission of the European Communities, *Communication from the Commission to the Council and the Parliament, Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach*, COM (2003) 826 final [hereinafter Comm. of Dec. 16, 2003]; European Commission, *Communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries*, COM (2010) 492 final [hereinafter Comm. of Sept. 21, 2010].

⁷ Comm. of Dec. 16, 2003, *supra* note 6.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ Comm. of Sept. 9, 2010, *supra* note 6, at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

convenience.”¹⁶ In addition, it named three general considerations as relevant: the “[s]hared security interest,” the “[p]rotection of personal data,” and “[e]xternal relations.”¹⁷

These aspects already convey a certain impression of the complexity of the entire issue. It can be assumed, however, that there are additional considerations that played and still play a significant role although they may not be meant for the public. Among those most likely is the relation—in other words, the distribution of power—between the different EU institutions as well as between the EU and its Member States.

B. SECURITY VS. PRIVACY

As pointed out above, the transatlantic cooperation in the PNR context concretely refers to the collection, processing, use, storage, and transatlantic transfer of PNR data. The purpose of these actions is to fight terrorism and serious crime.¹⁸

The fight against terrorism and serious crime is indeed one of the major goals of the EU. The EU Treaty (“TEU”) states that the EU:

[S]hall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.¹⁹

The same article transfers that goal to the “relations [of the EU] with the wider world” and urges it to “uphold and promote its values and interests and contribute to the protection of its citizens.”²⁰

The fight against terrorism and serious crime, however, does not take place in a legal vacuum. The EU is attached to “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.”²¹ This means that the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (“ChFREU”).²² Furthermore, “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”²³ Among those fundamental rights is the right to respect for private life²⁴ as well as the right to protection of personal data.²⁵ In its often-cited judgment in the *Niemietz* case of 1992, the European Court of Human Rights (“ECtHR”) held that article 8 of the ECHR:

¹⁶ *Id.* at 6–7.

¹⁷ *Id.* at 7.

¹⁸ 2007 PNR Agreement, *supra* note 3, Preamble, ¶ 1 (“Desiring to prevent and combat terrorism and transnational crime effectively as a means of protecting their respective democratic societies and common values.”).

¹⁹ Consolidated Version of the Treaty of European Union art. 3, Mar. 30, 2010, 2010 O.J. (C 83) 17 [hereinafter TEU].

²⁰ *Id.* The corresponding policies are reflected most explicitly in European Council, *A Secure Europe in a Better World: European Security Strategy*, (Dec. 12, 2003), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>; and European Commission, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM (2010) 673 final (Nov. 22, 2010), available at http://ec.europa.eu/commission_2010-2014/malmstrom/archive/internal_security_strategy_in_action_en.pdf [hereinafter EUISSA 2010].

²¹ TEU, *supra* note 19, at Preamble.

²² *Id.* at art. 6.

²³ *Id.*

²⁴ See Charter of Fundamental Rights of the European Union art. 7, 2010 O.J. (C 83) 389 [hereinafter ChFREU] (“[e]veryone has the right to respect for his or her private and family life, home and communications.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950 [hereinafter ECHR] (“[e]veryone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

[D]oes not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life.’ However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.²⁶

Despite the uncertainty as to the concrete scope of the provision, the ECtHR found it to be its essential object and purpose “to protect the individual against arbitrary interference by the public authorities.”²⁷ In light of and consistent with this broad perception of privacy, the ECtHR turned the collection, processing, use and storage of personal data into a question of fundamental rights in general and the right to respect for private life in particular.²⁸ The European Court of Justice (“ECJ”), in turn, appropriated the corresponding jurisprudence of the ECtHR, including its concept of privacy.²⁹ Although the ChFREU, other than the ECHR, contains a *specific right to the protection of personal data in Article 8, the ECJ keeps highlighting the close connection between the right to protection of personal data and the right to respect for private life*.³⁰

Against this backdrop, transatlantic cooperation in the sharing of PNR information reflects the classical dichotomy between security and privacy.³¹ Security has to be achieved by the vast collection of personal data without suspicion by public authorities for law enforcement purposes. Privacy is a sphere that is particularly sensitive to intrusion by public authorities and, therefore, to be protected by the “most comprehensive of rights and the right most valued by civilized men”³²—the right to privacy.³³

III. LOOKING BACK

This underlying controversy has surfaced repeatedly in the history of the transatlantic cooperation in the PNR context. Finding the right balance between security and privacy has often turned out to be a difficult challenge – not only as regards the negotiation and adoption of the two PNR Agreements between the U.S. and the EU (C), but also as regards the coordination between the EU institutions (B). If the U.S. authorities that are the major advocates for security, this is once more due to the legacy of 9/11 (A).

²⁵ See ChFREU, *supra* note 24, at art. 8 (“[e]veryone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.”).

²⁶ Niemietz v. Germany, 251 Eur. Ct. H.R. (ser. A) at ¶ 29 (1992).

²⁷ See Niemietz, 251 Eur. Ct. H.R. at ¶ 31. See also, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at ¶ 31 (1979).

²⁸ See Leander v. Sweden, 9 Eur. Ct. H.R. 433 (1987); Kopp v. Switzerland, App. No. 23223/94, 27 Eur. H.R. Rep. 91 (1999); Amann v. Switzerland, 30 Eur. Ct. H.R. 843 (2000); Rotaru v. Romania, 8 Eur. Ct. H.R. 449 (2000); Marper v. United Kingdom, 2008 Eur. Ct. H.R. 1581 (2008).

²⁹ See, e.g., Joined Cases C-465/00, C-138/01, & C-139/01, Rechnungshof v. Österreichischer Rundfunk and others, 2003 E.C.R. I-4989, ¶¶ 73–75; Joined Cases C-92/09 & C-93/09, Volker und Marcus Schecke GbR & Hartmut Eifert v. Land Hessen & Bundesanstalt für Landwirtschaft und Ernährung, 2010 E.C.R. I-0000, ¶ 59.

³⁰ Schecke, 2010 E.C.R. at ¶ 47 (“That fundamental right is closely connected with the right to respect of private life expressed in Article 7 of the Charter.”).

³¹ Arthur Rizer, *Dog Fight: Did the International Battle over Airline Passenger Name Records Enable the Christmas-Day Bomber?*, 60 CATH. U. L. REV. 77, 79–83 (2010); Alenka Kuhelj, *The Twilight Zone of Privacy for Passengers of International Flights between the EU & USA*, 16 U.C. DAVIS J. INT’L L. & POL’Y 383, 388–393 (2010).

³² Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J., dissenting).

³³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a comprehensive study of the most important conceptions of privacy as regards U.S. Constitutional law and U.S. Supreme Court jurisprudence, see Daniel Solove, *Conceptionalizing Privacy*, 90 CALIF. L. REV. 1087 (2002). For a transatlantic comparison, see James Whitman, *Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1151 (2004).

A. 9/11 AS THE HISTORICAL REASON

The PNR saga began in winter 2001, shortly after the terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington D.C., on September 11, 2001.³⁴ As a reaction to those terrorist attacks, the U.S. Government engaged in counter-terrorism activities of all kinds in the following months and years.³⁵ The U.S. Congress, in particular, enacted a series of laws aimed at the fight against terrorism.³⁶ In this context, air carriers operating flights to, from, or through the U.S. were obliged to grant the competent U.S. authorities access to PNR data contained in their reservation and departure control systems.³⁷ The goal of this legislation was “[t]o improve aviation security” and “[t]o enhance the border security of the United States.”³⁸ The Commission soon became aware of the potential clash of the legislation adopted by the U.S. Congress and the corresponding obligations of the air carriers on the one hand and data protection principles as laid down in EU law on the other.³⁹ As a consequence, it engaged in negotiations with the U.S. authorities to solve these problems and establish a sound legal framework for the respective obligations of the air carriers.

However, apart from the transatlantic negotiations, controversies within the institutional structure of the EU turned the corresponding decision-making into a difficult enterprise.

B. THE CONSTANT STRUGGLE FOR A CONSISTENT EU POLICY

The struggle for a consistent EU policy is again being reflected through the two PNR Communications of the Commission and their creation and evolution.

1. *The 2003 PNR Communication*

The EU Parliament certainly welcomed the fact that a dialogue was opened between the U.S. and the EU on the issue. Apparently, however, it did not share the reserved approach applied by the Commission. As a consequence, it adopted two corresponding resolutions in March and October 2003.⁴⁰

In the first one, it “[c]alls on the Commission to secure the suspension of the effects of the measures taken by the U.S. authorities pending the adoption of a decision regarding the compatibility of those measures with Community law” and “reserves the right to examine the action taken before the next EU-U.S.

³⁴ As to the historical dimension, see also Arthur Rizer, *supra* note 21, 83–91; Marjorie Yano, *Come Fly the (Unfriendly?) Skies: Negotiating Passenger Name Record Agreements between the United States and the European Union*, 5 J. L. & POL’Y FOR INFO. SOC’Y 479, 485–501 (2010).

³⁵ The most controversial aspects of this activity have most likely been the U.S. led interventions in Afghanistan and Iraq and the establishment of the detention camp in Guantanamo Bay (Cuba).

³⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, of 2001 (Patriot Act), Pub. L. No. 107–56 (explaining that the Act intends “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”); see David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 256–62 (2008).

³⁷ See Aviation and Transportation Security Act (ATSA) of 2001, Pub. L. No. 107–71 (codified as amended in scattered sections of 49 U.S.C.A.) [hereinafter ATSA]; see also Enhanced Border Security and Visa Entry Reform Act (EBSV) of 2002, Pub. L. 107–73 codified as amended in scattered sections of 8 U.S.C.A.) [hereinafter EBSV].

³⁸ ATSA, *supra* note 37, at preamble; EBSV, *supra* note 37, at Preamble.

³⁹ Parliament and Council, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data on the free movement of such data, 1995 O.J. (L 281) 31 [hereinafter Data Protection Directive]. To the fundamental rights dimension of data protection, as laid in section II.B.2., relevant secondary legislation is to be added, first and foremost. As to the dilemma faced by the air carriers concerned, see Megan Roos, *Safe on the Ground, Exposed in the Sky: The Battle Between the United States and the European Union over Passenger Name Information*, 14 Transnat’l & Contemp. Probs. 1137 (2005).

⁴⁰ See European Parliament Resolution on transfer of personal data by airlines in the case of transatlantic flights, 2003 O.J. (C 61) [hereinafter European Resolution of Mar. 13, 2003]; see also European Parliament Resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA, 2003 O.J. (C 81) [hereinafter European Parliament Resolution of Oct. 9, 2003].

summit.”⁴¹ In the second, it calls on the Commission, once again, to take action and “urges that a direct contact group be established between Members of the European Parliament and Members of the U.S. Congress, in order to exchange information and discuss the strategy of ongoing and upcoming issues.”⁴²

Against this as the backdrop, the Commission released the 2003 PNR Communication.⁴³ Its goal was to set out the criteria that the EU considered decisive for its future actions in the context of the transfer of PNR data.⁴⁴ In this document, the Commission first sketched the factual background of the Communication, then presented the main components of its future approach and finally laid out its elements in more detail.⁴⁵

As to the main components, the document revealed the political aspects that were to be given due consideration in the issue at hand (II.A.).⁴⁶ Thus, it prioritized the following elements as the five main components of the EU global approach: (1) “[a] legal framework for existing PNR transfers to the U.S.,”⁴⁷ (2) the “[c]omplete, accurate and timely information for passengers,”⁴⁸ (3) the replacement of the “‘pull’ (direct access by US authorities to airlines’ databases) with a ‘push’ method of transfer, combined with appropriate filters,”⁴⁹ (4) the “development of an EU position on the use of travellers’ data, including PNR, for aviation and border security,”⁵⁰ and (5) the “creation of a multilateral framework for PNR Data Transfer within the International Civil Aviation Organisation (‘ICAO’).”⁵¹ For the present article, the legal framework for the PNR transfer to the U.S. is of particular importance. In this context, the Commission claimed to have already “substantially improved” the applicable arrangements on data protection by means of its negotiations with the Bureau of Customs and Border Protection (“BCBP”).⁵² The safeguards—laid out in written Undertakings transmitted by the BCBP—now contained quantitative limits to the amount of data to be transferred, mandatory deletion requirements, a more precise and narrower tailoring of the transfer requests, a limitation of the maximum retention period, the establishment of a responsible Chief Privacy Officer (“CPO”) at the Department of Homeland Security (“DHS”) as well as an annual joint review of these safeguards.⁵³ The adequacy of the level of data protection provided for by these undertakings, however, was questioned by the corresponding opinion of the Article 29 Data Protection Working Party (“DPWP”) from June 2003.⁵⁴ For the future, the Commission would seek a more solid legal arrangement. It was to include a formal Commission Decision pursuant to art. 25(6) of the Data Protection Directive that confirms the adequacy of the level of data protection guaranteed by U.S. authorities and allows for the onward transfer of personal data as well as an international agreement.⁵⁵

In retrospect, particularly in view of the 2010 PNR Communication (2), the 2003 Communication can be said to have identified the major issues and laid ground for further development. However, in some

⁴¹ European Parliament Resolution of Mar. 13, 2003, *supra* note 40, at ¶¶ 5–6.

⁴² European Parliament Resolution of Oct. 9, 2003, *supra* note 40, at ¶ 4.

⁴³ Comm. of Dec. 16, 2003, *supra* note 6.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 3–10.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Id.*; see also Irfan Tukdi, *Transatlantic Turbulence: The Passenger Name Record Conflict*, 45 HOUS. L. REV. 587, 611–13, 620–21 (2009) (describing a multilateral framework as a potential solution to the underlying controversies).

⁵² Comm. of Dec. 16, 2003, *supra* note 6, at 5.

⁵³ *Id.* at 6–7.

⁵⁴ Article 29 Data Protection Working Party [hereinafter DPWP], *Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers’ Data* (June 13, 2003), available at http://www.statewatch.org/news/2003/jun/wp78_en.pdf; see also DPWP, *Opinion 2/2004 on the Adequate Protection of Personal Data Contained in the PNR of Air Passengers to Be Transferred to the United States’ Bureau of Customs and Border Protection (US CBP)* (January 29, 2004), available at <http://www.statewatch.org/news/2004/feb/WG29-PNR-US.pdf>.

⁵⁵ Comm. of Dec. 16, 2003, *supra* note 6, at 4.

aspects it remains in the abstract and is certainly not suitable to give solid guidance as to specific problems potentially arising in the issue.

2. *The 2010 PNR Communication*

Seven years after the release of the 2003 PNR Communication, the transatlantic PNR landscape had significantly changed (C). On the EU side, however, one well-known pattern remained unchanged: The Parliament was still not convinced by the approach applied by the Commission. Hence, in a Resolution of May 5, 2010, the Parliament called for:

[A] coherent approach on the use of PNR data for law enforcement and security purposes, establishing a single set of principles to serve as a basis for agreements with third countries; invites the Commission to present, no later than mid-July 2010, a proposal for such a single model and a draft mandate for negotiations with third countries.⁵⁶

The Commission indeed responded on September 21, 2010, and released the above-mentioned 2010 PNR Communication.⁵⁷ Seven years after the release of the 2003 PNR Communication, the Commission considered itself confronted with “new trends and challenges” as regards international PNR transfers. “The number of countries in the world developing PNR systems will most likely increase in the coming years. Furthermore, the EU gained important insight into the structure and value of PNR systems through its experience with carrying out joint reviews of the agreements with the U.S. and Canada.”⁵⁸ Because the measures envisaged in the 2003 PNR Communication had either already been implemented or were actually being implemented, the key objective of the 2010 Communication was to reconsider its strategy on the issue and to establish “a set of general criteria which should form the basis of future negotiations on PNR agreements with third countries.”⁵⁹ In the document, the Commission first addressed the factual developments of the recent years.⁶⁰ Second, it commented on international trends in the area.⁶¹ Third, it presented a revised EU approach to the matter and finally provided for a long-term perspective.⁶²

Especially with regard to the revised global approach on PNR for the EU, the document sets out in depth the various safeguards to be incorporated into future agreements. Among those are a strict purpose limitation (with respect to the use and the scope of the data), particular restrictions with regard to sensitive data, special requirements as to data security, provisions on oversight and accountability, the guarantee of a right to access, rectification, deletion and redress, limited retention periods as well as a restriction of potential onward transfers (to other government and other countries).⁶³ With respect to the long-term perspective, the Commission repeats its general dedication to a multilateral solution of the entire issue.⁶⁴

C. TRANSATLANTIC PNR AGREEMENTS

The EU approach was originally directed towards a multilateral solution which was considered “the only practical way to address international air travel issues.”⁶⁵ The approach actually put into practice,

⁵⁶ European Parliament Resolution on the launch of negotiations for Passenger Name Record agreements with the United States, Australia, and Canada, 2010 O.J. (C 81) 70, ¶ 7.

⁵⁷ Comm. of Sept. 9, 2010, *supra* note 6.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Comm. of Sept. 21, 2010, *supra* note 6, at 6–10. Regarding the safeguards in the area of data protection, there is a broad overlap between the mechanisms envisaged by the Communication (and most likely contained in the new PNR Agreement) and the 2010 SWIFT Agreement, *supra* note 1. See Valentin Pfisterer, *supra* note 1, 1173, 1185–86.

⁶⁴ Comm. of Sept. 21, 2010, *supra* note 6 at 10.

⁶⁵ *Id.* at 4. See also *Id.* at 10.

however, was bilateral and on a case-by-case basis.⁶⁶ At present, the EU has three international PNR agreements in place: with Canada (2005), the U.S. (2007) and Australia (2008).⁶⁷ Whereas the struggle of the EU for a consistent policy on PNR information sharing, looked at in isolation, already reflects the difficulty of the entire issue, the effort to establish a legally sound international agreement between the U.S. and the EU turned out to be even more challenging.⁶⁸

1. *Toward the 2004 PNR Agreement*

As alluded to in the 2003 PNR Communication, the Commission led the negotiations with the U.S. authorities with the goal of entering into an international agreement with the U.S. In the course of these talks, it apparently received sufficient commitment from its counterpart that—in its judgement—matched the requirements of an “adequate level of protection.”⁶⁹ Consequently, on May 14, 2004, it released a formal Decision pursuant to Article 25(6) of the Data Protection Directive that confirmed the adequacy of the level of protection guaranteed by U.S. authorities and allowed for the onward transfer of personal data.⁷⁰ As far as the involvement of the Parliament is concerned, a draft version of the Decision had been transmitted to it on March 1, 2004. In reaction, the Parliament adopted a corresponding Resolution on March 31, 2004, that criticized the envisaged Decision as well as the envisaged agreement in many aspects.⁷¹ Consequently, it called on the Commission “to withdraw the draft decision” and “to submit to Parliament a new adequacy-finding decision and to ask the Council for a mandate for a strong new international agreement in compliance with the principles outlined in this resolution.”⁷² In the meantime, the Parliament stated that it “reserves the right to appeal to the Court of Justice should the draft decision be adopted by the Commission” and “[r]eserves the right to bring an action before the Court of Justice in order to seek verification of the legality of the projected international agreement and, in particular, the compatibility thereof with the protection of a fundamental right.”⁷³ As neither the Commission nor the Council shared the perspective of the Parliament, the Council adopted the decision required by Article 300(2) of the then-valid EC Treaty.⁷⁴ Hence, it allowed the Agreement between the European Community and the U.S. on the processing and transfer of PNR data by air carriers to the U.S. Department of Homeland Security, Bureau of Customs and Border Protection (2004 PNR Agreement) to enter into force.⁷⁵ Beforehand, a proposal for the Council Decision had also been forwarded to the Parliament on March 17, 2004. The Parliament, however, had missed the opportunity to make a corresponding statement.⁷⁶

⁶⁶ *Id.* at 5 (stating that the Commission explains this discrepancy by the pressure from other countries is “demand driven”).

⁶⁷ Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, 2006 O.J. (L 82) 15; 2007 PNR Agreement, *supra* note 3; Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record data by air carriers to the Australian customs service, 2008 O.J. (L 213) 49. A new agreement with Australia was adopted in September 2011.

⁶⁸ As to the transatlantic dimension of the PNR saga, see Richard Rasmussen, *Suspicion of Terrorism? The Dispute between the United States and European Union over Passenger Name Record Data Transfers*, 26 WIS. INT. L. J. 551 (2008); Rizer, *supra* note 31, 83–90 (2010).

⁶⁹ The term “adequate level of protection” is a technical term defined in article 25(2) of the Data Protection Directive, *supra* note 39.

⁷⁰ European Commission, Decision on the Adequate Protection of Personal Data Contained in the Passenger Name Record of Air Passengers Transferred to the United States’ Bureau of Customs and Border Protection, 2004 O.J. (L 235) 11.

⁷¹ European Parliament, Resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records transferred to the U.S. Bureau of Customs and Border Protection, 2004 O.J. (C 103) 665.

⁷² *Id.* ¶¶ 4, 10.

⁷³ *Id.* ¶¶ 7–8.

⁷⁴ European Council, Decision of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 O.J. (L 183) 83.

⁷⁵ 2004 PNR Agreement, *supra* note 3.

⁷⁶ As to the inter-institutional difficulties in this respect, see Opinion of Advocate General Léger, Joined Cases C-317/04 & C-318/04, *Parliament v. Council and Comm’n*, 2006 E.C.R. I-4721 ¶¶ 1–16, 33–49.

2. *The 2004 PNR Agreement*

The 2004 PNR Agreement consisted of a preamble and an operative part consisting of eight paragraphs. Pursuant to the most important provision:

CBP may electronically access the PNR data from air carriers' reservation/departure control systems ("reservation systems") located within the territory of the Member States of the European Community strictly in accordance with the Decision and for so long as the Decision is applicable and only until there is a satisfactory system in place allowing for transmission of such data by the air carriers.⁷⁷

Hence, it basically permitted the CBP to access the relevant data by way of a "pull" mechanism and without major material or procedural restraints. The safeguard mechanisms included in the 2004 PNR Agreement were fragmented at best; the "importance of respecting fundamental rights and freedoms, notably privacy" was superficially acknowledged.⁷⁸ Vague references were made to the Data Protection Directive, the so-called Undertakings of the CBP from May 11, 2004, that accompanied the 2004 PNR Agreement and the above-mentioned Commission Decision that, for its part, relied on the Undertakings.⁷⁹ Then, U.S. laws and constitutional requirements were made the major standard governing the processing of the data received.⁸⁰ Finally, a joint and regular review by the BCBS and the Commission was provided for – but without any temporal or procedural framework.⁸¹

The ignorance of the doubts and objections of the Parliament by the Commission and the Council hastened the Parliament to take action and make the next move.

3. *ECJ Proceedings*

As alluded to in its Resolution from March 31, 2004, the Parliament had initiated proceedings to the ECJ on April 21, 2004, and requested its opinion on the legality of the agreement or the corresponding acts by the Commission and the Council pursuant to Article 300 (6) of the then-valid EC Treaty. However, as it was ignored by the the Commission and the Council that had finally adopted the relevant acts without a statement of the Parliament, it decided to change course. On July 9, 2004, the Parliament withdrew its request to the ECJ and initiated contentious proceedings. These proceedings aimed at the annulment of the above mentioned acts by the Commission and the Council on procedural and substantive grounds. The European Data Protection Supervisor ("EDPS") was granted leave to intervene in the proceedings in support of the Parliament.⁸²

On November 22, 2005, Advocate General Léger released a thoroughly drafted opinion that covered a wide range of the issues raised by the Parliament.⁸³ In his opinion, Léger argued that both the Commission and the Council Decision were illegal and, therefore, to be annulled by the Court.⁸⁴

In his view, the Commission Decision was to be rejected for lack of legal basis in the Data Protection Directive. The Directive, he stated, did not provide for measures concerning "public security, defence, State security . . . and the activities of the State in areas of criminal law"⁸⁵ and hence, could not serve as a suitable legal basis for the Commission Decision at hand.⁸⁶ Moreover, in his opinion, the Council

⁷⁷ 2004 PNR Agreement, *supra* note 3, preamble.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶¶ 3–5.

⁸⁰ *Id.* ¶ 4.

⁸¹ *Id.* ¶ 5.

⁸² Opinion of Advocate General Léger, Joined Cases C-317/04 & C-318/04, *Parliament v. Council and Comm'n*, 2005 E.C.R. I–2459.

⁸³ Opinion of Advocate General Léger, *supra* note 82.

⁸⁴ *Id.* at ¶¶ 284.

⁸⁵ Data Protection Directive, *supra* note 39, at art. 3(2).

⁸⁶ Opinion of Advocate General Léger, *supra* note 82.

Decision lacked a suitable legal basis as well. The provision of Article 95 of the then-valid EC Treaty, he stated, did not provide for a legal foundation for measures focusing on public security and defense such as the Council Decision at hand.⁸⁷ The most elaborate and—from a fundamental rights perspective—insightful part of Léger’s opinion, however, constitutes the assessment of the pleas that allege an infringement of the right to protection of personal data and a breach of the principle of proportionality.⁸⁸ In this context, he unfolded a thorough analysis of the 2004 PNR Agreement in light of the right to respect for private life as enshrined in Article 8 ECHR and interpreted by the ECtHR as well as the ECJ (II.B.).⁸⁹ As a result of this analysis, Léger found:

[W]hen all those safeguards are taken into account, the Council and the Commission cannot be considered to have exceeded the limits of the wide discretion which they must, in my view, be allowed for the purpose of combating terrorism and other serious crimes. It follows that the pleas alleging infringement of the right to protection of personal data and breach of the principle of proportionality are unfounded and must therefore be dismissed.⁹⁰

Beforehand, however, Léger had made a debatable argument in favor of a limited level of scrutiny in the case at hand which he consequently applied to his legal assessment.⁹¹ Nevertheless, even today, this part of Léger’s Opinion constitutes one of the most important official analyses in the context of PNR information sharing in particular and at the junction of counter-terrorism and human rights in general.

For the very proceedings, however, this part of the Opinion turned out to be—at least formally—ineffective. In its decision handed down on May 30, 2006, the ECJ struck down both the Commission Decision as well as the Council Decision—the first for lack of suitable legal basis, the second for wrong legal foundation—without further addressing questions of conformity with fundamental rights.⁹² At the same time and for reasons of legal certainty, it limited the temporary effects of the judgment so that the 2004 PNR Agreement would preliminarily stay in force and the organs involved would have to terminate it according to the procedures laid down in the very Agreement.⁹³ As a consequence, the Commission and the Council, in compliance with the judgement, terminated the Agreement a few weeks later, set back to the very beginning of its efforts in that matter.⁹⁴

4. Toward the 2007 PNR Agreement

The victory of the Parliament, however, did not last long and turned out to be pyrrhic. Following the judicial defeat, in October 2006, an interim Agreement was adopted to secure the transatlantic cooperation in the PNR context until the end of July 2007.⁹⁵ At the same time, negotiations for a new PNR Agreement were carried out and, in June 2007, the Council adopted a decision on the signing of the new Agreement.⁹⁶ By doing

⁸⁷ *Id.* at ¶¶ 126–162.

⁸⁸ *Id.* at ¶¶ 193–262.

⁸⁹ *Id.* at ¶¶ 211–262.

⁹⁰ *Id.* at ¶¶ 261–262.

⁹¹ *Id.*

⁹² *Id.* at ¶¶ 54–61, 67–70.

⁹³ *Id.* at 71–73; See also, Vanessa Serrano, *The European Court of Justice’s Decision to Annul the Agreement between the United States and European Community Regarding the Transfer of Personal Name Record Data, its Effects, and Recommendations for a New Solution*, 13 ILSA J. Int’l & Comp. L. 453 (2007).

⁹⁴ *Commission Communication to the Council, Termination of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection*, COM (2006) 335 final (June 16, 2006).

⁹⁵ Agreement between the European Union and the United States of America on the processing and transfer of passenger name record data by air carriers to the United States Department of Homeland Security, 2006 O.J. (L 298) 29.

⁹⁶ Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), 2007 O.J. (L 204) 16.

this, the Council responded to the ECJ judgment and chose Articles 24 and 38 of the then-valid EU Treaty as the corresponding legal foundation.⁹⁷ These provisions were part of the system of rules that established the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters respectively⁹⁸ and allowed the Council to conclude agreements with third countries. According to this set of rules, however, neither the Parliament nor the ECJ had anysay in the procedure of the adoption of such agreements.

5. *The 2007 PNR Agreement*

The 2007 PNR Agreement consists of a preamble and nine paragraphs. Pursuant to the core provision, “the European Union will ensure that air carriers operating passenger flights in foreign air transportation to or from the United States of America will make available PNR data contained in their reservation systems as required by DHS.”⁹⁹ The method to be applied is a “pull system” that allows U.S. authorities to access to the relevant data directly. Only after January 1, 2008, a “push system” was to be used with regard to those air carriers that dispose of the necessary technical requirements.¹⁰⁰ The most striking aspect, however, is that the Agreement is not, like the 2004 Agreement, to be perceived in combination with a Decision of the Commission and Undertakings. It is rather accompanied by a mere letter by the Secretary of Homeland Security whose intent is “to explain how the United States Department of Homeland Security handles the collection, use, and storage of Passenger Name Records.”¹⁰¹ It does, by no means, “create or confer any right or benefit on any person or party, private or public, nor any remedy other than that specified in the Agreement between the EU and the U.S. on the processing and transfer of PNR by air carriers to DHS signed in July 2007 (the Agreement).”¹⁰²

Against this backdrop, there would surely be enough grounds for doubts and objections to be raised by the Parliament or, even for the initiation of new proceedings to the ECJ. For the above-mentioned reasons, however, the latter option in particular is not at the disposal of the Parliament this time. As the 2007 PNR Agreement, pursuant to its ninth paragraph, is to expire in a few years, the Parliament seemed to have given away its influence on the issue for quite some time. However, and most likely due to the recent changes on the legal, institutional and political planes (IV), it will be able to wield its influence on the issue much earlier (IV. B).

IV. THE IMMEDIATE BACKGROUND OF THE NEW PNR AGREEMENT

There is every reason to believe that the negotiators had the lessons—learned from the rich history of the transatlantic cooperation on PNR information management—in mind when they negotiated and agreed upon the new PNR Agreement (III). Apart from that, however, certain developments of the recent past are likely to have had a significant impact on or to have even framed the negotiations and, as a consequence, be reflected in the concrete design of the new PNR Agreement.

Among those developments are the entry into force of the Lisbon Treaty (A) and the translation into practice of the corresponding legal changes by the Parliament (B) and the ECJ (C). Moreover, the Commission (D) as well as the German Federal Constitutional Court (E) may have contributed their share. Finally, there were significant changes in U.S. politics (F).

A. THE LISBON TREATY

A first aspect of the changed situation in which the negotiations on a new PNR Agreement took place is the entry into force of the Treaty of Lisbon on December 1, 2009.¹⁰³ Although it lacked the constitutional

⁹⁷ *Id.* at Preamble.

⁹⁸ TEU, *supra* note 19, art. 11–42 (as in effect 2007).

⁹⁹ 2007 PNR Agreement, *supra* note 3, ¶ 1.

¹⁰⁰ *Id.* ¶ 2.

¹⁰¹ See Letter from U.S. Sec’y of Homeland Sec. to EU (2007) (referencing 2007 O.J. (L 204) 21).

¹⁰² *Id.*

¹⁰³ TEU, *supra* note 19.

pathos of the failed Treaty establishing a Constitution for Europe, the Treaty came along with a complete overhaul of the European constitutional order. It brought about many changes to the European Treaties—among those, institutional, substantive, and procedural changes. As to the PNR context, however, two major changes are of particular importance.¹⁰⁴

First, the distribution of power within the institutional structure of the EU has been modified and, in this context, the position of the Parliament has been significantly strengthened. As a consequence, the influence of the Parliament has been reinforced in areas in which the Parliament had already had a say and it has been granted additional competencies in areas that it had been excluded from before.¹⁰⁵ With respect to the new PNR Agreement, this means that the approval of the Parliament will be required.¹⁰⁶

Second, the importance of the protection of fundamental rights, in general, and of privacy and personal data, in particular, has been underpinned. An expression of this is, amongst others, the newly worded Article 6(1) TEU that made the formerly non-binding ChFREU into binding primary law.¹⁰⁷ Under the new legal framework, the protection of privacy can not only be brought to bear by means of Article 8 ECHR, but also by Article 7 ChFREU (right to respect for private life). Moreover, the protection of personal data can be specifically called for by invoking Article 8 ChFREU (right to protection of personal data) and Article 16(1) TFEU which repeats the guarantee laid down in Article 8 ChFREU.

The shift reflected by these institutional and substantive changes was certainly not limited to the legal text in itself, but was rather put to practice by the Parliament (B) and the ECJ (C).

B. THE REJECTION OF THE 2009 SWIFT AGREEMENT BY THE PARLIAMENT

The Parliament in fact did not hesitate to make use of its new position and the increased power that came along with it. On February 11, 2010, it rejected the 2009 SWIFT Agreement between the U.S. and the EU.¹⁰⁸ The 2009 SWIFT Agreement, governed by the system of rules on the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters respectively, had been adopted by the Council on November 30, 2009 and without the consent of the Parliament. Only one day later, the Treaty of Lisbon would have entered into force and required the consent of the Parliament.¹⁰⁹ Hence, the later rejection of the SWIFT Agreement can be read as a self-conscious signal toward the U.S. as well as the Commission and the Council. In the following re-negotiations towards the 2010 SWIFT Agreement, the concerns raised by the Parliament were taken more seriously. Further, the Parliament also had the opportunity to vote on it.¹¹⁰

C. THE ECJ DECISION ON AGRICULTURAL SUBSIDIES

Similar to the Parliament, the ECJ quickly turned out to be aware of the changes the Treaty of Lisbon brought by to the European Treaties. This holds especially true with regard to the increased

¹⁰⁴ Jörg Terhechte, *Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der Europäischen Rechtsgemeinschaftodertechnischer Änderungsvertrag?*, EuR 143 (2008).

¹⁰⁵ Robert Visser, *Observations on a Change: The European Union, the Treaty of Lisbon, and the Area of Freedom, Security, and Justice*, 32 STATUTE L. REV. 77 (2011).

¹⁰⁶ Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47, at art. 218(6)[2]a [hereinafter TFEU].

¹⁰⁷ See TEU, *supra* note 19, art. 6 at ¶ 1 (“The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”), See also Juliane Kokott & C. Sobotta, *Die Charta der Grundrechte der Europäischen Union nachdem Inkrafttreten des Vertrags von Lissabon*, 37 EuGRZ 265 (2010); Elizabeth Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT’L COMP. L. 413 (2010).

¹⁰⁸ See European Parliament, *SWIFT: European Parliament votes down agreement with the US*, (Feb. 11, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674>.

¹⁰⁹ TFEU, *supra* note 106, at art. 218(6)[2]a.

¹¹⁰ See 2010 SWIFT Agreement, *supra* note 1 (referencing parliamentary approval for the 2010 Agreement on July 8, 2010), in general and the political struggles on the European side in particular; See also Valentin Pfisterer, *supra* note 1, at 1177–79 (2010) (referencing parliamentary approval for the Agreement and the political struggles on the European side in particular).

importance of the protection of fundamental rights.¹¹¹ As far as the increased protection of personal data in particular is concerned, the ECJ already had a chance to forcefully bring its corresponding awareness to bear.¹¹²

In the underlying case, the ECJ had to decide whether the publication of certain information about the beneficiaries of EU agricultural subsidies as provided for by EU secondary law was in conformity with EU primary law.¹¹³ The relevant provisions of secondary law had established that certain personal information (including the full name, the postal code, and the municipality of residence) and certain financial information (including the amount of payments received) were to be disclosed to the general public.¹¹⁴ In its judgment from November 19, 2010, the Court invoked the Charter as the relevant yardstick, declared the provisions as against Articles 7 and 8 ChFREU insofar as natural persons were concerned and correspondingly annulled them.¹¹⁵ The decision has provoked a lively political and academic debate on the proper balance of EU spending transparency and the protection of personal data.¹¹⁶ In any event, the ECJ decision confirms both the determination of the ECJ to translate the substantive changes of the Treaty of Lisbon into practice as well as to hold up fundamental rights protection in politically sensitive circumstances.¹¹⁷

D. INTERNAL EU LEGISLATION

The fourth consideration refers to actions taken by the EU legislature with regard to the implementation of a European PNR system. In the 2004 PNR Agreement, the EU insinuated the possibility of establishing its own system of collection, processing, use, storage, and transfer of PNR data:

In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current travel itinerary includes a flight to or from the European Union, DHS shall, in so far as practicable and strictly on the basis of reciprocity, actively promote the cooperation of airlines within its jurisdiction.”¹¹⁸

The same provision can be found in the 2007 PNR Agreement.¹¹⁹

¹¹¹ Presidents Costa and Skouris, Joint Declaration (Jan. 17, 2011), available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf.

¹¹² EUISSA, *supra* note 20.

¹¹³ *Id.*

¹¹⁴ Council Regulation No. 1290/2005 on the financing of the common agricultural policy, 2005 O.J. (L 209) 1 and Commission, Regulation No. 259/2008 laying down detailed rules for the application of Council Regulation (EC) No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), 2008 O.J. (L 76) 28.

¹¹⁵ EUISSA, *supra* note 20, at 89.

¹¹⁶ See Ferdinand Wollenschläger, *Budgetöffentlichkeit im Zeitalter der Informationsgesellschaft*, 135 ARCHIV DES OEFFENTLICHEN RECHTS, 363 (2010); Stefan Brink and Heinrich Wolff, *Anmerkung zu Eugh (C-92/09 - C-93/09)*, JZ 206 (2011); Friederike Dratwa und Jana Werling, *Die erste Grundrechtsprüfung anhand der Charta der Grundrechte der Europäischen Union – oder: Aller Anfang ist schwer*, Eur. L. R. 23 (2011); Annette Guckelberger, *Veröffentlichung der Leistungsempfänger von EU-Subventionen und unionsgrundrechtlicher Datenschutz*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 126 (2011); Wolfgang Kilian, *Subventionstransparenz und Datenschutz*, NEUE JURISTISCHE WOCHENSCHRIFT 1325 (2011); Markus Kotzur, *Der Schutzpersonenbezogener Daten in der europäischen Grundrechtsgemeinschaft*, 38 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 105 (2011).

¹¹⁷ See Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council of the EU, 2008 E.C.R. I-06351 (providing an example of the substantive changes of the Treaty of Lisbon as well as protecting fundamental rights in politically sensitive circumstances).

¹¹⁸ 2004 PNR Agreement, *supra* note 3, Preamble, ¶ 6.

¹¹⁹ *Id.* ¶ 5.

It should not have come as a surprise when the Commission, on November 6, 2007, released a “Proposal for a Council Framework Decision on the use of Passenger Name Record for law enforcement purposes.”¹²⁰ It provided for “the making available by air carriers of PNR data of passengers of international flights to the competent authorities of the Member States, for the purpose of preventing and combating terrorist offences and organised crime, as well as the collection and retention of those data by these authorities and the exchange of those data between them.”¹²¹ The core provision established:

Member States shall adopt the necessary measures to ensure that air carriers make available the PNR data of the passengers of international flights to the national Passenger Information Unit of the Member State on whose territory the international flight referred to is entering, departing, or transiting, in accordance with the conditions specified in this Framework Decision.¹²²

Despite the safeguard mechanisms contained in the 2007 Proposal (especially Art. 11 and 12 of the 2007 Proposal), it was confronted with fierce criticism by the Parliament.¹²³ Moreover, many doubts and objections were raised by experts on fundamental rights and data protection such as the EDPS,¹²⁴ the DPWP,¹²⁵ and the European Union Fundamental Rights Agency (FRA).¹²⁶ The EDPS in particular forcefully lamented the “move towards a total surveillance society.”¹²⁷ It highlighted the “major impact in terms of data protection of the present proposal” and stated that it is, under the present circumstances, “not in conformity with fundamental rights, notably Article 8 of the Charter of the Fundamental Rights of the Union, and should not be adopted.”¹²⁸ Finally, it made a wise suggestion of a political nature:

“[t]he EDPS notes that the present proposal is made at a moment when the institutional context of the European Union is about to change fundamentally. The consequences of the Lisbon Treaty in terms of decision making will be fundamental, especially with regard to the role of the Parliament. Considering the unprecedented impact of the proposal in terms of fundamental rights, the EDPS advised not to adopt it under the present Treaty Framework, but to ensure it follows the co-decision procedure foreseen by the new Treaty. This would strengthen the legal grounds on which the decisive measures envisaged in the proposal would be taken.”¹²⁹

Indeed, the adoption of the 2007 Proposal was rendered impossible when the Treaty of Lisbon entered into force on November 1, 2009, and, amongst others, abolished the legal instrument of a Council Framework Decision.

¹²⁰ *Commission Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, COM (2007) 654 (Nov. 6, 2007).

¹²¹ *Id.* art. 1.

¹²² *Id.* art.5(1).

¹²³ Resolution on the Proposal for a Council Framework Decision on the use of Passenger Name Record for Law Enforcement Purposes, Eur. Parl. Doc. P6_TA 0561 at 5 (2008), (“strong reservations as to the necessity for and added value of the proposal”) *see also* Nicolas Busse, *Widerstand gegen Speicherung von Fluggastdaten*, F.A.Z., April 15, 2008 available at <http://www.faz.net/aktuell/politik/europaeische-union/rat-und-eu-parlament-widerstand-gegen-speicherung-von-fluggastdaten-1547454.html> (showing corresponding media coverage).

¹²⁴ Opinion on the Draft Proposal for a Council Framework Decision on the Use of Passenger Name Record Data for Law Enforcement Purposes, 2008 O.J. (C 110) 1.

¹²⁵ DPWP and Working Party on Police and Justice, Joint Opinion on the Proposal for a Council Framework Decision on the use of Passenger Name Record for Law Enforcement Purposes, Presented by the Commission on 6 November 2007, and 18 December 2007 available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp145_en.pdf.

¹²⁶ Opinion of the on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) Data for Law Enforcement Purposes available at http://fra.europa.eu/fraWebsite/attachments/FRA-opinion-PassengerNR_EN.pdf (last accessed on: October 16, 2011).

¹²⁷ Kadi, *supra* note 117, at 35.

¹²⁸ *Id.* at 112.

¹²⁹ ChFREU, *supra* note 24, at 15.

Consequently, on February 2, 2011, the Commission presented a “Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime.”¹³⁰ The 2011 Proposal provides for “the transfer by air carriers of Passenger Name Record data of passengers of international flights to and from the Member States, as well as the processing of that data, including its collection, use, and retention by the Member States and its exchange between them.”¹³¹ Pursuant to the core provision, “Member States shall adopt the necessary measures to ensure that air carriers transfer ('push') the PNR data as defined in Article 2(c) and specified in the Annex, to the extent that such data are already collected by them, to the database of the national Passenger Information Unit of the Member State on the territory of which the international flight will land or from the territory of which the flight will depart.”¹³² Hence, it establishes, in principle, a system of information gathering, use, and exchange similar to the one envisaged by the 2007 Proposal. The 2011 Proposal claims, however, to take into account the critical opinions expressed on the 2007 Proposal by the Parliament as well as the experts on fundamental rights and data protection mentioned above.¹³³ And indeed, several modifications can be found that reflect an increase of the level of data protection compared to the safeguards provided for by the 2007 Proposal. Nevertheless, the 2011 Proposal has equally been confronted with severe criticism by experts on fundamental rights and data protection.¹³⁴ The so-called Meijers Committee, e.g., concluded with particular force:

Considering the risks of violation of non-discrimination, privacy and data protection, and the freedom of movement of EU citizens and third-country nationals, together with the failure to address its necessity and added value (and the high costs for the individual Member States and air transport organisations), the Meijers Committee recommends the withdrawal of the proposed PNR Directive.¹³⁵

¹³⁰ *Commission Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, COM (2011) 32 final (Feb. 2, 2011); see Evelin Brouer, *Ignoring Dissent and Legality: The EU's proposal to share the personal information of all passengers*, in: *Justice and Home Affairs*, CEPS Liberty and Security in Europe, (2011), available at <http://www.ceps.be/book/ignoring-dissent-and-legality-eu's-proposal-share-personal-information-all-passengers>.

¹³¹ *Id.* at Art.1(1).

¹³² *Id.* at Art.6(1).

¹³³ Explanatory Memorandum, *Commission Proposal of 2 February 2011*, *supra* note 106, at 6.

¹³⁴ Peter Hustinx, *Opinion of the European Data Protection Supervisor on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* (March 25, 2011), available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf; Jacob Kohnstamm, *Opinion 10/2011 on the Proposal for a Directive of the European Parliament and of the Council on the Use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime* (April 5, 2011), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp181_en.pdf; *Opinion on the Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* COM (2011) 32 (June 14, 2011), available at <http://fra.europa.eu/fraWebsite/attachments/FRA-PNR-Opinion-June2011.pdf>; E-mail from C. A. Groenendijk, Chairman, Meijers Committee, to Cecilia Malmstrom, Commissioner for Home Affairs, European Commission (June 21, 2011), available at <http://www.commissie-meijers.nl/assets/commissiemeijers/Commentaren/2011/CM1108%20Note%20of%20the%20Meijers%20Committee%20on%20the%20Proposal%20for%20a%20Directive%20on%20the%20use%20of%20PNR%20data%20regarding%20terrorist%20offences%20and%20serious%20crime.pdf>.

¹³⁵ *Id.* at 13.

As the 2011 Proposal is currently in the midst of the legislative procedure, little can be said about the final outcome. However, recent media reports insinuate that there will be an expansion of the scope of the 2011 Proposal rather than a limitation.¹³⁶

E. BVERFG DECISIONS

In addition to these developments on the EU level, relevant developments at the junction of the EU level and the Member State level have to be added to the picture. Among these are two decisions handed down by the German Federal Constitutional Court (BVerfG) in 2009 and 2010.¹³⁷ The background for the decisions is the constant struggle between the ECJ and the national Constitutional Courts of the Member States, first and foremost the BVerfG, about the final say in matters of European integration.¹³⁸

On June 30, 2009, the BVerfG handed down a decision on the constitutionality of the Treaty of Lisbon (more precisely, of the German legislation aimed at its implementation).¹³⁹ *It established that some specific substantive areas constituted essential components of the “Constitutional identity” (Verfassungsidentität) of the Federal Republic of Germany and that these areas were not at the disposal of the EU.*¹⁴⁰ *Not even one year later*, on March 2, 2010, the BVerfG struck down major parts of the German legislation aimed at the implementation of the Data Retention Directive as unconstitutional.¹⁴¹ In this decision, the *BVerfG established*:

[I]t is part of the Constitutional identity of the Federal Republic of Germany that the citizen’s exercise of their freedoms is not totally being observed and registered By implementing a system of precautionary retention of telecommunication data, the possibility to implement other measures of precautionary collection of data is significantly reduced – also by way of the European Union.¹⁴²

¹³⁶ “Großbritannien will Flugpassagierdaten-Speicherungsausweiten”, SPIEGEL ONLINE, March 3, 2011, available at <http://www.spiegel.de/reise/aktuell/0,1518,748772,00.html> (discussing the pressure of the UK to expand the scope of the 2011 Proposal to EU internal flights as well as train and ship carriers).

¹³⁷ [BVerfG] [The Federal Constitutional Court] June 30, 2009, Lisbon (Ger); Joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 – BVerfGE 123, 267 and BVerfG, Judgment of March 2, 2010 (*Data Retention*) – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08) available at www.bundesverfassungsgericht.de.

¹³⁸ Although the struggle certainly has a political dimension, it unfolds in the area of legal conceptions. In a few words: the ECJ perceives the European Treaties as an “independent source of law” that prevails over national law including national constitutional law. See Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585; see also Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125. The BVerfG, in contrast, perceives European law as derivative of national law and, hence, in principle subordinate to national constitutional law. E.g. Bundesverfassungsgericht [BVerfG] [The Federal Constitutional Court] October 12, 1993, *Maastricht* (Ger.); see 2 BvR 2134, 2159/92; see also Entscheidungen Des Bundesverfassungsgerichts [BVerfGE] [The Federal Constitutional Court] 89, 155 (Ger.). As to a contribution that aims at a conceptually sound conciliation of these concepts under the actual framework of the Treaty of Lisbon. See Armin von Bogdandy and Stephan Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag – Zur unionsrechtlichen Rollen nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs*, 70 HEIDELBERG J. INT’L L. 701 (2011).

¹³⁹ [BVerfG] [Federal Constitutional Court] June 30, 2009, available at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html> (Ger.); see also *supra* text accompanying note 111; see generally Christoph Schonberger et al., *The Federal Constitutional Court’s Lisbon Case*, 10 GER. L. J. 1201-308 (2009).

¹⁴⁰ *Id.* at 218–19, 239–41.

¹⁴¹ [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, available at <http://www.bverfg.de/pressemitteilungen/bvg10-011en.html> (Ger.); see also *supra* text accompanying note 111. See, e.g., Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC, 2006 O.J. (L 105) 54. See generally Christian DeSimone, *Pitting Karlsruhe against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive*, 11 GER. L. J. 291 (2010).

¹⁴² *Id.* at 218 (personal translation of the text).

By saying this, the BVerfG sent a clear signal to Brussels, Strasburg, and Luxemburg on its determination to protect the German Constitutional identity against a potential intrusion by the Union.¹⁴³

F. MAJOR CHANGES IN U.S. POLITICS

Whereas many of the developments on the European side can be traced back to the entry into force of the Treaty of Lisbon, the most important developments on the U.S. side are related to the presidential election held in 2008 and, hence, of a genuinely political nature.

On November 4, 2008, Illinois Senator Barack Obama was elected as the forty-fourth President of the United States. On January 20, 2009, he succeeded George W. Bush, who had controlled the fate of the country since January 2001. The cooperation between the U.S. and the EU in the area of counterterrorism in general and in the context of PNR information sharing in particular appears to have been relatively troublesome. As regards to the latter, the 2003 PNR Communication conveys an impression of how difficult the cooperation between the Bush Administration and the EU sometimes must have been:

The Commission had asked the U.S. authorities concerned to suspend the enforcement of their requirements until a secure legal framework had been established for such transfers. In the light of the U.S. refusal, the option of insisting on the enforcement of law on the EU side would have been politically justified, but it would not have served the above objectives. It would have undermined the influence of more moderate and co-operative counsels in Washington and substituted a trial of strength for the genuine leverage we have as co-operative partners.¹⁴⁴

Against this backdrop, there is every reason to believe that the arrival of the Obama Administration to the White House, in the eyes of the primary institutions of the EU, came along with the hope for and the expectation of a more accessible climate in future cooperation. Correspondingly, the European Council expressed that “[t]he arrival of a new U.S. administration is an opportunity for giving a fresh impetus to EU-U.S. relations which are more important than ever.”¹⁴⁵ More specifically, it stated that it looked forward “to working with the US in the fight against terrorism, in full respect of human rights and international humanitarian law.”¹⁴⁶ Although not less determined than the Bush Administration, the Obama Administration in fact seems to be more aware of the concerns of its allies. After all, the Obama Administration and the EU managed to negotiate and to adopt three important agreements in the area of interest here during the last two and a half years: the 2009 and 2010 SWIFT Agreements as well as the new PNR Agreement.¹⁴⁷

¹⁴³ But see, [BVerfG] [Federal Constitutional Court] July 6, 2010, (Ger.), available at www.bundesverfassungsgericht.de (decision in *Honeywell* case revealing a more reconciliatory attitude).

¹⁴⁴ Commission, Communication of December 16, 2003, *supra* note 6, at 5.

¹⁴⁵ Press Release, Eur. Council, *The Prague meeting of EU Heads of State and Government with the U.S. President*, 1 (Apr. 5, 2009), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107130.pdf.

¹⁴⁶ Eur. Council, *supra* note 137, at 4.

¹⁴⁷ The National Security Strategy of 2010 (“NSS 2010”) constitutes another visible example of the emphasis the Obama Administration puts on international cooperation and multilateralism, see White House, National Security Strategy, (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, particularly pp. 40-50. As to selected legal aspects of the NSS 2010, see Valentin Pfisterer, *Die nationale Sicherheitsstrategie der Vereinigten Staaten von Mai 2010 – ein Bericht*, 70 Heidelberg Journal of International Law 735 (2010) and Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of “Necessary Force”* 15 Journal of Conflict & Security 403 (2011); see Marjorie Yano, *supra* note 25 (suggesting an approach the Obama Administration should take to the negotiation of a future PNR agreement).

V. CONCLUSIONS, THE NEW PNR AGREEMENT, AND A LOOK AHEAD

The transatlantic cooperation in the PNR context is closely linked to the old dichotomy between security and privacy. Despite that—or simply because of it—it is a highly complex enterprise of a truly multidimensional nature. Just the legal dimension and its context help to prove the complexity of the issue: the two Commission Communications and the corresponding resolutions of the Parliament reflect the conflicting interests involved in the quest of the EU for a sound legal framework for the crossborder transfer of PNR data. Further, the two PNR Agreements between the U.S. and the EU (plus one interim Agreement), one of them struck down by the ECJ, display the great dynamics involved in the transatlantic dimension of the crossborder information sharing. Recent developments have brought further aspects into the already complex picture. Two things, however, have become clear as the transatlantic PNR saga has unfolded during the last ten years: i) the steady conviction of the U.S. Administration as well as the Commission and the Council to maintain and extend the use of PNR data for law enforcement purposes; and ii) the persistent concerns of the Parliament and data protection experts as to the adequacy of the level of data protection guaranteed by the relevant legal framework.¹⁴⁸

These patterns are also reflected in the new PNR Agreement that will be produced in the following weeks and months. The new PNR Agreement is said to represent “a big improvement over the existing Agreement from 2007.”¹⁴⁹ Moreover, it is said to bring: “more clarity and legal certainty to both citizens and air carriers. It ensures better information sharing by U.S. authorities with law enforcement and judicial authorities from the EU, it sets clear limits on what purposes PNR data may be used for, and it contains a series of new and stronger data protection guarantees.”¹⁵⁰ This refers, among others, to the limitation of the maximum retention period, the depersonalization of the data after a given period of time as well as the application of the “push” method as a general principle.¹⁵¹

With that said it seems likely that the new PNR Agreement does indeed constitute a step forward in the areas of privacy and data protection. In the light of the history of transatlantic cooperation in PNR information sharing, it can be assumed, however, that it still contains provisions that have the potential to cause a fierce legal and political debate. Hence, the new PNR Agreement – as thoroughly as it may have been designed and as complete it may seem – will not be the end of the saga. It will just be the beginning of another intriguing chapter of a story that is already rich in controversy and infighting, but also in reconciliation both within the EU institutional structure as well as between the U.S. and the EU.

¹⁴⁸ With respect to the transatlantic cooperation in the PNR context, the Commission appears in fact to be stuck in a position between U.S. authorities pushing for a more effective mechanism and the EU Parliament pushing for a higher level of data protection. Hence, it is remarkable that it is just the Commission that – as regards internal EU legislation – keeps pushing hard for the adoption and implementation of pieces of legislation with a disputable record in terms of data protection. Among those are not only the 2011 Proposal, *but see* Data Retention Directive, *supra* note 115; and Roland Derksen, *Zur Vereinbarkeit der Richtlinie über die Vorratsspeicherung von Daten mit der Europäischen Grundrechtecharta*, Opinion of the Research and Documentation Services of the German Bundestag, February 25, 2011, available at http://www.vorratsdaten-speicherung.de/images/rechtsgutachten_grundrechtecharta.pdf (expressing doubts about the conformity of the Data Retention Directive with EU fundamental rights).

¹⁴⁹ Eur. Comm’n, *supra* note 5 (quoting Commissioner Cecilia Malström).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

STUDENT NOTE

Habeas Corpus Outside U.S. Territory: *Omar v. Geren and Its Effects On Americans Abroad*

John Wright

ABSTRACT

The contention between habeas corpus rights and national security interests has been ongoing since the ratification of the U.S. Constitution. History proves that this relationship becomes especially precarious during times of conflict, from the U.S. Civil War and continuing through the War on Terrorism, which began in 2001.

This paper focuses on one of the most recent limitations placed on the right of habeas corpus as determined by the federal judiciary: that a writ of habeas corpus will not stay the transfer of a U.S. citizen to a foreign sovereign's authorities to face charges for alleged crimes committed within that sovereign. The author looks at how this restraint fits within the greater historical framework of the right of habeas corpus, as well as its recent evolution during the War on Terrorism. Lastly, it is determined whether or not the individual challenging the transfer has any further options regarding the appeal of his writ.

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INTRODUCTION

Habeas corpus, among the most fundamental and precious rights in our political system, remains a crucial guard against illegal or unwarranted government detention authority. The Suspension Clause in the United States Constitution dictates that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."¹ Barring extreme circumstances, the clause guarantees an individual the right to come before a court to test the legality of an arrest or commitment or obtain judicial review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence.² Despite this broad constitutional constraint, the recent case *Omar v. Geren*, from the United States District Court, District of Columbia, has established limits on the application of this right under specific circumstances, particularly for situations in the context of the War on Terror outside United States soil.³

BACKGROUND AND EARLY CASE LAW

To fully grasp the implications of the District Court's decision, one must first examine the right of habeas corpus in general, both its origin and evolution through our nation's history. A fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,⁴ the writ of habeas corpus is meant to provide for swift judicial review of alleged unlawful restraints on liberty.⁵ Indeed, it is a wise decision to allow third-party review of governmental decisions, balancing institutional authority with individual liberty.⁶ Consequently, legislation has been passed allowing courts to entertain applications for a writ of habeas corpus.⁷ Upon review of such an application, the court must either award the writ or issue an order directing the respondent to show cause as to why the writ should not be granted, unless it appears from the application that the applicant or person who is detained is not entitled to such a writ.⁸

A. HABEAS CORPUS DURING THE CIVIL WAR

This safeguard, however, is not absolute. At its core, the American constitutional government balances a constant tension between security and liberty.⁹ History provides multiple examples of habeas corpus suspension on the basis of national security. To the great dismay of some legal scholars, the President of the United States has utilized the constitutional power granted in the suspension clause to limit habeas corpus in times of war.¹⁰ During the Civil War, President Lincoln suspended the writ of habeas corpus, resulting in the military detention of more than 20,000 persons suspected of disloyalty against the Union.¹¹ Though his actions were deemed unconstitutional by one judge,¹² Lincoln was not dissuaded from continuing.¹³

¹ U.S. CONST. art. I, § 9, cl. 2.

² BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

³ See generally *Omar v. Geren*, 689 F. Supp. 2d 1, 3 (D.C. Dist. 2009).

⁴ *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

⁵ *Peyton v. Rowe*, 391 U.S. 54, 63 (1968).

⁶ Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring) ("For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.").

⁷ See Issuance of writ; return; hearing; decision, 28 U.S.C. § 2243 (1948).

⁸ *Id.*

⁹ *Hamdi*, *supra* note 6, at 545.

¹⁰ *Id.* ("...deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.").

¹¹ Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 482-83 (2005).

¹² *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861) (Taney, R.) ("The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.").

B. EX PARTE MILLIGAN—PROTECTION OF NON-MILITANTS

Upon the conclusion of the Civil War, the Supreme Court of the United States ruled on a pivotal issue surrounding habeas corpus and military tribunals.¹⁴ In *Ex Parte Milligan*, the high court determined that a military tribunal could not, at any time, try civilians or non-military individuals.¹⁵ The case centered on a United States citizen and Indiana resident, Milligan, who was arrested and charged with, among other things, conspiracy against the United States and inciting insurrection.¹⁶ The charges were brought as a result of Milligan's involvement with a secret society known as the "Order of American Knights" or "Sons of Liberty," that advocated overthrowing the Government and duly constituted authorities of the United States.¹⁷ Tried and found guilty by a military tribunal, Milligan was sentenced to death by hanging.¹⁸

The Supreme Court ruled, however, the military commission in Indiana, under the facts stated in the case, did not have jurisdiction to try and sentence Milligan.¹⁹ The court's reasons for the denial of jurisdiction stemmed from "the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty," and the fact that there are relatively few exceptions that can be substituted for them.²⁰ The Court concluded by stating in emphatic fashion that it was, "unwilling to give [their] assent by silence to expressions of opinion, which [seemed to the Court as] calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion."²¹

IMPACT OF THE WAR ON TERRORISM

There have been more recent illustrations of the struggle over habeas corpus between the branches of government. Since the War on Terrorism began in 2001, the Supreme Court has faced a myriad of habeas corpus issues involving both U.S. citizens and foreign nationals. Significantly, these judgments have established that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in any dominion under United States control are wrongfully imprisoned.²²

A. THE QUESTION OF JURISDICTION

In *Rasul v. Bush*, the Supreme Court was presented with "the narrow but important question whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."²³ Petitioners in the case consisted of two Australian citizens, two British citizens and twelve Kuwaiti citizens who were all captured abroad during hostilities between the United States and the Taliban.²⁴ All three groups of citizens filed separate writs of habeas corpus, and were construed together by the District Court for the District of Columbia, which dismissed all three for want of jurisdiction, holding that "aliens detained outside

¹³ Block, *supra* note 11, at 483.

¹⁴ See *Ex parte Milligan*, 71 U.S. 2 (1866).

¹⁵ *Id.* at 34 ("[M]ilitary tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government.").

¹⁶ See *id.* at 6.

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 135.

²⁰ *Id.* ("And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.").

²¹ *Id.*

²² *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

²³ *Id.* at 470.

²⁴ *Id.* at 470-71.

the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.”²⁵ The Court of Appeals for the District of Columbia Circuit affirmed, stating that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”²⁶ The Supreme Court subsequently granted certiorari to review the petitions.²⁷

Justice John Paul Stevens, writing for the majority, determined that the right to habeas corpus can be exercised by any individual, independent of citizenship status, in “all . . . dominions under the sovereign's control,” including the military base in Guantanamo Bay.²⁸ Stevens argued that, given the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses.²⁹ The majority found the fact that ultimate sovereignty of the base remained with Cuba was irrelevant.³⁰ Accordingly, the Court reversed the lower courts’ rulings, holding that United States courts had jurisdiction over habeas corpus petitions from non-citizens being held in any dominion under United States.³¹

The Court was divided concerning this ruling, with the Chief Justice and Justice Thomas joining Justice Scalia in dissent of the holding. Justice Scalia argued that, because even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee,³² United States courts do not have the jurisdiction to hear writs of habeas corpus petitioned by non-citizens. Scalia warned of the potential “breathhtaking” consequence of this holding, as applied to aliens outside the country, because it potentially permits “an alien captured in a foreign theater of active combat to bring a habeas corpus petition against the Secretary of Defense.”³³ Scalia’s final argument was that the proper course of action would have been through Congress, which could have changed federal judges’ habeas jurisdiction from what the Supreme Court had previously held that to be.³⁴

B. THE RIGHTS OF “ENEMY COMBATANTS”

In *Hamdi v. Rumsfeld*, decided concurrently with *Rasul v. Bush*, the Supreme Court determined that United States citizens who have been designated as enemy combatants by the Executive Branch have a right to challenge their detainment via habeas corpus.³⁵ This case developed from the detention of a United States citizen, named Yaser Esam Hamdi, who allegedly took up arms with the Taliban against the United States.³⁶ Members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, seized Hamdi and eventually transferred him to United States military custody.³⁷ The Government contended that Hamdi was an “enemy combatant,” and that this status justified holding him in the United States indefinitely, without formal charges or proceedings, unless and until it makes the determination that access to counsel or further process is warranted.³⁸

Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus on behalf of his son.³⁹ The petition stated that Hamdi's detention was not legally authorized, that, “[a]s an American citizen . . . Hamdi enjoys the full protections of the Constitution,” and that Hamdi's detention in the United States

²⁵ *Id.* at 472-3.

²⁶ *Id.* at 473 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-8 (1950)).

²⁷ *Id.*

²⁸ *Id.* at 481-2.

²⁹ *Id.* at 480.

³⁰ *Id.* at 485.

³¹ *Id.*

³² *Id.* at 489.

³³ *Id.* at 498.

³⁴ *Id.* at 506.

³⁵ *Hamdi*, *supra* note 6.

³⁶ *Id.* at 510.

³⁷ *Id.*

³⁸ *Id.* at 510-11.

³⁹ *Id.* at 511.

without charges, access to an impartial tribunal, or assistance of counsel “violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution.”⁴⁰ Though the District court for the Eastern District of Virginia ordered that counsel be given access to Hamdi, the Court of Appeals for the Fourth Circuit reversed, stating that the District Court had failed to extend appropriate deference to the Government’s security and intelligence interests.⁴¹ The case itself bounced back and forth between the district and circuit courts,⁴² with the Fourth Circuit eventually denying Hamdi’s constitutional claim, emphasizing that “[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.”⁴³

Writing for a plurality, Justice O’Connor wrote that, although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.⁴⁴ Absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.⁴⁵ Even though the Supreme Court admits that it is “beyond question that substantial interests lie on both sides of the scale in this case,”⁴⁶ it noted that a state of war is not a blank check for the President when it comes to the rights of the nation’s citizens.⁴⁷ Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.⁴⁸

Justice Souter, joined by Justice Ginsburg, concurred with the plurality so far as the fact that Hamdi had the right to challenge his status as an enemy combatant in court, but disagreed with the view that Congress authorized Hamdi’s detention.⁴⁹ Justice Scalia, joined by Justice Stevens, issued a dissent arguing that the government’s course of action was constitutionally sound under the Suspension Clause.⁵⁰ Where the exigencies of war prevent the government from prosecuting a citizen accused of waging war against it, the Constitution’s Suspension Clause allows Congress to relax the usual protections temporarily.⁵¹ Scalia went on to state that the Court proceeded to meet the current emergency in a manner the Constitution did not envision.⁵²

Justice Thomas wrote a separate dissent, arguing that Hamdi’s detention falls squarely within the federal government’s war powers, and that the Court lacked the expertise and capacity to second-guess that decision.⁵³ Given that, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation,”⁵⁴ Thomas believed that the plurality misapplied its chosen framework, “one that if applied correctly would probably lead to the result [Thomas] reached.”⁵⁵ Although Thomas admitted that it was undeniable that Hamdi had been deprived of a serious interest, one actually protected by the Due

⁴⁰ *Id.*

⁴¹ *See id.* (“[I]f Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”).

⁴² *See generally id.* at 512-16.

⁴³ *Id.* at 516 (quoting *Ex parte Quirin*, 317 U.S. 1 (1942)).

⁴⁴ *Id.* at 509.

⁴⁵ *Id.* at 525.

⁴⁶ *Id.* at 529 (“Hamdi’s ‘private interest . . . affected by the official action,’ is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”).

⁴⁷ *See id.* at 536.

⁴⁸ *Id.* at 537.

⁴⁹ *Id.* at 541 (“The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims.”).

⁵⁰ *Id.* at 554.

⁵¹ *Id.*

⁵² *Id.* at 579.

⁵³ *Id.* at 580.

⁵⁴ *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 307, (1981)).

⁵⁵ *Id.* at 594.

Process Clause, the Government possessed an overriding interest in protecting the Nation, which therefore justifies such deprivation.⁵⁶

C. REQUIREMENT FOR CONGRESSIONAL AUTHORIZATION

Since the landmark decisions in *Rasul* and *Hamdi*, the Supreme Court has utilized its universal power to review writs of habeas corpus petitioned by both U.S. citizens and foreign nationals to address further issues. In *Hamdan v. Rumsfeld*,⁵⁷ the Supreme Court determined, among other things, that neither an extant act of Congress nor the inherent powers of the Executive enumerated in the Constitution expressly authorized military commissions established by the Executive Branch to try detainees at Guantanamo Bay.⁵⁸

Congress, in response to the September 11th terrorist attacks, adopted a Joint Resolution, the Authorization for Use of Military Force (AUMF),⁵⁹ authorizing 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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁶⁰ Pursuant to the AUMF, the President ordered the Armed Forces of the United States to invade Afghanistan, and hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.⁶¹ On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”⁶² The order stated that those subject to the order⁶³ “shall, when tried, be tried by a military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.”⁶⁴ Subsequently, the President announced that Hamdan was subject to the aforementioned order.⁶⁵

Hamdan filed a writ for habeas corpus demanding to know the charges he faced.⁶⁶ The District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings.⁶⁷ The Court of Appeals for the District of Columbia Circuit reversed, rejecting the District Court's conclusion that Hamdan was entitled to relief under Article III of the Third Geneva Convention,⁶⁸ asserting that the Geneva Conventions were not “judicially enforceable.”⁶⁹ Further, the appellate court concluded that there was no

⁵⁶ *Id.* at 598.

⁵⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁵⁸ *Id.* at 636 (“The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ . . . Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).
⁵⁹ 115 Stat. 224.

⁶⁰ *Hamdan*, *supra* note 57, at 568.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (“Those subject to [the order] include any noncitizen for whom the President determines “there is reason to believe” that he or she (1) “is or was” a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.”)

⁶⁴ *Id.*

⁶⁵ *Id.* at 569.

⁶⁶ *Id.*

⁶⁷ *Id.* at 571 (“[The District Court] concluded that the President's authority to establish military commissions extends only to ‘offenders or offenses triable by military [commission] under the law of war;’ that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War; that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear.”).

⁶⁸ 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention).

⁶⁹ *Id.* at 571.

separation of powers objection to the military commission's jurisdiction.⁷⁰ The Supreme Court subsequently granted certiorari to determine whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan could rely on the Geneva Conventions in these proceedings.⁷¹

Justice Stevens, authoring the opinion, determined that, absent express congressional authorization, it was the court's duty to determine whether the military commission complied with the ordinary laws of the United States and the laws of war.⁷² The Geneva Convention, as a part of the ordinary laws of war, was applicable to Hamdan and required that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁷³ The military commission that the President had convened to try Hamdan was found to violate the convention by not meeting its listed requirements,⁷⁴ and therefore was determined illegal.⁷⁵

D. THE MILITARY COMMISSIONS ACT OF 2006

In the wake of the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (MCA),⁷⁶ which established procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions.⁷⁷ Further, § 7 of the MCA expressly eliminated court jurisdiction over all pending and future causes of action other than the limited review permitted under the Detainee Treatment Act (DTA).⁷⁸ Congress's intent was explicit and broad—the MCA would eliminate all constitutional guarantees of habeas corpus to all detainees designated as "enemy combatants" in United States custody, no matter where they were held.⁷⁹

This tension between the three branches of government came to a head in the case *Boumediene v. Bush*.⁸⁰ This case, brought by a representative group of aliens⁸¹ designated as enemy combatants and detained at Guantanamo Bay, presented two questions to the high court: First, whether the aliens have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause;⁸² and second, if the aliens do possess the privilege, whether the Military Commissions Act of 2006 operates as an adequate and effective substitute for habeas corpus.⁸³ The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause, and, as a result, that it was unnecessary to consider whether Congress

⁷⁰ *Id.* at 571-72.

⁷¹ *Id.* at 572.

⁷² *Id.* at 595.

⁷³ *Id.* at 631-32.

⁷⁴ *Id.* at 640.

⁷⁵ *Id.* at 635.

⁷⁶ Military Commissions Act of 2006, 120 Stat. 2600 (2006).

⁷⁷ *Id.*

⁷⁸ *Id.* ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination . . . Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

⁷⁹ *See id.*

⁸⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸¹ *Id.* at 732 ("There are others detained there, also aliens, who are not parties to this suit.").

⁸² *Id.*

⁸³ *Id.*

provided an adequate and effective substitute for habeas corpus in the DTA.⁸⁴ Subsequently, the Supreme Court granted certiorari.⁸⁵

Justice Kennedy, writing for a five-justice majority, determined that the Court of Appeals was correct to take note of the legislative history when construing the MCA, and agreed with the appellate court's conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions under review.⁸⁶ However, the Court also held that the Suspension Clause of the Constitution has full effect at Guantanamo Bay.⁸⁷ Therefore, if the privilege of habeas corpus is to be denied to the detainees before the court, Congress had to have acted in accordance with the requirements of the Suspension Clause.⁸⁸ Because the MCA did not purport to be a formal suspension of the writ, and the Government, in its submissions to the court, did not argue that it was, the Court determined that the petitioners were entitled to the privilege of habeas corpus to challenge the legality of their detention.⁸⁹

In light of this holding, the question facing the court became whether the MCA accommodated the Suspension Clause mandate.⁹⁰ Although the Government argued there was compliance with the Suspension Clause because the DTA review process provides adequate substitute procedures for habeas corpus,⁹¹ the Court determined that the Government did not establish that the detainees' access to the statutory review provisions at issue was an adequate substitute for the writ of habeas corpus, and that MCA § 7 thus effects an unconstitutional suspension of the writ.⁹² The petitioners, in the Court's mind, were invoking the fundamental procedural protection of habeas corpus, a protection "designed to survive, and remain in force, in extraordinary times."⁹³ Accordingly, the petitioners were to be entitled to the protections that a writ of habeas corpus offers.⁹⁴

E. MUNAF V. GEREN

This case centers on Shawqi Omar (the petitioner in *Omar v. Geren*) and Mohammad Munaf, both of whom are U.S. citizens who voluntarily traveled to Iraq and allegedly committed crimes there.⁹⁵ Petitioner Omar voluntarily traveled to Iraq in 2002 and, in October 2004, was captured and detained in Iraq by U.S. military forces, part of the Multinational Force-Iraq ("MNF-I"), during a raid of his Baghdad home.⁹⁶ Omar is believed to have provided aid to al Qaeda in Iraq by facilitating this group's connection with other terrorist groups, bringing foreign fighters into Iraq, and planning and executing kidnappings in Iraq.⁹⁷ Omar's wife and son filed a next-friend petition for a writ of habeas corpus on Omar's behalf in the District Court for the District of Columbia.⁹⁸ After the Department of Justice informed Omar that he would be referred to the Central Criminal Court of Iraq for criminal proceedings, his attorney sought and obtained a

⁸⁴ *Id.* at 735-36.

⁸⁵ *Id.*

⁸⁶ *Id.* at 738-39.

⁸⁷ *Id.* at 771.

⁸⁸ *Id.* (quoting *Hamdi*, 542 U.S., at 564 (SCALIA, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ.")).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See The Detainee Treatment Act*, § 1005(e)(2)(C), 119 Stat. 2742 ("(i) whether the status determination . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.").

⁹² *Boumediene*, *supra* note 80, at 792.

⁹³ *Id.* at 798.

⁹⁴ *Id.*

⁹⁵ *Munaf v. Geren*, 553 U.S. 674, 674 (2008).

⁹⁶ *Id.* at 675.

⁹⁷ *Id.* at 681.

⁹⁸ *Id.* at 682.

preliminary injunction barring Omar's removal from United States custody.⁹⁹ The United States appealed and the Court of Appeals for the District of Columbia Circuit affirmed the injunction.¹⁰⁰ A single appellate judge dissented, stating "[T]he District Court had no authority to enjoin a transfer that would allow Iraqi officials to take custody of an individual captured in Iraq—something the Iraqi Government 'undeniably h[ad] a right to do.'"¹⁰¹

Petitioner Munaf voluntarily traveled to Iraq with several Romanian journalists to serve as the journalists' translator and guide.¹⁰² Shortly after arriving in Iraq, the group was kidnapped and held captive for two months, and, after the journalists were freed, Munaf was detained based on the belief that he had orchestrated the kidnappings.¹⁰³ Munaf's sister filed a next-friend petition for a writ of habeas corpus in the District Court for the District of Columbia.¹⁰⁴ The District Court dismissed the petition for lack of jurisdiction, finding that Munaf was "in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly."¹⁰⁵ The Court of Appeals for the District of Columbia Circuit affirmed, distinguishing the prior opinion in *Omar* on the ground that Munaf, unlike Omar, had been convicted by a foreign tribunal.¹⁰⁶ One appellate judge concurred in judgment, concluding that the District Court had improperly dismissed for want of jurisdiction because "Munaf is an American citizen . . . held by American forces overseas," but would have still held that Munaf's habeas petition failed on the merits.¹⁰⁷ The Supreme Court subsequently consolidated both the *Omar* and *Munaf* cases and granted certiorari.¹⁰⁸

The United States acknowledged that both Omar and Munaf are American citizens held overseas in the immediate physical custody of American soldiers who answer only to an American chain of command.¹⁰⁹ Given those circumstances, the Supreme Court declined to preclude American citizens held overseas by American soldiers subject to a United States chain of command from filing habeas petitions.¹¹⁰ The Court then turned to the question of whether United States District Courts may exercise their habeas jurisdiction to enjoin the United States Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution.¹¹¹ Given that the consolidated cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, Supreme Court precedent dictated that the power of the writ should not grant the relief sought by the petitioners.¹¹²

Petitioners Omar and Munaf argued that the writ should be granted in their cases because they have "a legally enforceable right" not to be transferred to Iraqi authority for criminal proceedings under both the Due Process Clause and the Foreign Affairs Reform and Restructuring (FARR) Act of 1998.^{113, 114} The Supreme Court determined, however, that the granting of such writs would interfere with Iraq's sovereign right to

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 682-83 ("construed the injunction only to bar transfer to Iraqi custody and upheld the District Court's order insofar as it prohibited the United States from: (1) transferring Omar to Iraqi custody; (2) sharing details concerning any decision to release Omar with the Iraqi Government; and (3) presenting Omar to the Iraqi Courts for investigation and prosecution.

¹⁰¹ *Id.*

¹⁰² *Id.* at 683.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 684.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 685.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 688.

¹¹¹ *Id.* at 689.

¹¹² *Id.* at 692.

¹¹³ Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 (1998).

¹¹⁴ *Id.*

“punish offenses against its laws committed within its borders.”¹¹⁵ The Court went further to state that such a conclusion would implicate “not only concerns about interfering with a sovereign’s recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders,” but also concerns about “unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.”¹¹⁶ Accordingly, the Court determined that those who commit crimes within a sovereign’s territory may be transferred to that sovereign’s government for prosecution.¹¹⁷

The petitioners contended that these general principles of foreign policy should be trumped because their transfer to Iraqi custody is likely to result in torture, arguing that their claims of potential torture may not be readily dismissed on the basis of these principles because the FARR Act prohibits transfer when torture may result.¹¹⁸ However, the petitioners did not assert a FARR Act claim in their petitions for habeas, nor did they raise the Act in any of the certiorari filings before the Court.¹¹⁹ Accordingly, the Supreme Court refused to consider the question.¹²⁰

The habeas petitioners’ final argument to stay their transfer to Iraqi custody was that the Government may not transfer a citizen without legal authority, and the United States bears the burden of identifying a treaty or statute that permits it to transfer them to Iraqi custody.¹²¹ The Court, however, rejected this argument, stating that Petitioner’s precedent “involved the extradition of an individual from the United States; this is not an extradition case, but one involving the transfer to a sovereign’s authority of an individual captured and already detained in that sovereign’s territory.”¹²² Further, because Omar and Munaf voluntarily traveled to Iraq and were being held there, they are therefore subject to the territorial jurisdiction of that sovereign, not of the United States.¹²³

A unanimous court afforded American citizens held overseas by American soldiers subject to a United States chain of command the right to habeas corpus.¹²⁴ That same unanimous court, however, held that habeas corpus does not require the United States to shelter such fugitives as Omar and Munaf, who are alleged to have committed hostile and warlike acts within the sovereign territory of Iraq from the criminal justice system of the sovereign with authority to prosecute them.¹²⁵ Consequently, the Supreme Court found that the petitioners stated no claim in their habeas petitions for which relief could be granted, and those petitions should have been promptly dismissed.¹²⁶

OMAR V. GEREN—THE CASE AT HAND

Supreme Court decisions on habeas corpus issues during the War on Terror period have generally sustained the right to petition for both foreign nationals as well as U.S. citizens in a wartime setting. In contrast, *Munaf v. Geren* disallowed the use of such a writ in order to stay a transfer to a foreign sovereign to face criminal charges.¹²⁷ Petitioner Omar, however, still believed that such a transfer could be stayed through a writ. Omar subsequently amended his writ to include different arguments and filed, once again, in District Court.¹²⁸

¹¹⁵ *Id.* (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)).

¹¹⁶ *Id.* at 700.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 703.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 704.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 688.

¹²⁵ *Id.* at 705.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Omar*, *supra* note 3, at 3.

A. FACTS OF OMAR V. GEREN

Petitioner, Shawqi Ahmad Omar, as aforementioned, is an American citizen detained in Iraq based on his suspected role in facilitating insurgent activities.¹²⁹ Omar's wife and son commenced these habeas corpus proceedings to prevent his transfer to the custody of Iraqi authorities to face the criminal charges.¹³⁰ After receiving an e-mail from the respondents stating that "a determination was previously made to refer [Omar's] case to the Central Criminal Court of Iraq," counsel for the petitioner filed a motion for an *ex parte* temporary restraining order to prevent the prisoner transfer.¹³¹

The District Court granted the motion for a preliminary injunction, and ordered that "the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them . . . not remove the petitioner" from United States custody.¹³² On review, the Circuit affirmed the order granting the motion for a preliminary injunction.¹³³

The Supreme Court subsequently granted the respondents' petition for a writ of certiorari and consolidated the appeal with another separate petition for a writ of certiorari granted.¹³⁴ The Supreme Court vacated the preliminary injunction and remanded the case for further proceedings.¹³⁵ Subsequently, the Omar filed an amended petition for a writ of habeas corpus, asserting claims under the FARR Act, the Fifth and Eighth Amendments to the U.S. Constitution, and the Citizen Non-Detention Act (CNDA).^{136, 137}

The amended petition asserts that the FARR Act implements the Convention Against Torture (CAT),¹³⁸ which prohibits the government from transferring an individual to a country in which he or she will be subject to torture.¹³⁹ Omar also contended that his transfer to Iraqi authorities would violate his Eighth Amendment right to be free from cruel or unusual punishment.¹⁴⁰ This is because, under Iraqi law, he could be subjected to the death penalty despite the fact that his alleged crimes did not result in any fatalities.¹⁴¹ Lastly, the petitioner asserted that his continued detention by the U.S. military violates the Due Process Clause of the Fifth Amendment as well as the CNDA.¹⁴² The respondents moved to dismiss the amended petition for a writ of habeas corpus, arguing that the amended petition fails to state a claim on which relief could be granted.¹⁴³

B. THE FARR LIMITS JUDICIAL REVIEW

Respondents, in their motion to dismiss, asserted that the petitioner has no claim for relief under the FARR Act because "the Act does not apply to a detainee who is already physically present in the nation to which his transfer is threatened," and also because "the Act precludes judicial review of claims under the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007).

¹³⁴ *Munaf*, *supra* note 95, at 685.

¹³⁵ *Id.* at 705.

¹³⁶ Citizen Non-Detention Act, 18 U.S.C. § 4001(a).

¹³⁷ *Omar*, *supra* note 3, at 3.

¹³⁸ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, AND DEGRADING TREATMENT OR PUNISHMENT, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹³⁹ *Omar*, *supra* note 3, at 4 ("[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.*

¹⁴² *Id.* at 8.

¹⁴³ *Id.* at 4.

Act except in the context of final orders of removal by immigration authorities.”¹⁴⁴ In response, the petitioner contended that 1) Congress’s inclusion in the FARR Act of the phrase “expel, extradite, or otherwise effect the involuntary return” of a person to torture indicates its intent to “prohibit without exception any transfer by U.S. personnel, wherever located, that ends in torture,” 2) the FARR Act does not contain the clear and unambiguous language required to strip federal courts of habeas jurisdiction, and 3) the Suspension Clause prohibits the court from construing the FARR Act so as to preclude habeas jurisdiction.¹⁴⁵

The CAT provides that, “[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁴⁶ The FARR Act implements the CAT requirements by providing, “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”¹⁴⁷ However, the Supreme Court determined that the FARR Act limits the availability of judicial review of CAT claims to solely, “as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act.”¹⁴⁸

C. THE REAL ID ACT OVERTURNS PRECEDENT

The petitioner, relying principally on Supreme Court precedent which has been followed by several circuit courts, contended that, because § 2242(d) of the FARR Act does not contain a sufficiently clear and unambiguous expression of congressional intent to limit judicial review of habeas petitions brought under the FARR Act, that provision does not strip district courts of habeas jurisdiction over FARR Act claims.¹⁴⁹ The court determined, however that the REAL ID Act of 2005¹⁵⁰ supersedes the holdings in these cases, providing, “[n]otwithstanding any other provision of law, including . . . any other habeas corpus provision . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.”¹⁵¹ The Court noted that it expressly determined that the REAL ID Act provision eliminates habeas jurisdiction over FARR Act claims in the case *Kiyemba v. Obama*.¹⁵² As in *Kiyemba*, the Court determined that the petitioner was not challenging a final order of removal, but was instead seeking to enjoin his transfer to the custody of a foreign nation.¹⁵³ Accordingly, the court concluded that the REAL ID Act of 2005 precludes the court's consideration of the petitioner's FARR Act claims.¹⁵⁴

D. SUSPENSION CLAUSE TRUMPED BY SEPARATION OF POWERS

Though the Court did not deny the petitioner’s claim that such a conclusion runs afoul of the Suspension Clause because it would effectively “bar prisoners in such situations from pursuing any judicial recourse to review the legality of executive actions regarding their detention,” the Court did state that it is

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ CONVENTION AGAINST TORTURE, *supra* note 138.

¹⁴⁷ Foreign Affairs Reform and Restructuring Act, *supra* note 113, at § 2242.

¹⁴⁸ *Omar*, *supra* note 3, at 4-5.

¹⁴⁹ *Id.* at 5 (citing *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (In *St. Cyr*, the Supreme Court declined to construe provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) so as to preclude judicial review of an order of removal)).

¹⁵⁰ REAL ID Act of 2005, 8 U.S.C. § 1252 (2005).

¹⁵¹ *Id.* at § 1252(a)(4).

¹⁵² *Kiyemba v. Obama*, 561 F.3d 509, 511 (D.C. Cir. 2009) (Centered around nine individuals held at Guantanamo Bay, challenging their detention by asserting that they feared being transferred to a country where they might be tortured or further detained).

¹⁵³ *Omar*, *supra* note 3, at 6.

¹⁵⁴ *Id.*

bound by the holding in *Kiyemba*.¹⁵⁵ The *Kiyemba* Court suggested that Suspension Clause concerns are trumped by the separation of powers principles that preclude judicial second-guessing of the Executive's authority on matters of foreign policy and diplomacy.¹⁵⁶ Accordingly, the Court ruled that the Suspension Clause does not permit the Court from deviating from *Kiyemba*'s holding, which "precludes a court from considering FARR Act claims asserted in a habeas petition."¹⁵⁷ Consequently, the Court granted the respondents' motion to dismiss the petitioner's FARR Act claims.¹⁵⁸

E. EIGHTH AMENDMENT CLAIMS DISCOUNTED

Omar also contended that his transfer to Iraqi Authorities would violate his Eighth Amendment right to be free from cruel or unusual punishment since, under Iraqi law, he could be subjected to the death penalty despite the fact that his alleged crimes did not result in any fatalities.¹⁵⁹ The District Court for the District of Columbia determined, however, that *Munaf v. Geren* barred the court from issuing a writ of habeas corpus to protect the petitioner from the Iraqi criminal justice system based on the Eighth Amendment.¹⁶⁰ As the *Munaf* Court explained:

[T]he jurisdiction of a nation within its own territory is necessarily exclusive and absolute . . . This is true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people.¹⁶¹

Omar himself traveled to Iraq of his own volition and Iraq plainly has the authority to prosecute him for any crimes he committed within its sovereign territory.¹⁶² Accordingly, the Court held that the Eighth Amendment does not afford Omar the protection that he seeks.¹⁶³

F. FIFTH AMENDMENT DUE PROCESS AND CNDA CLAIMS DISMISSED

Lastly, Petitioner Omar asserted that his continued detention by the U.S. military violates the Due Process Clause of the Fifth Amendment and the CNDA.¹⁶⁴ The Court noted, however, that Omar asserted both of these claims in his original habeas petition, which was subsequently dismissed by the Supreme Court in *Munaf v. Geren*.¹⁶⁵ The petitioner insisted that the Supreme Court did not consider the legality of the petitioner's detention in light of the fact that the FARR Act renders the threatened transfer illegal, and, because of this, his Fifth Amendment and CNDA claims asserted in the amended petition should not be dismissed.¹⁶⁶ The Court was not moved by these arguments and found that because the FARR Act does not provide a legal basis for prohibiting the petitioner's transfer to Iraqi authorities, the petitioner fails to

¹⁵⁵ *Id.* at 6.

¹⁵⁶ *Id.* at 7 (Observing *Kiyemba*, 561 F.3d at 514 ("[t]he Judiciary is not suited to second-guess . . . determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area")).

¹⁵⁷ *Id.* (citing *Kiyemba*, 561 F.3d at 514-15).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 8 (noting that "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them").

¹⁶¹ *Munaf*, *supra* note 95, at 677, 695.

¹⁶² *Id.*

¹⁶³ *Omar*, *supra* note 3, at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

distinguish the Fifth Amendment and CNDA claims raised in this original petition and dismissed by the Supreme Court on this ground.¹⁶⁷ Because the Supreme Court adjudicated and rejected the two arguments Omar was asserting, the court was precluded from reconsidering the two issues.¹⁶⁸ The Court went farther, stating that, even if it were to consider the CNDA claim in the amended petition, the respondents would still prevail because the petitioner's detention is pursuant to congressional authorization.¹⁶⁹ Accordingly, the Court dismissed the petitioner's claim that he was being detained in violation of the Fifth Amendment and the CNDA.¹⁷⁰

CONCLUSION AND IMPACT

The District Court granted respondent's motion to dismiss petitioner's amended writ of habeas corpus.¹⁷¹ Shawqi Ahmad Omar, a U.S. citizen, can therefore be transferred to Iraqi custody.¹⁷² The District Court's affirmation of *Munaf*, when combined with its rejection of the FARR Act defense, leaves American citizens abroad little habeas corpus protection against holdings and transfer to foreign authorities.¹⁷³

Petitioner Omar has appealed the ruling, and the District of Columbia Circuit Court of Appeals subsequently affirmed the District Court's decision, holding that, pursuant to *Munaf*, a transferee such as Omar does not have a habeas corpus or due process right to judicial review of conditions in the receiving country.¹⁷⁴ Omar does not have many options for further petitions, as it seems unlikely that the Supreme Court will overturn *Munaf*.¹⁷⁵ While Congress is free to establish additional statutory protections with respect to transfers,¹⁷⁶ such action seems unlikely, given the fact that most congressional action in recent history has resulted in a constriction of habeas corpus rights, rather than an expansion.¹⁷⁷

Based on the aforementioned case law, the right of both U.S. citizens and foreign nationals to challenge their imprisonment through writs of habeas corpus has been in a state of flux in recent years. The judicial branch, however, has drawn a clear line concerning those persons who are being held in a foreign sovereign for alleged crimes committed there.¹⁷⁸ A writ of habeas corpus will not stay the transfer of that individual to that sovereign's authorities to face the charges for which he is accused.¹⁷⁹ While the right of habeas corpus remains broad, the District Court's decision in *Omar v. Geren*, and its subsequent affirmation at the Circuit Court level, has established that such petitions are not without limits. Current precedent makes U.S. borders a crucial demarcation in habeas corpus application.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 8-9.

¹⁶⁹ Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1501.

¹⁷⁰ *Omar*, *supra* note 3, at 9.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See generally Omar*, *supra* note 3.

¹⁷⁴ *Omar v. McHugh*, 646 F.3d 13, at 24 (D.C. Cir. 2011).

¹⁷⁵ *See generally Omar*, *supra* note 3.

¹⁷⁶ *Omar*, *supra* note 174.

¹⁷⁷ *See generally* Military Commissions Act of 2006, 10 U.S.C. §§ 948-949 (2006).

¹⁷⁸ *See generally Omar*, *supra* note 3.

¹⁷⁹ *Id.*

STUDENT NOTE

Reevaluating ITAR: A Holistic Approach to Regaining Critical Market Share While Simultaneously Attaining Robust National Security

Justin Levine*

ABSTRACT

This note considers the application of the International Traffic and Arms Regulations (“ITAR”) framework and proposes statutory and policy modifications to promote both national security and industry growth. ITAR is the regulatory framework that controls the export of munitions and defense technologies from the United States. However, as applied, free trade is now grossly over-regulated to such an extent that both significant market share and industry opportunity have been lost and national security itself has simultaneously been threatened. Due to heavy restrictions, many previous industry partners are now looking elsewhere for trade and systematically avoiding the United States for inclusion in research and commerce transactions. The ultimate effect of this relieves America of any oversight or involvement in the newest of defense technologies while concurrently providing these opportunities to foreign entities such as Russia, China, and India. This note proffers a spectrum of recommendations that aim to retain robust national security while regaining lost market share and critical trade opportunities.

* J.D., University of Miami School of Law, 2013; M.A., International Business, University of Florida, 2010; B.S. Business Finance, University of Florida, 2009. Editor-in-Chief of the University of Miami National Security and Armed Conflict Law Review. Edited by Alexander J. Roth.

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INTRODUCTION

Both the modern expansion of technology and a growing knowledge of warfare create a broader availability of instruments and methods that can be used against a nation. Nations developing these instruments thus have an incentive, in the interest of their own security, to establish oversight and regulation before releasing these technologies into the international stream of commerce. In the United States, it is the International Traffic and Arms Regulations (“ITAR”)¹ that govern the export of American-born munitions and defense technologies.

ITAR tracks and evaluates the trade of certain technologies that are classified as “restricted” on the United States Munitions List (“USML”). If a good or technology is deemed “restricted” it must be approved for trade through the ITAR licensing process. If approved, these technologies can then enter the international stream of commerce. Ultimately, the ITAR framework exists to protect American national security by blocking the access to sensitive technologies by adverse or untrustworthy entities. While national security is a significant concern of the United States, other concerns, primarily economic growth and domestic profitability, cannot be dismissed. In recent years, however, this appears to be the case. Because of ITAR complications, many American defense and technology businesses have lost considerable market share.²

In 1999, out of growing concerns for national security, the authority over ITAR was transferred from the Department of Commerce to the Department of State.³ Accompanying this transfer were significant intensifications in compliance requirements that resulted in a decrease in the number of technologies and goods that could freely enter the stream of international commerce.⁴ These changes led to a stifling of the economic growth and profitability of American businesses.

To date, these changes have altered the face of the United States’ involvement in international trade and investment as well as innovation in defense, dual-use,⁵ and space technology. ITAR’s current investigative and licensing processes have weighed down businesses by imposing an excessively heavy burden of compliance.⁶ Some American businesses have engaged in expensive research and development (“R&D”), planning, and sales—all within compliance—only to still lose foreign customers due to impatience with ITAR export processes.⁷ For some American firms, the ITAR licensing process has become such a burden that they are shifting their resources from developing defense technologies to other less restricted industries.⁸

From a foreign business perspective, ITAR is more than a mere inconvenience. Foreign states previously loyal to American innovators and manufacturers are being driven away from American goods

¹ 22 C.F.R. § 120-130 (2011).

² Richard Kusiolek, *ITAR Dilemma: Finding The Balance Between Regulation And Profit*, SATELLITE TODAY (Jul. 1, 2008), http://www.satellitetoday.com/military/milsatcom/ITAR-Dilemma-Finding-The-Balance-Between-Regulation-And-Profit_23649.html.

³ *Id.*

⁴ *Id.*

⁵ A good is considered “dual-use” if it can be used for both commercial and defense oriented purposes, such as a communications satellite.

⁶ OFFICE OF UNDER SECRETARY OF DEFENSE, ACQUISITION, TECHNOLOGY & LOGISTICS, INDUSTRIAL POLICY, ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS, at 30 (2011), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.acq.osd.mil%2Fmibp%2Fdocs%2Fannual_ind_cap_rpt_to_congress-2011.pdf&ei=o7OIT9ikEcjEtweDrZW-CQ&usg=AFQjCNFeystx9d0VlymVb0ePHF6yA7QpnA.

⁷ David Pugliese, *Navy says no to buying American; U.S. restrictions on technology can lead to delays*, THE OTTAWA CITIZEN (Jan. 25, 2010), <http://www.canada.com/business/Navy+says+buying+American/2480208/story.html>.

⁸ OFFICE OF UNDER SECRETARY OF DEFENSE, ACQUISITION, TECHNOLOGY & LOGISTICS, INDUSTRIAL POLICY, ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS, at 33 (2009), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.acq.osd.mil%2Fmibp%2Fdocs%2Fannual_ind_cap_rpt_to_congress-2009.pdf&ei=Pq6IT82RA8agtwe325DNCQ&usg=AFQjCNH0aaGgMCAhJSJhclMeQ38ToMAvbw.

altogether.⁹ Specifically, they are shifting towards entities with more relaxed export control regulation.¹⁰ More than just isolated examples, however, there is *growing momentum* among foreign customers and businesses going elsewhere to obtain defense technology.¹¹ This shift is causing many U.S. companies to abandon ITAR-regulated industries or simply fail altogether.¹²

With American competitiveness in these industries dwindling, market voids have been created. As in all markets, a void creates an opportunity for competing incumbents or new market entrants. Moreover, gaining economic supremacy by capitalizing on market voids in industries such as space and defense technology *also* creates foreign advantages in diplomatic power and a State's ability to use force. Therefore, boosting American competitiveness in these industries promotes national security as well. Losing competitive ground has the opposite effect. With countries like China and India stepping up as both space and economic players¹³ and the omnipresent war on terror, the United States cannot afford to fall behind either economically or defensively.

The bolstering of ITAR compliance requirements in 1999 was to keep national security as a high priority and maintain an intellectual hold on modern technologies that could potentially be used against the United States.¹⁴ However, contrary to the intentions of Congress, these changes in ITAR have actually *increased* the potential for national security threats while simultaneously impeded the economic growth of America's defense and technology industries.¹⁵ Many independent recommendations to update the ITAR language have been offered by participants in these industries. Instead, by making a *multitude* of policy and regulatory recommendations, this article looks beyond the statutory language to offer a long-term, holistic approach to regaining domestic market share and robust national security.

Section I of this article will discuss the history of ITAR and changes leading to the complications in the international trade community. Next, section II addresses how these changes are affecting foreign and domestic competitiveness. Section III will undertake the current heightened concerns regarding national security. Finally, section IV will deliver recommendations that both maintain national security priorities and regain economic competitiveness in the international technology industries.

I. THE EVOLUTION AND CURRENT STATE OF ITAR

As one would expect, exportation of defense and munitions technology is a highly regulated area. In the United States, there are two sets of statutes that govern these export controls: the Export Administration Act ("EAA"),¹⁶ and the Arms Export Control Act ("AEA").¹⁷ The EAA is instructive as to the *administration* of defense goods and technologies.¹⁸ The focus of this article on the other hand, sits with the AEA, which has a more specific goal of "*reducing* the international trade in implements of war" by restricting which goods and technologies can be exported.¹⁹ The AEA is administered by the Department of

⁹ Pugliese, *supra* note 7.

¹⁰ See Raymond Colitt, *Brazil Favors France's Rafale Jet*, REUTERS (Apr. 7, 2010, 3:44 PM), <http://www.reuters.com/article/2010/04/07/brazil-jets-idUSN0710697320100407> (discussing an example of the Brazilian government choosing to purchase alternative technology in an effort to avoid engagement with ITAR).

¹¹ Kalliroi L. Landry, *Exploring The Effects Of International Traffic In Arms Regulations Restrictions On Innovation In The U.S. Space Industrial Base*, 12 (Aug. 2010) (Master of Sci. in Research and Dev. Mgmt. Thesis, Air Force Inst. of Tech.), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CGYQFjAB&url=http%3A%2F%2Fwww.dtic.mil%2Fdtic%2Ftr%2Ffulltext%2Fu2%2Fa535245.pdf&ei=k6OuT7rnNcLGtweow8HzCA&usg=AFQjCNFrzrGrKoLuS89K5mzO759p2TdqYA>.

¹² Pugliese, *supra* note 7.

¹³ *Earthbound*, THE ECONOMIST, Aug. 23, 2008, at 66.

¹⁴ Landry, *supra* note 11, at 2; Kusiolek, *supra* note 2.

¹⁵ Kusiolek, *supra* note 2.

¹⁶ 50 App. U.S.C. § 2401.

¹⁷ 22 U.S.C. § 2751.

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

State and employed through the Department of Commerce via ITAR.²⁰ The ultimate purpose of ITAR is to “prevent sensitive technology from reaching parties hostile to the United States.”²¹

Initially, the Department of Commerce maintained authority over the AEA, and thus, control of ITAR.²² However, in 1999 ITAR authority was transferred to the Department of State due to mounting concerns for national security.²³ With this new authority, the Department of State now regulates the importation and exportation of technology and goods that may be used in hostility against the United States.²⁴

With the transfer of control to the Department of State, Congress has, in effect, prioritized national security over economic growth and profitability. This may appear to have even been the intention of Congress. However, the smothering and overbearing effect on economics has not just moved profit concerns into a position of subordination, but has essentially pushed them to the sidelines.²⁵ This is evidenced by the widespread loss in domestic profits and market share.²⁶

At the heart of ITAR is the USML and the ITAR licensing process. The USML is a list directly managed by the Department of Defense,²⁷ which contains twenty classifications of goods and technologies that require an approved export license.²⁸ To obtain an export license, one must first register with the Directorate of Defense Trade Controls²⁹ and then submit a license application.³⁰ The Department of Defense maintains a database of over ten thousand registrants used for tracking and enforcement.³¹ Currently, to remove an item from the USML, the Secretary of Defense must grant approval and give thirty days advance notice to Congress.³²

To be efficient and effective in the rapidly changing world of defense technology, the adaptability of the USML must not be bound by the slow and burdensome bureaucratic processes of typical government. As discussed in section II, it is American businesses that are bearing the cost of these burdens through increased compliance and planning expenses or losses in customers and market share. The next section of this article illustrates these effects and discusses how ITAR has affected domestic business’ profits and trade relations.

II. FOREIGN AND DOMESTIC COMPETITIVENESS

The 1999 increases in ITAR compliance requirements have suppressed U.S. competitiveness in the technology, space, and defense industries. The hyper-restrictive nature of ITAR is encouraging foreign buyers to look elsewhere.³³ For example, between 1999 and 2006, sales of U.S. communication satellites fell by twenty percent resulting in nearly \$2.5 billion in losses.³⁴ Moreover, illustrative of the growing foreign

²⁰ SELECT COMMITTEE OF THE UNITED STATES HOUSE OF REPRESENTATIVES, U.S. EXPORT POLICY TOWARDS THE PRC 24 (May 21, 1999), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CG8QFjAA&url=http%3A%2F%2Fwww.house.gov%2Fcoxreport%2Fpdf%2Fch9.pdf&ei=JqOuT4mEKYyTtwn3_3zCA&usg=AFQjCNGhFYWo-U5lw0S82QCddkPIX9T_cw.

²¹ Landry, *supra* note 11, at 2.

²² Kusiolek, *supra* note 2.

²³ *Id.*

²⁴ Landry, *supra* note 11, at 2.

²⁵ Kusiolek, *supra* note 2.

²⁶ *Id.*

²⁷ Landry, *supra* note 11, at 2.

²⁸ 22 C.F.R. § 121.

²⁹ U.S. Department of State, Directorate of Defense Trade Controls, *Licensing*, EXPORTING REQUIREMENTS (May 12, 2012, 9:33 PM), <http://www.pmdtc.state.gov/licensing/index.html>; U.S. EXPORT POLICY TOWARDS THE PRC, *supra* note 21, at 29.

³⁰ U.S. Department of State, *Licensing*, *supra* note 29.

³¹ U.S. EXPORT POLICY TOWARDS THE PRC, *supra* note 20, at 42.

³² U.S. EXPORT POLICY TOWARDS THE PRC, *supra* note 20.

³³ Colitt, *supra* note 10.

³⁴ Alan Taylor, *Defense Industrial Base Assessment: U.S. Space Industry Final Report*, Air Force Research Laboratory 15 (Aug. 2007), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fbeta-www.bis.doc.gov%2Findex.php%2Flicensing%2Fforms-documents%2Fdoc_download%2F38-defense-

movement away from ITAR regulated transactions, between 2009 and 2011 the United States' share in satellite manufacturing revenue suffered a further drop of twenty-seven percent.³⁵ While this is only an example of one focused industry, the waning of revenue, employment, competitive confidence, innovation, and trading competency is being felt across the entire defense and space technology spectrum.³⁶

As expected with normal market conditions, a widespread drop in U.S. competitiveness creates market voids that allow other foreign States to move in, capitalize, and advance their own market positions. Adjunct Professor at the University of Phoenix, Richard Kusiolek, in his article *ITAR Dilemma: Finding the Balance Between Regulation and Profit*, lists some of the countries that are moving into these voids and taking advantage of the market opportunities.³⁷ Kusiolek argues that some countries, including "China, Pakistan, Russia, Canada, Brazil, Australia, France, the Republic of Korea, Ukraine, and Japan have grown their commercial space industries, while U.S. companies have seen dramatic losses in customers and market share."³⁸

In fact, this pattern of foreign entities acquiring market share has actually resulted in the widespread foreign momentum away from reliance on U.S. components in foreign technology systems.³⁹ Some foreign states are opting to avoid ITAR altogether by completely foregoing the use of American-made components in their defense systems.⁴⁰ One example is Alcatel Space, a French satellite manufacturer that has replaced all of the U.S. components on its satellites with foreign components to avoid having to comply with ITAR.⁴¹

Kusiolek does proffer that ITAR isn't directly to blame for all of the loss in market share. He states that business outsourcing also plays a role.⁴² However, is it reasonable to assume that the uncertainty, confusion, and complexity of being ITAR compliant may be at the base of business' decisions to outsource? It seems likely.

Several studies offer support that ITAR has a direct causal relation to the declining performance numbers of American firms. In 2008, the Center for Strategic and International Studies assessed several performance aspects of the United States' space industry.⁴³ This evaluation explained that the uncertainty and long wait times of the ITAR licensing process was negatively affecting industry confidence due to a loss of foreign sales and an increase in compliance costs.⁴⁴ Another study, done by the Institute for Defense Analysis in 2007, claimed that ITAR discourages U.S. firms from participating in R&D for the Department of Defense because of uncertainty, risks, and over-regulation.⁴⁵ Finally, in

industrial-base-assessment-of-the-u-s-space-industry-

2007&ei=OkRfUI2QMowQ9gTg6oFA&usg=AFQjCNGy4NvbzCbn8wonHOHjzpeAjjyrHw.

³⁵ FUTRON CORP., *2011 State of the Satellite Industry Report Shows Further Growth in 2010*, Satellite Industry Association 2 (Jun. 2011), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.sia.org%2FPDF%2FFINAL%2520Press_Release_State%2520of%2520the%2520Satellite%2520Report%25202011%2520JUNE%25202011.pdf&ei=8kdfUNEEg870BIanggaAJ&usg=AFQjCNEaz4ZefvX8b72tUhzUjDMnrYwn2g.

³⁶ *Briefing of the Working Group on the Health of the U.S. Space Industrial Base and the Impact of Export Controls*, Center for Strategic & International Studies 32 (Feb. 2008), available at <http://csis.org/publication/health-us-space-industrial-base-and-impact-export-controls>; FUTRON CORP., *supra* note 36, at 1, 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Landry, *supra* note 11.

⁴⁰ George Abbey & Neal Lane, *United States Policy: Challenges and Opportunities Gone Astray*, American Academy of Arts and Sciences 5 (2009), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fcarnegie.org%2Ffileadmin%2FMedia%2FPublications%2FPDF%2FspaceUS.pdf&ei=rm1fUNK5Ooj68QTxyoCADw&usg=AFQjCNF-keECofsd9vxa5up0DizL8z-liQ>.

⁴¹ Jeff Foust, *One Nation, Over Regulated: Is ITAR Stalling the New Space Race?*, NATIONAL SPACE SOCIETY (Aug. 7, 2008), <http://www.nss.org/adastra/volume17/itar.html>.

⁴² Kusiolek, *supra* note 2.

⁴³ Center for Strategic & International Studies, *supra* note 36.

⁴⁴ *Id.* at 32.

⁴⁵ Richard Van Atta, *Export Controls and the U.S. Defense Industrial Base*, INSTITUTE FOR DEFENSE ANALYSES 4 (Jan. 2007), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=>

2009, a report conducted by the Office of Under Secretary of Defense claimed that companies are withholding their best innovations from the Department of Defense so that they can sell them privately at a more favorable price.⁴⁶

With the effects of ITAR at the center of these studies, American business concerns have impacted U.S. confidence overall and encouraged foreign capabilities.⁴⁷ In fact, since the boost in ITAR compliance standards in 1999, the U.S. market share in the international space technology industry has declined by thirty-three percent.⁴⁸

In 2010, then-Air Force Major, Kalliroi Landry also conducted a study. Landry submitted questionnaires to “any individual or group that participates in the United States space industry through some kind of interaction with ITAR.”⁴⁹ 219 entities in total responded to the questionnaire portion of the study or were otherwise interviewed.⁵⁰ These groups spanned from government agencies involved in policy making to entities on both sides of private sector transactions.⁵¹ Landry’s study participants also included members from each tier of businesses.⁵²

Space (and other) industry participants can be compartmentalized into three tiers based on the scale of products that they produce or where they participate within the stream of commerce. Tier 1 companies “sell end-products to commercial or government customers.”⁵³ Tier 2 entities “provide major components and/or systems to Tier 1 companies.”⁵⁴ Tier 3 companies “provide less complex components, sub-assemblies, structures, and materials.”⁵⁵

The chart below represents a tip-of-the-iceberg snapshot of Landry’s research. The results have been separated into a “Consequences, Effects, and Desired Changes” format. This brief representation of Landry’s study will shed light on the ultimate objective of this article—to address the consequences and effects of the current state of ITAR and recommending some changes desired by the defense and technology community at large. Recall that Landry had a total of 219 respondents.⁵⁶ However, not every respondent addressed every question.⁵⁷ The below percentages are only from the total number of responses to each *specific* question or set of questions.

http://3A%2F%2Fwww.acq.osd.mil%2Fmibp%2Fdocs%2Fida_study-export_controls_%2520us_def_ib.pdf&ei=onFfUIP5KJGo8QTXwICIG&usg=AFQjCNHRL2SFesa19RPuK61ybKigv0q7Pw.

⁴⁶ OFFICE OF UNDER SECRETARY OF DEFENSE, *supra* note 8.

⁴⁷ Landry, *supra* note 11, at 11, 24.

⁴⁸ *Earthbound*, *supra* note 13.

⁴⁹ Landry, *supra* note 11, at 28.

⁵⁰ *Id.* at 30-31.

⁵¹ *Id.* at 28.

⁵² *Id.*

⁵³ *Id.* at 31.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 30-31.

⁵⁷ *Id.* at 51, 54, 66 (study findings were noted in percentage of total responses).

Consequences of ITAR	% of Responses
Increased Costs	52.94 % ⁵⁸
Timelines Too Long	47.06 % ⁵⁹
Encourage Foreign Competition	35.29 % ⁶⁰
Unable to Market or Sell to Foreign	29.41 % ⁶¹
Stalls Communication	29.41 % ⁶²
Effects of ITAR	% of Responses
Continued Drawdown of U.S. Suppliers	47.06 % ⁶³
Limited Access to the Best Talent	35.29 % ⁶⁴
Foreign Approach to Export Controls Differs from U.S.	35.29 % ⁶⁵
Withdraw from the Space Industry	23.53 % ⁶⁶
Desired Changes to ITAR	% of Responses
Review and Revision of ITAR	41.18 % ⁶⁷
Update/Re-Focus Export Controls	35.29 % ⁶⁸
Clarify/Simplify the Language	23.53 % ⁶⁹

While this graphical depiction shows only a snapshot of the results most identified by respondents, it is illustrative of a common view among industry participants. In addition to the above, some numbers worth noting are:

- The top factor for foreign products being competitive is “Export Licensing Requirements” (follow by cost);⁷⁰
- The top *five* recommendations to improve innovation in the space industry are directly related to changes, updates, or revisions to ITAR;⁷¹
- 51.91% suggested U.S. Government action to improve market competitiveness;⁷²

⁵⁸ *Id.* at 36.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 41.

⁶⁴ *Id.* at 45.

⁶⁵ *Id.*

⁶⁶ *Id.* at 36.

⁶⁷ *Id.* at 43.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 51.

⁷¹ *Id.* at 43.

- 88.52% gave ITAR related responses when asked about “Barriers to Entry into Foreign Countries.”⁷³ This is opposed to a mere 2.73% of participants that claimed EU limitations as a barrier into a foreign country.⁷⁴

Landry’s research, however, also revealed some numbers that were inconsistent with the above trend. For example, only 5.88% of respondents predicted losing further business opportunities. However, not all of Landry’s numbers take into account the differentiation between the tiers or size of companies. These are important distinctions because, as Landry herself stated, “[a]s a percent of foreign sales, the cost burden on Tier 3 companies is nearly eight times that of Tier 1 firms.”⁷⁵ Therefore, answers to a question about ITAR compliance costs might be very different between Tier 1 and Tier 3 companies. One must also consider the advantages larger organizations hold over smaller entities. These advantages include legal counsel, dedicated legal departments, and funding available for ITAR training and compliance—all factors that enable larger firms to efficiently cope with the burdens of ITAR. Therefore, one must consider *who* is answering each question, and why.

Despite the elevated cost burden on Tier 3 companies, they invest a much higher percentage of internal funds into R&D and ITAR compliance as compared to Tier 1 companies.⁷⁶ Thus, the ability to grow by smaller firms that deal with USML goods is being restrained, while the larger firms are (relatively) more protected.⁷⁷ As a whole, however, the growth of U.S. companies has still been stifled, whereas foreign entities have collectively continued to progress.⁷⁸ Intensifying this effect on domestic profitability, lower-tier companies (Tier 3) are a paramount source of technology and innovation.⁷⁹ Thus, it is in the best interest of the United States to relieve these companies of the costly compliance burden and to nurture and promote the smaller firms, rather than hinder them.

Landry further explains that the punitive threat of noncompliance is so great⁸⁰ that U.S. firms are turning their innovative focus to other, less-regulated industries.⁸¹ The penalties for being ITAR noncompliant are significant and readily assessed if proper measures are not followed. A single violation can significantly affect the operating expenses of smaller firms.⁸² “Given the ease with which violations can occur, inadvertent violations by unaware companies and their officers can have drastic consequences.”⁸³ ITAR language expressly states:

⁷² *Id.* at 52.

⁷³ *Id.* at 54.

⁷⁴ *Id.*

⁷⁵ Center for Strategic & International Studies, *supra* note 36, at 33.

⁷⁶ Taylor, *supra* note 34, at 36; *See also* Guy Ben-Ari, et al., National Security and the Commercial Space Sector: *Initial Analysis and Evaluation of Options for Improving Commercial Access to Space*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES 26 (Apr. 2010), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCQQFjAB&url=http%3A%2F%2Fcsis.org%2Ffiles%2Fpublication%2F100430_berteau_commercial_space.pdf&ei=Y4BfUPW_BYre8ATP3IH0Bw&usg=AFQjCNEFQuHL1ZSyl7Zdlcho7v4ty0ypbA (stating that while large firms can invest between 1.5 to 2 percent of their revenue on internal research and development, smaller firms can invest as much as 15 percent).

⁷⁷ Kusiolek, *supra* note 2.

⁷⁸ *Id.*

⁷⁹ *ITAR and the U.S. Space Industry*, Space Foundation 1 (2008), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.spacefoundation.org%2Fdocs%2FSpace_Foundation_ITAR.pdf&ei=cYlfUKzpDoe8QS1tYHIBA&usg=AFQjCNFKKcjckKXfgJBmUrwbQfXzGb0Luw; *See also* Guy Ben-Ari, et al., *supra* note 77.

⁸⁰ Landry, *supra* note 11, at 39.

⁸¹ *Id.* at 40.

⁸² *ITAR Compliance*, ExportRules.com, (2011-12), available at <http://www.exporthrules.com/> (conducting a comparative analysis between sections “\$50,000 in ITAR Fines,” “ITAR Export Exemptions,” and “Export Enforcement Actions in 2007”).

⁸³ *Id.*

Any person who willfully [or criminally] violates any provision . . . or regulation . . . shall . . . be fined for each violation not more than \$1,000,000 or imprisoned not more than ten years, or both⁸⁴ . . . the civil penalty for each violation . . . may not exceed \$500,000.⁸⁵

Smaller market participants, however, are not the only firms feeling these negative effects of ITAR. The penalties from ITAR violations are being applied across the board of space and defense industries. Despite being better “equipped” to handle ITAR’s obstacles, large firms are also sustaining harsh penalties for noncompliance, including:

- Boeing – \$32.2 million since 1998⁸⁶
- Lockheed Martin – \$17 million since 2000⁸⁷
- L3 Communications – \$1.5 million since 2006⁸⁸
- Motorola – \$750,000 since 2001⁸⁹
- Northrup Grumman – \$15 million since 2008⁹⁰

Since the change in authority in 1999, there have been at least twenty-nine reported incidences of noncompliance, all resulting in heavy penalties.⁹¹ This is compared to only twelve in the prior twenty-two years.⁹²

In addition to purely monetary penalties, actual compliance costs can detract significantly from profits or cash available for reinvestment. Compliance expenses can include licensing fees, training, dedicated compliance personnel, and legal fees. Administrative penalties can further include the prevention of the exportation of goods, interim suspensions, and seizures of goods and transportation vessels.⁹³ If a company believes that it may have violated one of ITAR’s provisions, its best course of action may be to submit a voluntary disclosure. Under 22 C.F.R. § 127.12, a company’s voluntary disclosure can serve “as a mitigating factor in determining the administrative penalties, if any, that should be imposed.”⁹⁴

⁸⁴ 22 U.S.C. 2778(c) (emphasis added).

⁸⁵ 22 U.S.C. 2778(e) (emphasis added).

⁸⁶ U.S. Department of State, *Consent Agreements, 2008: The Boeing Company*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements/BoeingCompany.html.

⁸⁷ U.S. Department of State, *Consent Agreements, Lockheed Martin Corporation*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements/LockheedMartinCorp.htm.

⁸⁸ U.S. Department of State, *Consent Agreements, 2006: L-3 Communications Corporation/L-3 Titan Corporation*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements/L3communications.html.

⁸⁹ U.S. Department of State, *Consent Agreements, 2001: Motorola Corporation*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements/MotorolaCorp.htm.

⁹⁰ U.S. Department of State, *Consent Agreements, 2008: Northrop Grumman Corporation*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements/NorthropGrummanCorp.htm.

⁹¹ U.S. Department of State, *Consent Agreements*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), http://pmddtc.state.gov/compliance/consent_agreements.html.

⁹² *Id.*

⁹³ U.S. EXPORT POLICY TOWARDS THE PRC, *supra* note 20, at 44.

⁹⁴ C.F.R. 22 § 127.12.

These penalties and burdens on U.S. firms are not going unrecognized, nor are they something that has appeared overnight. So why does it appear that the Federal government is remaining passive and allowing these burdens to continue by moving very slowly, if at all, to relieve American manufacturers, innovators, and trading partners from the strain of ITAR? Consider the mission statement for the export control laws, and it becomes clear:

“The U.S. Government views the sale, export, and re-transfer of defense articles and defense services as an integral part of *safeguarding U.S. national security* and furthering U.S. foreign policy objectives.”⁹⁵

The federal government has indubitably prioritized national security and policy over economic growth.⁹⁶ The aforementioned studies show a correlation between ITAR compliance and the United States’ declining foreign market position.⁹⁷ With the weakening of U.S. competitiveness, foreign entities are capitalizing on new market voids. International market shifts like these can lead tangentially to other concerns—such as the deterioration of national security. The next section will address national security and American foreign relations concerns that have arisen from the increase in ITAR compliance requirements.

III. DOMESTIC NATIONAL SECURITY AND FOREIGN RELATIONS

The heightening of ITAR compliance standards was carried out because of growing Congressional concerns of threats to national security.⁹⁸ At the genesis was the failed 1996 launch of a Chinese “Long March Rocket.”⁹⁹ In the most simplistic recount of the incident, the approval of the export license for the rocket, built by a U.S. company, Space Systems/Loral (“Loral”), had faced significant criticism.¹⁰⁰ When the launch failed, the criticism materialized into fears that American secrets had been passed to the Chinese¹⁰¹ and Loral was ultimately charged with a violation of the AEA.¹⁰²

This controversy led to concerns of exploitable weaknesses in the American export policy—the potential for breaches in national security. As previously mentioned, in 1999 Congress reactively authorized the lateral transfer of the ITAR regulatory authority to the Department of State.¹⁰³ This transfer is important when one considers the Department of State’s natural inclination toward national security over that of the Department of Commerce. The transfer has effectively enabled the prioritization of national security over economic growth and profitability. Ultimately, this transfer of ITAR authority—designed to *curb* any weakness in national security—has de-prioritized economic growth to such an extent that the U.S. security shield has been thinned. As mentioned, the increase in ITAR compliance requirements has encouraged foreign States to move away from engaging the United States in trade and collaborative research efforts, thereby decreasing the American technology advantage.

The ostracization of the United States from development projects encourages other nations to collaborate in R&D efforts that would otherwise have included the United States. This gives these foreign entities access to information, which under different circumstances would have been privileged to the U.S. and its partners.¹⁰⁴ The included foreign nations also gain the opportunity to profit from these projects,¹⁰⁵ representing another important opportunity lost by the United States.

⁹⁵ U.S. Department of State, *Mission*, DIRECTORATE OF DEFENSE TRADE CONTROLS (Jan. 21, 2009), <http://pmdt.state.gov/index.html> (emphasis added).

⁹⁶ Kusiolek, *supra* note 2.

⁹⁷ Landry, *supra* note 11, at 2; *ITAR and the U.S. Space Industry*, *supra* note 79; Taylor, *supra* note 34; Center for Strategic & International Studies, *supra* note 36 at 33.

⁹⁸ Kusiolek, *supra* note 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Earthbound*, *supra* note 13.

¹⁰² Taylor Dinerman, *ITAR’s Failure*, THE SPACE REVIEW (Mar. 17, 2008), <http://www.thespacereview.com/article/1086/1>.

¹⁰³ Kusiolek, *supra* note 2.

¹⁰⁴ Landry, *supra* note 11.

Stemming from frustrations with ITAR, foreign sellers of space and defense technologies now actively avoid the United States, preferring other, more cooperative buyers. This affords American competitors and enemies the opportunity to acquire the newest in technologies. By the very nature of their policy, some of these buyers pose potential threats, in clear adversity to American national security policy. These are the very security threats that Congress attempted to minimize in 1999 with its revisions of ITAR. Moreover, with the growing momentum away from American technology, the United States loses the advantage of having firsthand knowledge and expertise of the leading technologies around the world. This can lead to significant inadequacies in the United States' ability to defend itself, while also undermining the United States' ability to innovate, attract foreign customers,¹⁰⁶ and collaborate with foreign entities.

ITAR is also affecting established relationships with friendly foreign states. "*Frustrated*" accurately describes the international sentiment toward ITAR. For example, in 2010, Canada withdrew from using certain American-built parts when modernizing key systems on its naval fleet.¹⁰⁷ This decision came about when the Canadian navy was "faced with delays and restrictions [from the United States] about what it can and cannot do"¹⁰⁸ in upgrading some of its systems. The United States' northern neighbor expressed its desire to be free from bureaucratic restriction or having to seek permission from the United States when looking to upgrade, repair, or modify its systems.¹⁰⁹

As a result, and to the detriment of U.S. technology firms, "the [new Canadian] command-and-control system will be free of any U.S. export controls."¹¹⁰ On its face, this may appear to be merely an isolated instance of economic loss. However, the Canadian withdrawal from American components in this instance is only one example of many ITAR-related hold-ups and restrictions for U.S. equipment and technology into Canada.¹¹¹ It is further illustrative of the shift away from U.S. parts that is growing outside American borders.¹¹² In short, this is not an isolated incident.¹¹³

With the exclusion of the United States from the Canadian sale, Canada turned to a collaboration of foreign firms (representing Sweden, Israel, Germany, and the Netherlands) to develop the naval system.¹¹⁴ These foreign companies can now market the new system to other entities, without American oversight. The negative effects of this exchange can include, i) an economic boost for foreign firms, ii) the access of cutting-edge technology by adverse entities, and iii) lost American opportunities to collaborate,¹¹⁵ profit, and control access. This scenario exemplifies the potential depth of losing more and more technology opportunities due to the growing global frustration with ITAR compliance.¹¹⁶

Thales, a global leader in the aerospace, transportation, and defense and security markets, reported a "spike in desire for ITAR-free equipment . . . from military forces around the world."¹¹⁷ The strain from ITAR even has Britain, America's most important global defense partner, frustrated.¹¹⁸ So much so that the

¹⁰⁵ *Id.*

¹⁰⁶ Colitt, *supra* note 10; *F35 Joint Strike Fighter: 2009-2010*, DEFENSE INDUSTRY DAILY (Jan. 08, 2011 11:05 AM), <http://www.defenseindustrydaily.com/F-35-Lightning-The-Joint-Strike-Fighter-Program-2012-07501/>; Pugliese, *supra* note 7.

¹⁰⁷ Pugliese, *supra* note 7.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Landry, *supra* note 11.

¹¹³ See *Earthbound*, *supra* note 13, at 66-67 (stating that after 1999, projects between the U.S. and Canada fell significantly and that European officials further "cited export controls as a reason for avoiding anything to do with America wherever possible.").

¹¹⁴ Pugliese, *supra* note 7.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *UK Warns USA Over ITAR Arms Restrictions*, DEFENSE INDUSTRY DAILY (Dec. 01, 2005, 10:00 AM), <http://www.defenseindustrydaily.com/uk-warns-usa-over-itar-arms-restrictions-01549/>.

Defense Industry Daily, a UK defense publication, analogized Britain's growing resentment towards ITAR to the Boston Tea Party.¹¹⁹

During the Clinton administration, the United States ensured that Britain would receive a waiver around the difficult ITAR licensing process, giving it access to U.S. defense technology.¹²⁰ Years later, at the end of George W. Bush's first term, Britain had still not received the waiver and was understandably "becoming increasingly angry."¹²¹ Exacerbating this resentment, Britain at the time was fighting alongside America in the Operation Iraqi Freedom conflict.¹²²

During wartime, sharing technology holds a unique and critical function in the interoperability among allies.¹²³ The Defense Industry Daily reported, "British and Australian officers serving in Iraq alongside the United States [were] sometimes barred from operations briefings because they aren't cleared to receive [the] information."¹²⁴ One can imagine the embarrassment and irritation between battlefield counterparts, notwithstanding the potentially fatal interference with the efficiency and efficacy of wartime operations. To illustrate the breadth of ITAR's negative operational effect, ITAR restrictions were applied to:

"furnishing of assistance, including training to foreign persons in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles, whether in the United States or abroad" or furnishing of technical data."¹²⁵

Therefore, not only must the United States' battlefield allies cope with the hardships of war, they must also struggle against the bureaucratic difficulties of ITAR as well. Yet ITAR remains uncompromising in joint operations. Accordingly, United States' wartime co-operators may be left with inclinations of distrust and resentment¹²⁶ as they are working with a partner who asks for help, then "pushes back" in resistance.

ITAR frustration between allies also extends beyond the battlefield. In one deal, between the United States and Britain and described as "the largest single global defense program in history," Britain encountered ITAR resistance in the sharing of technical information with the United States.¹²⁷ The deal, valued at \$382 billion, was aimed at supplying fighter jets to the United States, Britain, and other countries.¹²⁸ After the withholding of certain information, a British defense committee demanded assurance from the United States that all technical information regarding the project would be provided to Britain by the end of the year, or threats of Britain not buying into the project may materialize.¹²⁹ While this disconnect was eventually settled, it serves as another example of a growing resentment between the United States and its closest allies, rooted in ITAR.

Brazil has also made strategic decisions to avoid the United States in defense partnerships and deals.¹³⁰ In 2010, Brazil chose the more expensive French Rafale jet over Boeing's cheaper F-18, despite both planes meeting all of Brazil's requirements.¹³¹ When considering market norms, this decision is counterintuitive. Given perfect substitutes, a rationale consumer should choose the cheaper alternative. However, Brazilian Defense Minister Nelson Jobim expressed the nation's concern with America's history of sensitive

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ DEFENSE INDUSTRY DAILY, *supra* note 106.

¹²⁸ *Id.*

¹²⁹ *MPs Warn Over U.S. Fighter Jet Deal*, BBC NEWS (DEC. 8, 2006, 11:47 AM), http://news.bbc.co.uk/2/hi/uk_news/politics/6219122.stm.

¹³⁰ Colitt, *supra* note 10.

¹³¹ *Id.*

technology embargoes and that “the United States Government could give no upfront guarantee” that another technology embargo would not occur.¹³² Brazil President Luiz Inacio Lula da Silva stated that the “choice was not technical but political and strategic.”¹³³ This deal amounted to thirty-six fighter jets, valued at over four billion dollars,¹³⁴ and a lost opportunity for the U.S. to develop a working relationship with a worthy ally and promising economy. It further represents another example of the United States losing opportunities to be involved in a global defense deal.

Along Brazil’s northern border lies Venezuela, which represents a more hostile example of the foreign effects of ITAR. While Venezuela is a major supplier of oil to the United States,¹³⁵ there is a long history of turbulent relations between the two nations. Nevertheless, in 1983, the United States sold Venezuela a fleet of F-16 fighter jets.¹³⁶ In response to a U.S. ban on arms sales, in 2006 Venezuela threatened to sell the fleet of F-16’s to Iran.¹³⁷ In actuality however, it had been some time that Venezuela was considering options for replacing this fleet due to long-standing frustrations with ITAR.¹³⁸ After the 1999 increase in ITAR restrictions, the United States halted the sale of replacement parts and upgrades for the jets, thus prompting Venezuela’s desire to sell the fleet.¹³⁹ In addition to selling the jets to Iran, Venezuela had also considered China and Cuba.¹⁴⁰ Moreover, Venezuela was considering replacing the F-16 fleet with a new fleet of state-of-the-art Russian Sukhoi Su-35 jet fighters.¹⁴¹ This represents lost American opportunities both to profit and retain control of the technology in use by a foreign nation. Of course, the latter represents a serious potential threat to the security of the United States.

Meanwhile, as historically hostile Venezuela is contemplating *increasing* its arms capabilities with state-of-the-art foreign technology, American defense companies are *withholding* their best products from the federal government in the hope of simply avoiding engagement with ITAR.¹⁴² Further threatening the national security of the United States, the withheld American technology is being sold on the open market depriving the U.S. government of that technology and providing foreign entities the opportunity to obtain it.¹⁴³

Finally, American educational institutions are also suggesting that ITAR is keeping bright foreign students from coming to the United States to study; minimizing foreign contribution to domestic research and innovation.¹⁴⁴ An assessment done at MIT shows a correlation between simultaneously increased ITAR and visa requirements, and a significant decline in foreign student enrollment in American universities.¹⁴⁵ If capable foreign students are being kept from contributing to American research and innovation, they may seek this opportunity elsewhere and, to that end, contribute to the intellectual capital pools of foreign entities.

These examples are illustrative of how ITAR is *contributing* to the threat of the United States’ national security. The 1999 changes to ITAR—originally designed to make the United States more secure—have frustrated the United States’ allies, alienated it from international defense collaborations, and angered other

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ U.S. Energy Information Administration, *Crude Oil and Total Petroleum Imports Top 15 Countries*, INDEPENDENT STATISTICS & ANALYSIS (Nov. 2011), http://www.eia.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html.

¹³⁶ Associated Press, *Venezuela Threatens to Sell F-16 Fleet to Iran*, FOX NEWS (May 16, 2006), <http://www.foxnews.com/story/0,2933,195672,00.html>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² OFFICE OF UNDER SECRETARY OF DEFENSE, *supra* note 6.

¹⁴³ *Id.*

¹⁴⁴ David A. Broniatowski, Nicole C. Jordan, Andrew M. Long, Matthew G. Richards, and Roland E. Weibel, Note, *Balancing the Needs for Space Research and National Security in the ITAR*, 6 AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS, available at <http://web.mit.edu/mgr/www/Portfolio/Balancing%20the%20Needs%20for%20Space%20Research%20and%20National%20Security%20in%20the%20ITAR.pdf>.

¹⁴⁵ *Id.*

foreign States. In essence, by shifting the focus of ITAR solely to national security, both economic competitiveness *and* national security have suffered.¹⁴⁶ The next and final section will suggest changes and solutions to the current state of ITAR and propose recommendations that will lead to favorable compromises between national security, foreign relations, and economic growth.

IV. RECOMMENDATIONS

Many industry participants and evaluators have suggested changes to ITAR to give the United States a boost in market competitiveness.¹⁴⁷ However, there seems to be a commonality between the suggestions; a focus on “patchwork regulation.” Patchwork regulation is the idea of regulation-on-top-of-regulation to solve a problem. But patchwork regulation may only solve temporary and symptomatic issues. In a case such as this, however, it does not resolve a fundamentally flawed system. For example, Landry and her respondents’ primary suggestion was an update of the USML.¹⁴⁸ While this recommendation will relieve a limited number of items from the restrictive grip of the USML, making the trade of those goods easier for certain organizations, it will do so only until the next evolution in technology. Instead, given the necessity for a long-term, effective solution, a more holistic approach is needed. Here, the big picture must be considered. This is not to say that the United States must scrap the entire body of current export control laws, but a multi-faceted approach is warranted.

United States Air Force Major General Robert Dickman, the Executive Director of the American Institute of Aeronautics and Astronautics, understands this. In a similar effort as this article—the provocation of revisions to legislation *and* policy—Dickman delivered a testimonial to the U.S. House of Representatives Committee on Science and Technology and suggested changes to aid in the economic recovery of the relevant technology industries.¹⁴⁹

In his testimony, Dickman suggests a system based on “*by exception*” as opposed to the current “*by approval*” method.¹⁵⁰ A “by approval” regulatory system is the practice by which prior to any trade over international borders, a good or technology must be approved by an authority. As applied here, this system has shown to be cumbersome and detrimental. In contrast, a “by exception” system encourages the freedom of general trans-border trade but still affords regulators the power to prevent the flow of select goods or technologies (the exceptions).¹⁵¹ A “by exception” system promotes collaboration, partnerships, trading, and profitability. A new regulatory framework should be one that *encourages* robust, economic growth while at the same time, continuing to advance national security. The following recommendations seek to do just that.

USML REVISION(S)

In his testimony, Dickman lays the groundwork for several necessary and essential considerations on how to improve industry profitability.¹⁵² However, for the United States to realize a significant and *permanent* growth in market share and profitability, policy makers must go further than Dickman’s recommendations. Initially the most common and obvious recommendation, as many suggest, is an update

¹⁴⁶ Kusiolek, *supra* note 2.

¹⁴⁷ Landry, *supra* note 11, at 53.

¹⁴⁸ *Id.* at 67.

¹⁴⁹ Maj. Gen. Robert Dickman, Executive Director, The Am. Inst. of Aeronautics and Astronautics, Testimony to the Comm. on Sci. and Tech., U.S. House of Representatives: Impacts of U.S. Export Control Policies on Science and Technology Activities and Competitiveness (Feb. 25, 2009), *available at* http://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=1&ved=0CFIQFjAA&url=http%3A%2F%2Fwww.aiaa.org%2FuploadedFiles%2FIssues_and_Advocacy%2FNational_Security%2FITARTestimony022509.pdf&ei=VyC8T6LkFY2c8QTkyKQY&usg=AFQjCNEsj5ORYf6mIF3SAIgd0-U4KEQcnQ.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

of the USML.¹⁵³ Dickman correctly claims that “one of the problems with the current list is that [it] has not been examined *comprehensively* since [its] inception.”¹⁵⁴

Both Dickman and Landry call for each item on the USML to be evaluated.¹⁵⁵ At the most basic level, some USML items are readily available elsewhere, thus any justification for inclusion on the list is moot. In other areas, foreign technology has been shown to outperform U.S. innovation.¹⁵⁶ Again, with even more sophisticated products readily available elsewhere, the United States should not withhold its own products from trade on the sole basis of national security. Finally, items with outdated defense uses that can now only be used in commercial ways do not pose a threat to national security and thus, should also be excluded from the restrictive scrutiny of the USML.

Remaining items deemed to be defense-orientated or dual-use should next be evaluated. The intended goal for these items is to, *if appropriate*, permit a less stringent licensing process. Factors to be considered include the entity to which the item is being exported, the level of availability of the item elsewhere, or a collective analysis as to how significant this item is as a part of a sensitive United States defense or munitions system.¹⁵⁷ In addition to an initial evaluation, Dickman suggests continued periodic reexaminations of the USML with subsequent revisions following every twelve months.¹⁵⁸ Given the ever-changing environment of the technology industry, continuous USML revisions are critical.

In sum, there is an accumulation of components on the USML that lack the sufficient rationale to justify restriction.¹⁵⁹ To that end, the re-evaluations of the USML are the “quick-fix” that can help American companies in the short-term. Future revisions will become less laborious as the USML is trimmed down to accommodate the new ultimate objective of ITAR—boosting market competitiveness *while* maintaining robust national security.

TRANSPARENCY

Transparency of the administration and application of ITAR must increase so that firms may plan efficient business models. The aforementioned revisions of the USML will only allow firms to realize immediate results. However any long-term benefits may stop there, as much of the confusion and frustration regarding ITAR compliance will still be present. With technology industries constantly evolving, what might equate to profitability now may not in the near future. Therefore increasing transparency, by publishing the “constants” of the regulatory system, will be critical to regaining market superiority. For example, currently “[t]here is . . . a lack of explanation for how a component is evaluated for export release and how decisions are made in the certification process,” states Dickman.¹⁶⁰ The ITAR regulatory authority must establish and publish a standard for future reevaluations. Frequent and continued reevaluations of the USML will only complicate both innovative and sales planning for market participants if there are incessant surprises as to what is included or excluded from the USML. A published standard will eliminate this.

LONG-TERM INVESTMENT

Next, there are several problems with simply revising the USML and increasing transparency. The necessity for long-term and permanent growth requires more than just regulatory and policy changes. As with any business, permanent and effective growth also requires investment.

¹⁵³ Dickman, *supra* note 149; Landry, *supra* note 11, at 15, 43, 67.

¹⁵⁴ Dickman, *supra* note 149 (emphasis added).

¹⁵⁵ Dickman, *supra* note 149; Landry, *supra* note 11, at 42-43.

¹⁵⁶ Dickman, *supra* note 149.

¹⁵⁷ This list is not intended to be exhaustive.

¹⁵⁸ Dickman, *supra* note 149.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see also Landry, *supra* note 11, at 16 (discussing the uncertainty among U.S. firms of “possible licensing requirements”).

First, an increase in human capital should be considered to bolster the ITAR administrative and licensing office. In recent years, the licensing office has been “streamlined” to make it more efficient.¹⁶¹ However, like with any business trying to expand, a growth in administration cannot go overlooked. Initially, greater manpower will be needed to conduct a reexamination of the USML. A team should then be established to continue reevaluations and that would also act as a liaison between ITAR’s administrative processes and industry participants.

As previously mentioned, small companies and foreign buyers/sellers are losing both time and money navigating their way through the export control laws. Rather than continuing to push all of the expense onto these entities, a greater return on investment may be realized by employing experts in the ITAR control and licensing office who can serve in both advisory and consulting capacities.

In conjunction with transparency, a practical understanding must be readily available to market participants. In this period of regrowth, it is critical that companies and foreign entities have free or inexpensive access to an easy understanding of ITAR’s processes. An increased staff will ease the compliance process for inquiring entities or simply aid in a seamless transition for new participants into the system. Here, new entrants are critical for regaining market share and their ability to work smarter through transparency is their greatest tool. The more transparent a system is, the less ambiguity is faced within the market and the easier it is for market participants to implement ITAR-compliant business models. Less ambiguity also leads to proper planning and ultimately will allow significant savings of time, frustration, and compliance related expenses. This can all be accomplished with an investment in administrative staff, which can then aid in a global understanding of ITAR.

Dickman also recognized a significant need for reinvestment in the United States’ R&D facilities. Reinvestment in research facilities must not be limited to only domestic development, however, but also for the purpose of attracting foreign researchers and innovators.¹⁶² “Nations no longer need to come to the United States for [its] knowledge, facilities, or technology because of [its] restrictions,” states Dickman.¹⁶³ The goal is to encourage foreign minds to physically come to the United States and collaborate with American researchers in American facilities. By promoting the collaboration of research efforts on American soil, partnerships can further be developed for American benefit. Additionally, one can expect the growth in collaboration to yield an increase in the sophistication, quality, and breadth of ideas and products developed within the United States.

Finally, an “industry infrastructure reinvestment” is not as simple as approving generous funding for modern equipment and facilities. Applying capital to infrastructure is useless without a competent workforce to maximize the value of the infrastructure investment. Therefore, scientists, students, innovators and other manpower must be available to employ these resources for the American global advantage. A need for bright minds, both foreign and domestic, leads to the next recommendation—a change in American visa policy to attract foreign intellect to the United States.

POLICY CHANGES TO ENCOURAGE GROWTH IN INTELLECTUAL CAPITAL

Currently, American participants in global defense technology industries are, in one form or another, losing competitive ground on the international stage.¹⁶⁴ Dickman accurately states that “[w]e need to develop policies that allow and encourage U.S. researchers [and innovators] to talk and share ideas, findings, and recommendations without a fear of violating U.S. trade policy.”¹⁶⁵ Therefore, in addition to a monetary investment in infrastructure, there must be an accompanying investment in human capital. The first step involves a boost of domestic human capital in research, education, and innovation.

¹⁶¹ Dickman, *supra* note 149.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Second, a controlled relaxation in American visa policy will allow promising foreign intellect—notably, foreign students and professors—to come to the United States and work in collaborative efforts.¹⁶⁶ A focused relaxation of the visa policy in conjunction with the reinvestment in the R&D infrastructure will naturally encourage foreign students and professors to study and teach at American universities.¹⁶⁷ Increasing student diversity in America’s educational institutions can also foster early relationships between American and foreign students and set a stage for the sharing of ideas during the most basic levels of research and education. Additionally, it will enlarge the available talent pool that will subsequently flow into the working industry after post-secondary education.¹⁶⁸ As an aside, if talented foreign students are studying in America, they will not be contributing to foreign competitors’ up-and-coming intellect pool.¹⁶⁹ Finally, foreign professors who come and teach will bring with them different perspectives and thus afford America’s students the benefit of a more expansive breadth of scientific and innovative theory and application.

EXPEDITIOUS DEALING WITH PREVIOUS TRADING PARTNERS OR FRIENDLY ENTITIES

Beyond updating the USML, the licensing of transactions for entities with which an extensive positive trading history has been established should be handled expeditiously and on a less intrusive and instigative scale. A few obvious examples include, but are not limited to, Britain, France, and Canada. This is not to say that no restrictions should be placed on transactions with these entities at all. However, the relationship and trading frequency between with these foreign states and the United States should be recognized, if not for the sake of partisanship, than for economy. For example, a preliminary investigation may be completed and deemed sufficient to serve for a set number for future transactions. That preliminary investigation may be renewed annually, or as otherwise needed.

COLLECTIVE LICENSING

The ITAR authority might also consider “collective” company licenses for reputable and established firms. Such licenses may govern a set or subset of similar items and allow specific trading activity without individualized approval for each item. Specific company licenses can be tailored as narrowly or as broadly as is appropriate. “Collective licensing” will relieve the laborious process of investigating and issuing many individualized licenses. This form of licensing will aid all parties to the transaction, including the licensing office. To that end, collective licensing will promote company savings by cutting down on administrative expenses as well as promoting the efficacy of the licensing office by further streamlining the efficient use of human capital.

GRANTS OR TAX INCENTIVES

Next, grants or tax incentives may be considered for smaller firms trying to maintain or establish a presence in an industry. It has been discussed, that by the very nature of being a smaller company, these firms can have difficulty remaining ITAR compliant.¹⁷⁰ Common characteristics of smaller entities that aid in the difficulty of being ITAR compliant include a lack of legal counsel, dedicated legal departments, or funds for employee training and compliance. This is a significant concept that should not go overlooked as lower-tier companies provide significant innovation in both niche and larger technology markets.¹⁷¹ Grants to help relieve the burden of compliance expenses can help smaller firms return to their specialties and again rise to the level of competitiveness that has been seen in the past.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Landry, *supra* note 11, at 11, 44, 52; Dinerman, *supra* note 102.

¹⁷¹ *ITAR and the U.S. Space Industry*, *supra* note 79.

Moreover, incentives for companies who plan and enter into trade contracts early might be considered. Early contracting promotes both time and money savings by enabling ample time for the government to complete any administrative needs without delaying transactions. Monetary incentives can reward early contracting, thereby decreasing the risk of either party abandoning the transaction later on. Thus, this can help to lock in business and promote future trading relations. Finally, other grants or tax incentives might be acknowledged for those transactions that serve state interests.

POST-EXPORTATION TRADING FREEDOM

Revisions to *pre*-exportation policy are not the only changes to be considered. Certain actions by the ITAR authority *after* exportation of the original item can continue to aid in the profitable operations of domestic firms.¹⁷² For instance, allowing the license-free exportation of replacement components for systems that have already been approved and exported would encourage both efficient and profitable trade practices. This can also be applicable to the modification and upgrade of systems¹⁷³ as well, although some newly developed replacement components of sensitive, pre-existing systems may still warrant individual investigation. Ultimately, however, allowing simple replacement parts and certain upgrade components to leave the country unobstructed can benefit future business operations without threatening national security.

AUTOMATION OF ITAR ADMINISTRATION ON INDUSTRY SIDE

The final recommendation of this article requires action on the part of industry participants—the automation of ITAR compliance administration. An efficient and effective regulated trade system requires cooperation on both sides—government and industry participants. Both Microsoft and Enterprise Content Management have developed compliance software systems that streamline ITAR compliance administrative tasks for business and research entities.¹⁷⁴ These systems aid in the minimization of company costs while maximizing the use of company time. Additional benefits include the acceleration of processing and the elimination of both redundant tasks and dependencies on personnel. The implementation of systems such as these throughout the industry will harmonize its participants, compliment government regulatory improvements, and yield an ITAR framework that promotes both national security and profitable trade practices.

In sum, changes to the ITAR framework and its effects on both global and domestic trade and innovation must be considered. Considerations however, must go beyond a mere revision of the USML and ITAR framework where many suggestions stop. The foregoing recommendations, if taken together, provide the holistic approach necessary to regain long-term and robust market superiority for American business while maintaining dependable national security.

CONCLUSION

“In the production of its 787 and B-2 ‘Stealth Bomber,’ Boeing had to take drastic measures and backtrack some of its technology, at great expense, due to ITAR concerns.”¹⁷⁵ This article has focused on these concerns, where significant economic shortcomings have been compelled by current ITAR requirements. The 1999 increases in ITAR compliance were predicated on heightened concerns of national

¹⁷² Dinerman, *supra* note 102.

¹⁷³ See Pugliese, *supra* note 7.

¹⁷⁴ MICROSOFT OFFICE 365 ITAR, <http://www.microsoft.com/en-us/download/details.aspx?id=23910> (last visited Oct. 17, 2012); ITAR AND EAR COMPLIANCE WITH EMC DOCUMENTUM, http://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=3&sqi=2&ved=0CE0QFjAC&url=http%3A%2F%2Fwww.emc.com%2Fcollateral%2Fsoftware%2Fsolution-overview%2Fh4571-itar-so.pdf&ei=CFV_UOD_B42C9QTYo4GYDA&usg=AFQjCNEyMWpKSEG53AzC-YMe12O5oxuJSA (last visited Oct. 17, 2012).

¹⁷⁵ Dominic Gates, *Separation anxiety: The wall between military and commercial technology*, SEATTLE TIMES AEROSPACE REPORTER (Jan. 22, 2006), http://seattletimes.nwsources.com/html/business/technology/2002754224_boeingitar22.html.

security. However, this left critical goals, such as industrial growth and profitability, as inferior objectives. The effects of the ITAR revisions have now come full circle and actually detracted from the stability of the United States' national security. The revisions empowered foreign entities, augmented their technological capabilities, and increased the potential for adverse actions against the United States.

Economically, the revisions have increased both transaction costs and times, hindered the ability to grow a business, and relinquished profitable opportunities to foreign entities.¹⁷⁶ Moreover, the hyper-restrictive nature of ITAR has led to a costly foreign "ITAR-free" movement away from American products.¹⁷⁷ The ITAR framework must be reevaluated and ultimately, changes must be made.

This article preliminarily suggests a revision of the USML relieving many items of the need for individualized approval. Subsequent USML revisions must continue for the legislation to remain up-to-date and in support of U.S. competitiveness. Also accompanying these revisions must be transparency and an established standard of the revision process. Established USML revision factors will allow firms and research entities to effectively plan compliance into their business operations.

Next, the United States should consider "collective licensing" and expedited, less-inquisitive investigations for entities with an established trading history and similar economic and social outlooks. In conjunction with this idea is the automatic approval of replacement parts or (some) upgrades for systems that have already been exported to an end buyer. This will foster relationships, promote future business, and reduce wasteful licensing and frustration over wait times. On the company side, implementing automated ITAR software can further decrease redundancy while boosting accuracy and trim expenses.

Next, grants and tax incentives should be considered for smaller to medium size firms in an effort to ease their burden of compliance. Providing grants or other financial relief, will enable smaller firms to remain competitive and grow within their respective industries. Alongside direct federal relief, Congress must also consider reinvestment into the R&D infrastructure. Government contribution in this area will again modernize the nation's testing and science facilities, thus attracting foreign scientists, researchers, and developers.

Finally, a controlled relaxation of visa policy will allow promising foreign students and professors to come study and teach, respectively, at American universities. Lifted visa restrictions will also enable desirable researchers and innovators to retain a permanent or long-term working status for which to build working relationships with their American colleagues. Ultimately, this will promote foreign collaboration, broaden domestic opportunities to earn profit, and nurture a broader pool of promising student intellect from which to employ in future development projects.

The need for significant change to current export control policy is evidenced by the severe domestic shortcomings in today's global markets. A holistic reevaluation and advancement of ITAR and export control policy is necessary to regain the lost superiority by American firms in the defense and technology industries. Implementing the foregoing changes to the ITAR framework and beyond, national security can remain strong without having to sacrifice robust economic competitiveness in global markets.

¹⁷⁶ Landry, *supra* note 11.

¹⁷⁷ Abbey, *supra* note 40; Ben-Ari, et al., *supra* note 76, at 23, 30.

STUDENT NOTE

How Puppet Masters Create Genocide: *A Study in the State-Sponsored Killings in Rwanda and Cambodia*

Joel H. Feigenbaum*

ABSTRACT

This paper calls on the United States to assess where its true interests lie in evaluating genocide and mass killings. Through an examination of the social and political factors which were paramount in bringing about the atrocities in Cambodia in the late 1970s and Rwanda in the mid-1990s, the U.S. is urged to take heed of the tried-and-true methods used by ruthless regimes throughout history in bringing about the destruction of their own citizenry. Consideration of the psychological imperatives necessary for ordinary men or women to depart from the standard boundaries of civilized society and butcher their neighbors and countrymen is worthwhile in understanding how individuals permit, if not facilitate, genocide in their own backyards.

Many believe that genocides are inevitable and caused by ancient ethnic or religious strife. Governments understand these tensions and use them to exploit their own people and gain political leverage. Genocide does not occur over night. Bringing about the conditions necessary to permit such a grave injustice is cultivated over many years, often decades. When governments enact laws and issue directives, no matter the content, the legitimacy of such edicts cannot be overlooked by the average citizen, especially the ill-educated and impoverished. By looking at the legislation and government programs enacted prior to mass-murder, clear and systematic evidence of intent cannot be overlooked. The goal of this article is to spread awareness of the methods and techniques employed leading up to genocide so that the freedom-loving nations of the world may act proactively and prevent tragedies before needless blood is spilled.

* J.D., University of Miami School of Law, 2013; B.A. History, University of Richmond, 2010. Executive Managing Editor of the University of Miami National Security and Armed Conflict Law Review. Edited by Alexander J. Roth.

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I. INTRODUCTION

Only 16 of the world's 193 countries currently remain untouched by war.¹ At any given time, an average of 50 nations are engaged in armed conflict.² Prolific writer and professor emeritus at the University of Hawaii, Rudolph Rummel, estimates that in the twentieth-century about forty million people were killed in wars, but 140 million noncombatants died.³ Civilians comprise well over half of this latter figure, not killed accidentally, but deliberately.⁴ By starvation, overwork, "outright slaughter" in concentration camps and prison, and as helpless refugees fleeing persecution or cowering in their homes, killing in such astronomical numbers requires a great deal of organization and a "gross asymmetry of power in favor of the perpetrators."⁵

What is it that drives an ordinary person to commit the most heinous acts imaginable against their neighbors? What precisely breaks the moral fiber of an individual and leads them to participate in an organized campaign of mass murder? When looking specifically to the genocides in Cambodia and Rwanda, one gains an understanding of how governments can manipulate the morality and culture as well as the legal and social systems which govern a society, thus creating an ideal set of circumstances for a bloodbath. In both Cambodia and Rwanda, state-sponsored killings were the result of a methodical and carefully contrived political and social agenda, which effectively, over time, garnered them the support of their citizenry.

In both circumstances, the top-down, contrived scheme, designed by puppet masters in government offices, was paramount in annihilating a segment of the population. A keen understanding of the social, ideological, and demographically oriented history of the region and its inhabitants set the stage for the events which unraveled on the ground. The Communist Khmer Rouge ("Khmer") regime in Cambodia and the elected Hutu in Rwanda each utilized different strategies in securing the confidence of their citizenry. In a military coup, the Khmer established Democratic Kampuchea ("DK") in today's Cambodia and under a new constitution, ruled from 1975-1979. The DK was recognized by the United Nations and a majority of the international community, including the United States, as the legitimate representative of the Cambodian people.⁶

Following the assassination of Rwandan President Habyarimana, the Rwandan Armed Forces ("RAF") took control of the government with the Hutu Presidential Guard at the helm. This force had a loose control of Rwanda for roughly 100 days, in which no legislation or "official" directives were given. Both governments relied heavily on tactics including propaganda and preying on mortal fears, as well as the desire to achieve upward mobility and elevating designed segments of the population.

Through an examination of the critical political and social conditions made possible by authorities in these two nations, one can put together two coherent and complimentary blueprints of how genocides commence. It is this article's aim to bring attention to these models and suggest that the United States not only consider them, but prioritize them in evaluating future humanitarian crises. No longer can the

¹ STEVE K. BAUM, *THE PSYCHOLOGY OF GENOCIDE: PERPETRATORS, BYSTANDARDS, AND RESCUERS* 9 (Cambridge University Press, 2008).

² *Id.* citing C.P. SCHERRER, *STRUCTURAL PREVENTION OF ETHNIC VIOLENCE* (Palgrave Macmillan, 2002).

³ DANIEL CHIROT & CLARK MCCAULEY, *WHY NOT KILL THEM ALL? THE LOGIC AND PREVENTION OF MASS POLITICAL MURDER* 57 (Princeton University Press, 2006); *But see* PIERRE HASSNER, *FROM WAR AND PEACE TO VIOLENCE AND INTERVENTION: PERMANENT MORAL DILEMMAS IN HUMANITARIAN INTERVENTION*, in *HARD CHOICES: MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 17 (Jonathan Moore ed., 1998) (suggesting that about 150 million people have been killed in cold blood by their own governments, compared to the 35 million who were killed in all of the twentieth-century wars, including both world wars and all civil wars).

⁴ CHIROT & MCCAULEY, *supra* note 3, at 58.

⁵ *Id.* at 57.

⁶ Linda L. Schlueter, *The Constitution of Democratic Kampuchea*, MOD. L. SYS. CYCLOPEDIA, vol. 9, 2002, at 9.1610.19, available at HeinOnline 9 Mod. Legal Sys. Cyclopedia 9.160.19.

U.S. sit idly by and watch innocent men and women be slaughtered by the hundreds of thousands, while it knowingly prioritizes domestic concerns and political capital over innocent lives.

The article will begin with an introduction to the dissonance theory and mob mentality—psychological principles that help explain the phenomena of mass-killing performed by ordinary men and women from the general populace. Common dissonance techniques will then be discussed as they relate to the Cambodian genocide. An analytical inspection of the nation’s Communist constitution will assist the reader in understanding the governmental initiatives which led to the “Killing Fields.” By looking at the Rwandan genocide next, one gains a greater appreciation for the similar methods employed by ruthless regimes to bring about the destruction of a distinct population. The role of identification cards by the Hutu government will be highlighted. The article will then discuss the United States’ understanding of these two atrocities and its role in handling the humanitarian crisis. Lastly, there is a call for the U.S. to take a more proactive approach to genocide prevention and prioritize the value of human life above what are considered less consequential concerns.

II. HOW KILLING BECOMES EASY

A. MOB-MENTALITY

In his 1895 book, *La Psychologie Des Foules* (“The Psychology of Crowds”), French sociologist and journalist Gustav Le Bon stated, “A man descends several rungs in the ladder of civilization . . . by the mere fact he forms part of an organized crowd. Isolated, he may be a cultivated individual: in a crowd, he is a barbarian – this is, a creature acting by instinct.”⁷ Austrian neurologist and philosopher Sigmund Freud agreed with Le Bon, believing that crowds were excitable, impulsive, suggestive[,] and lacked self-criticism.⁸ Freud argued that people in groups: 1) exhibit a loss of individual personality; 2) focus their thoughts and feelings into the common direction; 3) see a surge in the unconscious power of emotion of reason and judgment; and 4) are compelled to immediately carry out their intentions.⁹

Violence in the group becomes possible because individuals, who have lost their conscience and values, now look to the group leader as their moral compass.¹⁰ Although the individuals in the group may be good and moral, groups are *inherently* selfish and uncaring.¹¹ The American Founding Fathers were quite wary of mob mentality. In conceiving their new government, they feared that the “mob” might overtake Congress and cripple the young nation. Under the pseudonym Publius, James Madison shared his concerns to the people of New York in *The Federalist No. 55*. He said, “In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”¹²

M. Scott Peck, an American psychiatrist and best-selling author suggests, “Any group will remain inevitably[,] potentially conscienceless[,] and evil until such a time as each and every individual holds

⁷ JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLINGS* 34-36 (Oxford University Press, 2d ed. 2007) *citing* GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* 12 (Norman S. Berg ed., 1968) (describing group immaturity, or the notion that human groups behave at a level that is more primitive and immature than one might expect).

⁸ WALLER, *supra* note 7, at 34.

⁹ *Id.*; Ravi Bhavanani, *Ethnic Norms and Interethnic Violence: Accounting for Mass Participation in the Rwanda Genocide*, 43 J. PEACE RES. 6, 653 (2006).

¹⁰ WALLER, *supra* note 7, at 35; BAUM, *supra* note 1, at 199 (according to historian Ben Valentino, the number of perpetrators in the average population ranges between 2 and 15 percent).

¹¹ Reinhold Niebuhr of the Union Theological Seminary in New York City believed that all collectives are more arrogant, hypocritical, self-centered, and ruthless in the pursuit of their ends than the individual. WALLER, *supra* note 7, at 35 *citing* REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* ix (Charles Scribner’s Sons ed., 1932).

¹² THE FEDERALIST NO. 55 (James Madison).

himself or herself directly responsible for the behavior of the whole group—the organism—of which he or she is a part.”¹³ Falling back on group absolution, Lt. Col. David Grossman, who coined the term “killology” while a professor of military science at Arkansas State University, argues that individuals believe the group is a killer, not themselves personally.¹⁴ By diffusing responsibility, individuals in a group commit acts they would never dream of doing alone.¹⁵ Over time, group goals overshadow and become indistinguishable from personal ones.

B. AN INTRODUCTION TO DISSONANCE

It is relatively easy to get soldiers to fight and kill others in battle who are clearly intent on killing them first. The “dissonance theory” helps to explain the psychology necessary to overcome the natural reluctance to kill those that pose little to no threat.¹⁶ Dissonance can be described as “an unpleasant arousal that comes from seeing ourselves as having chosen to do something wrong, stupid, or sleazy—that is something at odds with our positive self-image.”¹⁷ To eliminate these feelings, it is necessary to change one’s beliefs about what is right and wrong. Dissonance commonly takes form in: 1) dehumanizing victims; 2) employing euphemisms to mask deeds; 3) moral restructuring and justification; and 4) becoming acclimated to killing and denying responsibility for individual actions.¹⁸ These methods of dissonance have commonly been employed by genocidal regimes, and were seen in both Cambodia and Rwanda.

C. COMMON FORMS OF DISSONANCE IN GENOCIDE

i. Dehumanization

Psychologist Erik Erikson advocates that through pseudospeciation, killers dehumanize their victims. He explains, “People lose the sense of being one species and try to make other people into a different and mortally dangerous species, one that doesn’t count, one that isn’t human . . . You can kill them without feeling that you have killed your own kind.”¹⁹ In many cases of genocide, victims are categorized as animals—subhuman—or as demons and monsters—inhuman.²⁰ Dehumanization is most prevalent where a group can be easily identified as belonging to a distinct racial, ethnic, religious, social or political group that the killers regard as inferior.²¹ Perpetrators first deprive victims of their individual identity by defining them by their “category.”²² They then exclude those of the “category” from all others in the community, thereby laying the groundwork in separating this smaller community from the morals governing community as a whole.²³

¹³ WALLER, *supra* note 7, at 37 citing M. SCOTT PECK, *PEOPLE OF THE LIE: THE HOPE FOR HEALING HUMAN EVIL*, 218 (Simon and Schuster ed., 1983).

¹⁴ CHIROT & MCCAULEY, *supra* note 3, at 57 (saying “Membership in a group of killers creates powerful bonds of solidarity that can legitimize killing and reduce any dissonance felt by those who murder.” Cohesion in a group that is assigned a horrid task makes it difficult for an individual to shirk their responsibilities for they know their load will be shifted onto their cohorts); WALLER, *supra* note 7, at 37.

¹⁵ WALLER, *supra* note 7, at 37.

¹⁶ CHIROT & MCCAULEY, *supra* note 3, at 54.

¹⁷ *Id.*; W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 973 YALE FACULTY SCHOLARSHIP SERIES 78 (1996); See also Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why it Matters*, 98 J. CRIM. L. & CRIMINOLOGY 3, 931.

¹⁸ Alexander Laban Hinton, *Agents of Death: Explaining the Cambodian Genocide in Terms of Psychological Dissonance*, 98 AM. ANTHROPOLOGIST 4, 824 (1996); WALLER, *supra* note 7, at 202.

¹⁹ WALLER, *supra* note 7, at 206 citing Elizabeth Hall, *A Conversation with Erik Erikson*, PSYCHOL. TODAY 30 (1983).

²⁰ WALLER, *supra* note 7, at 206-208 (saying that in World War II, the Japanese would perform medical experiments on human prisoners, calling them *maruta*—logs of wood. Similarly, the Nazis referred to the Jews as “parasites,” “vermin,” and “excrement.” When counting the corpses of those gassed to death in the concentration camps, Gestapo officials denoted the numbers as “merchandise” and “pieces,” as opposed slaughtered human beings).

²¹ *Id.* at 207.

²² Anthony Oberschall, *Preventing Genocide*, 29 CONTEMP. SOC. 1, 2 (2000); WALLER, *supra* note 7, at 207.

²³ WALLER, *supra* note 7, at 207.

ii. *Euphemisms*

By camouflaging evil in “innocuous or sanitizing jargon, the evil loses much of its moral repugnancy . . . language can obscure, mystify or otherwise redefine acts of evil.”²⁴ Through euphemism, bombing runs are surgical strikes, killed innocents are collateral damage, and enemies are “wasted” or “liquidated,” not killed.²⁵ Mass murder becomes “ethnic cleansing” in Bosnia, “bush clearing” in Rwanda, and “cleansing diseased elements” in Cambodia.²⁶ In Nazi Germany, Jews were referred to by medical vocabulary and their extermination was characterized as a calculated public health decision.²⁷ While simply calling murder by another name does not completely remove the connotation to the average perpetrator, it does however lead to “dissociation, disavowal, and emotional distance.”²⁸

iii. *Moral Justification*

People are normally unable to engage in extraordinarily evil acts without justification; the necessity to kill is often rationalized in terms of one’s own personal safety and security—self-defense.²⁹ Genocide and mass killings “are made personally and socially acceptable by portraying it as serving socially worthy or moral purposes.”³⁰

iv. *Acclimation to Killing and the Denial of Personal Responsibility*

Denial and becoming acclimated to killing, or to evil, is often critical for the perpetrators of genocide.³¹ As Elie Wiessel, Holocaust survivor and Nobel Laureate, conveys in *Night*, humans tend toward denial because reality is too inconvenient to deal with.³²

III. THE CAMBODIAN GENOCIDE

People often used to characterize Cambodia as a “gentle land” inhabited by nonviolent Buddhists who were always courteous, friendly, and ready with a smile. Beginning in the late 1960s, however, the country was rocked by socioeconomic unrest, civil war, intense U.S. bombings, and, finally, social revolution. While 600,000 of Cambodia’s 8 million inhabitants perished during these years, up to a million and a half people later died from disease, starvation, overwork, and execution during the Democratic Kampuchea (1975-79). Survivor accounts are replete with stories of how the Khmer Rouge shot, bludgeoned, stabbed and tortured legions of their own country’s people. This type of violence demands the attention of scholars.³³

The social and political landscapes that developed in Cambodia resulted from a series of key campaigns designed to alter citizen ideology. The most fundamental need of the Communists upon taking

²⁴ *Id.* at 211.

²⁵ Bhavnani, *supra* note 9, at 666; WALLER, *supra* note 7, at 211.

²⁶ WALLER, *supra* note 7, at 211.

²⁷ Hinton, *supra* note 18, at 825 (stating that in being prepared for “special treatment” at Auschwitz, Jews appeared before “disinfection squads” that poured cyanide into their “shower” rooms).

²⁸ WALLER, *supra* note 7, at 212 (suggesting that by using euphemisms, “perpetrators are able to mask the true nature of their actions with expressions that make them seem benign or even respectable”).

²⁹ *Id.* at 202.

³⁰ *Id.* at 203; Oberschall, *supra* note 22, at 10.

³¹ See generally ELIE WIESEL, *NIGHT* (Bantam Books, 1982).

³² See generally WIESEL, *supra* note 31; Gregory H. Stanton, *The 12 Ways to Deny Genocide*, GENOCIDE WATCH (Sept. 13, 2004), <http://www.genocidewatch.org/genocide/12waystodenygenocide.html>.

³³ Hinton, *supra* note 18, at 818; ROBERT G. SUTTER, *THE CAMBODIAN CRISIS & U.S. POLICY DILEMMAS* 14 (Westview Press ed., 1991) (saying that scholars estimate the dead range from one and a half to three million).

power was to challenge and change the political hierarchy of the nation.³⁴ Through advancing the power of rural peasants and eliminating the opposition threats that existed in the wealthy, educated, urban, and political realms, the Khmer Rouge turned Cambodia upside down. Kaylanee Mam, a Yale University professor, writes, “When the KR [Khmer Rouge] came to power in 1975, their aim was to achieve a communist revolution that would place state power in the hands of the work-peasant . . . and radically transform the Cambodian social order.”³⁵

A. THE URBAN EVACUATION

After seizing power on April 17, 1975, the Khmer Rouge immediately began a brutal evacuation of the two million citizens living in the Cambodian capital of Phnom Penh and the provincial capitals.³⁶ Thousands died of exhaustion, starvation, and execution in this evacuation and the others that followed in cities across the country.³⁷ Most treks lasted from two weeks to four months, however longer voyages were not uncommon.³⁸ Meas Sokhom, who was forced to evacuate from Phnom Penh to Takeo, walked for six months before reaching her destination.³⁹

Dispersing the urban population was a design to: 1) control the citizenry; 2) level class distinctions; 3) create a strong labor base for the new agrarian, communist society; and 4) weed out opposition.⁴⁰ The “forced rustification,” as it was called, witnessed the closure of hospitals, schools, factories and monasteries.⁴¹ Money, wages, and personal property were abolished, and libraries destroyed.⁴² A campaign to identify potential traitors, such as teachers, students, bureaucrats, technical workers, and professionals was undertaken.⁴³ Most of these “class enemies” were killed while others were sent to be “re-educated” at special camps or farms.⁴⁴

In relocating the urban population to the countryside, these outcasts automatically became a disadvantaged class of people who, upon arriving in rural settings, were seen as “new.”⁴⁵ The youngest and poorest individuals were chosen as local leaders because they were believed to be the most malleable and could be easily convinced of the “class enemy.”⁴⁶ By exploiting social cleavages that existed between the rural and city dwelling populations, the Communists made a key strategic gain.⁴⁷ By putting those that had previously enjoyed the least power and influence in positions of authority, the Khmer appointed those who most likely harbored the strongest ill will toward the previous elites and were most willing to exercise their newfound rights.⁴⁸

³⁴ WILLIAM SHOWCROSS, LESSONS OF CAMBODIA, in THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION, at 39 (Nicolaus Mills & Kira Brunner eds., 2002).

³⁵ KAYLANEE MAM, THE ENDURANCE OF THE CAMBODIAN FAMILY UNDER THE KHMER ROUGE REGIME: AN ORAL HISTORY in GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES, at 119 (Susan E. Cook ed. 2006).

³⁶ *Id.* (stating that Khmer Rouge soldiers soon forced all families, urban and rural alike to abandon their homes for relocation. Soldiers were told to bring as little as possible with them, only a little food. They said that *Angkar* (*Angkar* is Khmer for the “organization”) would bring them everything they needed); see also Hinton, *supra* note 18, at 823 citing ELIZABETH BECKER, WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA’S REVOLUTION AND ITS PEOPLE (Touchstone ed., 1986); WALLER, *supra* note 7, at 163.

³⁷ WALLER, *supra* note 7, at 163; SUTTER, *supra* note 33, at 13-14; MAM, *supra* note 35, at 121-22 (saying that in Phnom Penh, the trek death rate was approximately 0.53 percent or a total of 10,600 out of two million evacuees).

³⁸ MAM, *supra* note 35, at 121.

³⁹ *Id.*

⁴⁰ Hinton, *supra* note 18, at 823.

⁴¹ WALLER, *supra* note 7, at 164.

⁴² *Id.*; MAM, *supra* note 35, at 131, 133-34.

⁴³ Hinton, *supra* note 18, at 823.

⁴⁴ *Id.* (saying that eradicating any potential sources of opposition, the Khmer Rouge instituted several social and ideological reforms that created an environment in which genocide could prosper); MAM, *supra* note 35, at 121 (suggesting that 93 percent of those interviewed confirmed that their families were deported to another place, while an additional 33 percent said that they were separated from their families while evacuating).

⁴⁵ Hinton, *supra* note 18, at 825.

⁴⁶ *Id.*

⁴⁷ *Id.*; MAM, *supra* note 35, at 140.

⁴⁸ Hinton, *supra* note 18, at 825.

B. THE CONSTITUTION OF DEMOCRATIC KAMPUCHEA

On January 3, 1976 the Council of Ministers approved the constitution by which their new government would be run.⁴⁹ It came into effect two days later on January 5th when Hu Nim, Cambodian Minister for Information and Propaganda, read the document over the radio.⁵⁰ A special National Congress had met in April 1975, soon after the coup, and was empowered to draft a constitution.⁵¹ The constitution was not drafted by scholars or intellectuals, nor was it the product of painstaking research and consultation of foreign documents; the people—workers, peasants, and soldiers created this document so that it would be easy to understand and recall.⁵²

The Kampuchean Constitution proclaimed that Cambodia was a “State of the people, workers, peasants, and all other Kampuchean labourers [sic].”⁵³ Conspicuously missing from this list are students, artists, authors, and professional.⁵⁴ Vast portions of the Cambodian populace were excluded from this list and left to wonder where they will fall in this new society.⁵⁵ It is later promulgated that the legislature, the Kampuchean People’s Representative Assembly, would be filled with only workers peasants and laborers.⁵⁶ This legislature was charged with appointing the nation’s president, vice presidents, and judiciary.⁵⁷

In a purposely vague and amorphous decree, Article X, Chapter III, states that any “dangerous activities in opposition to the people’s State must be condemned to the highest degree.”⁵⁸ In failing to explain what would constitute treason, much less the punishment imposed for such a violation, the Khmer were provided the legitimacy and authority to carry out mass executions and re-education campaigns without worrying about constitutional safeguards against their abuse of power.⁵⁹ The rights of Cambodians under this regime were few:

Every citizen of Democratic Kampuchea is guaranteed a living. All workers are the masters of their factories. All peasants are the masters of their rice paddies and fields. All other labourers [sic] have the right to work. There is absolutely no unemployment in Democratic Kampuchea.⁶⁰

The rights of a citizen were summed up in no more than five short sentences, which only guaranteed the (compulsory) right to work.⁶¹ There is no mention of home, family, inheritance, health,

⁴⁹ Schlueter, *supra* note 6, at 9.160.19; Broadcast: *Daily Report: Pacific and Far East*, U.S. Department of Commerce, Foreign Broadcast Information Service (FBIS) (Jan. 5, 1976); SUTTER, *supra* note 33, at 14; David P. Chandler, *The Constitution of Democratic Kampuchea (Cambodia): The Semantics of Revolutionary Changes*, 49 PAC. AFF. 3, 506 (1976).

⁵⁰ SUTTER, *supra* note 33, at 15.

⁵¹ Chandler, *supra* note 49, at 506 (saying drafters included all cabinet members, 500 farmer’s representatives, 300 worker’s representatives, and 300 representatives of the Cambodian Revolutionary Army).

⁵² *Id.*; See generally A.P. BLAUSTEIN & G.H. FLANZ, CONSTITUTIONS OF COUNTRIES OF THE WORLD (1971).

⁵³ DEMOCRATIC KAMPUCHEA CONSTITUTION (1975-1979), available at Cornell University Libraries, Ithaca, NY [hereinafter DK CONSTITUTION].

⁵⁴ Chandler, *supra* note 49, at 511 (noting that the absence or abolition of patrons, landlords, money-lenders, merchants, and other white-collar workers is telling).

⁵⁵ DK CONSTITUTION, *supra* note 53 (saying, not coincidentally, these individuals would likely be the most equipped to challenge the new government); Chandler, *supra* note 49, at 508 (stating that the preamble divided society into “workers, poor farmers, middle farmers, lower-level farmers, and all other laborers”).

⁵⁶ DK CONSTITUTION, *supra* note 53; See also *Cambodia: Thieves be Gone* 258 ECONOMIST 6907, 40 (Jan. 10, 1976) [hereinafter *Thieves*] (saying neither the constitution nor any other statements has shed any light on how the legislature would be elected and the qualifications to run for a seat).

⁵⁷ DK CONSTITUTION, *supra* note 53 (saying that this 250 member body selected through general election was responsible for appointing every official in the country); Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L L. 4, 950 (1999).

⁵⁸ DK CONSTITUTION, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ *Id.*

education, or rights before the law, which are common among most constitutions, even communist constitutions.⁶² Prominently, the overriding purpose of Cambodian life is said to be *chivaphead* (“livelihood”) instead of the more common word *chivit* (“life”).⁶³ Noteworthy, all “reactionary religions” deemed detrimental to the nation and its people are absolutely forbidden⁶⁴ and the use of guerrilla warfare is legitimized.⁶⁵

C. WORLD TURNED UPSIDE DOWN

Cambodia was cut off from the world. Foreign and minority languages were banned, communication and travel between villages was eliminated and the Theravada Buddhist religion, to which ninety percent of the population belonged, was outlawed.⁶⁶ By banning the practice of law, medicine, engineering, and science, farming became the national (unpaid) occupation.⁶⁷ Founder of the Cambodian Genocide Program at Yale University, Ben Kiernan, estimates that 1.7 million people—nearly a quarter of the total population—were “worked, starved or beaten to death.”⁶⁸

A culture of harmony was further eroded by the execution of the country’s leading monks immediately after the revolution.⁶⁹ The rest of the Buddhist leaders were removed from their posts.⁷⁰ Temples were destroyed, religious texts burned, and artifacts desecrated.⁷¹ “If a Cambodian child had previously received her or his earliest lessons on mortality at the temple, she or he was now indoctrinated into an ideology that glorified revolutionary violence and blood sacrifice . . . communism replaced Buddhism as the new ‘religion.’”⁷²

The vertical, hierarchical structure of Cambodian society—where people are differentiated in terms of power, status, and patronage—lays the groundwork for a cultural model of obedience to, and respect for, authority.⁷³ The Khmer Rouge was able to tap into an existing cultural model that undermined the gentle ethic previously characterized through communal interactions.⁷⁴ Families were previously the core unit of Cambodian life and therefore constituted a threat to the new regime.⁷⁵ By stripping away the social and economic functions of the family, employed for generations, the Khmer Rouge destroyed the

⁶¹ Chandler, *supra* note 49, at 510-13 (noting that the specific rights and obligations of citizens, and institutions of government were left out).

⁶² *Id.*; Ben Kiernan, *Coming to Terms with the Past*, 54 HIST. TODAY 9 (2004), available at <http://www.historytoday.com/print/1284> (saying that three-quarters of Cambodia’s 20,000 teachers perished, or fled abroad).

⁶³ Chandler, *supra* note 49, at 511.

⁶⁴ DK CONSTITUTION, *supra* note 53.

⁶⁵ *Thieves*, *supra* note 56, at 40 (saying “Alone among the world’s constitutions, this one provides for guerrillas as a major subdivision of the armed forces”).

⁶⁶ WALLER, *supra* note 7, at 164.

⁶⁷ *Id.*

⁶⁸ *Id.* but see Douglas Preston, *The Temples of Angkor: Still Under Attack*, NAT’L GEOGRAPHIC 198 (2000) (estimating that the true death toll Pol Pot was responsible for in Cambodia was between three and four million).

⁶⁹ Hinton, *supra* note 18, at 823.

⁷⁰ *Id.* (stating less than two thousand of the nation’s seventy thousands Buddhist monks survived the executions, forced labor, rampant disease and torture that claimed the lives of their brethren).

⁷¹ *Id.*; Keirnan, *supra* note 62.

⁷² KARL D. JACKSON, THE IDEOLOGY OF TOTAL POWER, in CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH, at 39 (Karl D. Jackson ed., 1989); Hinton, *supra* note 18, at 823; May Ebiara, A Khmer Village in Cambodia (1968) (Ph.D. dissertation) (on file with the Columbia University Department of Anthropology); STEVE HEDER & JUDY LEDGERWOOD, POLITICS OF VIOLENCE: AN INTRODUCTION, in PROPAGANDA, POLITICS, AND VIOLENCE IN CAMBODIA, at 19 (Steven Heder & Julia Ledgerwood eds., 1996).

⁷³ MAM, *supra* note 35, at 119-120 (suggesting that before the Khmer Rouge, Cambodian’s identity was bound to their class, religion and family. To achieve their objectives, the Khmer “attempted to weaken these traditional loyalties and supplant them with new loyalty to *Angkar*”); WALLER, *supra* note 6, at 181.

⁷⁴ Hinton, *supra* note 18, at 823.

⁷⁵ *Id.*; MAM, *supra* note 35, at 123.

basic societal unit, uprooting Cambodian life from its core.⁷⁶ Families were separated by housing restrictions, relocation, communal meetings, and segregated work details. This separation was designed to foster allegiance to the government in place of familial loyalty.⁷⁷ By controlling contact between family members, the Khmer aimed to weaken family bonds, and replace them with a bond to the revolution.⁷⁸

Children who had been raised to respect their elders suddenly became equals to their parents and grandparents.⁷⁹ Children were indoctrinated and told that they no longer needed to show deference to their elders; they were all “comrades” now.⁸⁰ The Khmer pitted children against their parents and offered reasons why parents should be hated: parents stole from *Angkar*, were disloyal to the regime, and deserved to be punished.⁸¹ The cadres also expanded upon some cultural ideologies and traditions that were already a part of Cambodian heritage. For instance, the Communists glorified the concept of disproportionate revenge, which involves severe retaliation against enemies as to diminish their capability to cause harm or retaliate.⁸²

Cambodians are hailed as a people who never forget; most in the lower classes remembered the inferior status they endured and the plight of past generations as a result of the wealthier urbanites who were now ousted from their positions of power.⁸³ Even in the next generation, people saw this new set of circumstances as an opportunity to avenge what they and their forefathers had struggled through.⁸⁴

There is also a “warrior heritage” in Cambodia that pre-existed the arrival of Buddhism.⁸⁵ This is one of the few “national traditions” discussed in the DK Constitution.⁸⁶ From a young age, children learned the merits of being a warrior, someone who distinguishes themselves through bravery, fulfilling their duty, and heroically fighting the enemy.⁸⁷ Alexander Hinton, an Emory University anthropologist, suggests that “this type of ‘Cambodian machismo’ was premised upon an honor code that held those who dared to kill a sociopolitical enemy in battle gained face, while those who did not were shamed.”⁸⁸

D. SOCIAL CAMPAIGNS FOR GENOCIDE

i. Dehumanization

In Cambodia, the State established initiatives to stamp out individuality. The Khmer Rouge arsenal included two key weapons: 1) Exclusion, where a group of people lose their personal identity and are viewed in terms of a group by the larger society; and 2) Devaluation, whereby the society marginalizes the excluded group.⁸⁹ Working and eating took place communally;⁹⁰ everyone was required to cut their hair

⁷⁶ Hinton, *supra* note 18, at 823; Laura Hill & Patricia Schoor, *CAMBODIA: The Continuing United States Role*, 3 HARV. HUM. RTS. J. 177, 179 (1990).

⁷⁷ Hinton, *supra* note 18, at 824; *See also* MAM, *supra* note 35, at 121 (saying that the Khmer Rouge fractured the family structure with deportation, execution, and the collectivization of work and living arrangements).

⁷⁸ MAM, *supra* note 35, at 121.

⁷⁹ Hinton, *supra* note 18, at 823.

⁸⁰ *Id.*; MAM, *supra* note 35, at 143 (noting children were told their old families done, *Angkar* was their family now).

⁸¹ MAM, *supra* note 35, at 143; Hill et al., *supra* note 76, at 178.

⁸² Alexander Laban Hinton, *A Head for an Eye: Revenge in the Cambodian Genocide*, 25 AM. ETHNOLOGIST 3, 353 (1998) [hereinafter *Head for an Eye*].

⁸³ *Id.*; Ratner, *supra* note 57, at 952.

⁸⁴ *Head for an Eye*, *supra* note, 82, at 354.

⁸⁵ Hinton, *supra* note 18, at 822.

⁸⁶ Chandler, *supra* note 49, at 512.

⁸⁷ *Id.*

⁸⁸ *Id.*; *See generally* SUTTER, *supra* note 33, at 91.

⁸⁹ Hinton, *supra* note 18, at 824; *See generally* SUTTER, *supra* note 33, at 91.

⁹⁰ MAM, *supra* note 35, at 133 (citing that the bitterness towards collective dining halls was triggered by the fact that families could not eat together and the meager rations”); Hinton, *supra* note 18, at 824.

short, wear identical black garbs, and speak as well as act in a manner deemed appropriate with a “proper revolutionary.”⁹¹ All of these radical adjustments were designed to drown out the individual and create a homogeneous mass.⁹²

Relocated from the cities or as rural refugees, New People were labeled “class enemies” because they were said to have supported Lon Nol, whom the Khmer Rouge ousted in a military coup.⁹³ New People were treated as outsiders and subjected to dehumanizing practices.⁹⁴ Forced into overcrowded trucks for relocation, they died of suffocation and were forced to defecate and urinate as they stood crammed next to one another for hours on end like cattle.⁹⁵

New People were treated as “war slaves.”⁹⁶ Soldiers would often shout, “Prisoners of war! You are pigs. We have suffered much. Now you are our prisoners and you must suffer.”⁹⁷ The Khmer Rouge was indoctrinated not to have feelings for the enemy; one cadre stated, “We were brainwashed to cut off our heart from the enemy, to be willing to kill those who had betrayed the revolution, even if the person was a parent, sibling, friend or relative. Everything we did was supposed to be for the [P]arty.”⁹⁸ Public executions of anyone considered unreliable or to have links with the past government were common; torture centers were established where detailed records were kept.⁹⁹

To make their deaths viewed less critically, New People were dehumanized by the Khmer Rouge. One “outsider” recalls, “we were being treated worse than cattle, the victims of methodical, institutional contempt . . . we [were] no longer human beings.”¹⁰⁰ A survivor of the genocide remembers, “[K]illing us was like swatting flies, a way to get rid of undesirables.”¹⁰¹ The Communists advocated that the educated people were undesirable because they posed the greatest threat to State power; the peasant class was brainwashed to believe the New People were not their countrymen and therefore inferior.¹⁰²

ii. Acclimation to Killing and Denying Responsibility

A notable initiative sponsored by the Khmer government was desensitization of the population to the prospect of killing. The “revolutionary spirit” was stressed at various propaganda meetings and ideological training sessions.¹⁰³ Killing, it was explained, was a part of their civic duty and the more experience they got with it, the less it affected them.¹⁰⁴

⁹¹ Hinton, *supra* note 18, at 824 (stating that the Communists desired to create a homogeneous population in which the urban elites particularly no longer had advantage over their rural brothers and sisters. Those “outsiders” who, as a result of being expelled from their city homes, arrived in the countryside, finding themselves treated as enemies).

⁹² *Id.* at 824-25 (noting that everyone was not equal in this mass however- there were clear societal divisions. The “true Khmer” were a part of the *Angkar* and those who were against it were “enemies” and therefore treasonous).

⁹³ BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* 31 (Yale University Press, 1996).

⁹⁴ *Id.*; Hinton, *supra* note 18, at 825 (stating that once they reached the villages, the New People were subjected to brutally long work days, fed very little, and could be executed at any time).

⁹⁵ *Id.*; SOMETH MAY, *CAMBODIAN WITNESS* 165 (Random House, 1986) (noting that the living conditions endured were so horrific that illnesses such as cholera, malaria, dysentery, diarrhea and skin infections were rampant— all sense of hygiene was lost. A survivor stated, “We were hungry, too tired to wash or clean our clothes, and we lost all sense of hygiene. We didn’t care what we ate . . . where we had a shit, or who saw us.”).

⁹⁶ Hinton, *supra* note 18, at 825.

⁹⁷ NANCY MOYER, *ESCAPE FROM THE KILLING FIELDS* 81 (Zonervan Publishing House, 1991) (saying that enemies were expected to work hard and be obedient. Their execution is no loss).

⁹⁸ Hinton, *supra* note 18, at 825 (saying that this ideology of exacting sympathy from an excluded and dehumanized enemy enabled many rank and file Cambodians to “protect” their neighbors and “serve” their county).

⁹⁹ *Id.* at 825-26.

¹⁰⁰ MATS BERDAL & MICHAEL LEIFER, *CAMBODIA, in THE NEW INTERVENTIONISM 1991-1994: UNITED NATIONS EXPERIENCE IN CAMBODIA, FORMER YUGOSLAVIA AND SOMALIA* 79 (James Mayall ed., 1996); Hinton, *supra* note 18, at 825.

¹⁰¹ *Id.*

¹⁰² Hinton, *supra* note 18, at 824; BERDAL et al., *supra* note 100, at 71.

¹⁰³ *Head for an Eye, supra* note 82, at 857.

¹⁰⁴ *Id.*; HEDER et al., *supra* note 72, at 59.

The people's drive to comply with the directives they were issued and overlook the cruel, inhumane duties they were charged with, can further be attributed to the strong culture of obedience and the ingrained killing mechanism that the Khmer installed.¹⁰⁵ Individuals felt forced to obey orders as a result of intimidation, criticism, and the threat of physical harm to them and their family.¹⁰⁶ Through diligent training, which emphasized the necessity of killing and an obligation to follow instructions, as a means by which to also gain honor, a committed force of followers arose.¹⁰⁷ Although some took solace in the thought of transferring blame for any wrongdoings they committed onto a higher up if they were ever questioned about their actions.¹⁰⁸

iii. Euphemisms

In transforming directions to kill into medical jargon, which included such phrases as "cleansing" and extracting "diseased elements," the order, and consequentially the act, became masked and appeared as something perhaps far removed from murder.¹⁰⁹ In 1976, Pol Pot said, "There is a sickness in the Party . . . we cannot locate it precisely. The illness must emerge to be examined . . . if we wait any longer, the microbes can do real damage."¹¹⁰ As historian Laurence Picq noted, "the race to eliminate this 'infection' led to increasingly violent purges both on the local level and within the upper echelons of the [P]arty itself."¹¹¹ A "pro-Vietnamese virus" that "infected" or "contaminated" many in the East Cambodia border region was cited as the rationale behind slaughtering a series of villages.¹¹² In employing a tactic made famous in Nazi Germany, the Communists were able to convince the majority of their populace that there was an "infection" within them that needed to be "surgically removed" with all due force and haste.¹¹³

iv. Moral Justification

The Party convinced the rural, uneducated masses that the campaign they had embarked on was morally justified. For Comrade Chev and many like him in Cambodia at the time, killing "enemies" was a political necessity and a moral imperative: "If he purged enough enemies, he satisfied his conscience. He had done his duty to *Angka*."¹¹⁴ Chev was taught that these New People were traitors: they stole food, attempted to escape, conspired against the State, and did not display "proper" revolutionary spirit.¹¹⁵ It was his duty to punish or execute them. Illustrated by the numerous references to blood in the national anthem, political speeches and revolutionary songs, violence against enemies was glorified by the Khmer Rouge regime.¹¹⁶

A later justification for their actions came through retrospective analysis. The Khmer Rouge claimed that their revolutionaries had suffered far worse conditions than the "class enemies" of today, thereby negating the overwork, disease, starvation, living conditions, and executions newly-created societal enemies were enduring.¹¹⁷ Perhaps the most powerful means by which the State had to justify their actions came directly from those they persecuted. Through torture and forced confessions, their policies came to be defensible, for they had "proof" that there was in fact an enemy working against the People's Party.¹¹⁸

¹⁰⁵ HEDER et al, *supra* note 72, at 59; Hinton, *supra* note 18, at 824.

¹⁰⁶ Hinton, *supra* note 18, at 824; *See generally* MOYER, *supra* note 97.

¹⁰⁷ Hinton, *supra* note 18, at 827.

¹⁰⁸ *Id.*

¹⁰⁹ *See* JOAN D. CRIDDLE & TEEDA BUTT MAM, TO DESTROY YOU IS NO LOSS 164 (Anchor ed., 1987).

¹¹⁰ David P. Chandler, Ben Kiernan & Muy Hong Lim, *Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977*, 33 MONOGRAPH SERIES 183 (Yale University Southeast Asia Studies, 1988).

¹¹¹ LAWRENCE PICQ, BEYOND THE HORIZON: FIVE YEARS WITH THE KHMER ROUGE 100 (St. Martin Press, 1989).

¹¹² MARTIN STUART-FOX, THE MURDEROUS REVOLUTION 112 (Alternative Publishing Cooperative Ltd., 1985).

¹¹³ Hinton, *supra* note 18, 825.

¹¹⁴ HAING NGOR, A CAMBODIAN ODYSSEY 229 (Warner, 1987).

¹¹⁵ PICQ, *supra* note 111, at 104; *See generally* MOLYDA SZYMUSIAK, THE STONES CRY OUT (Hill & Wang, 1986).

¹¹⁶ BECKER, *supra* note 36, at 40; *See generally* JACKSON, *supra* note 72.

¹¹⁷ Hinton, *supra* note 18, at 826.

¹¹⁸ *Id.*

E. COMPLACENCY OF THE UNITED STATES

In her Pulitzer Prize winning work, *A Problem from Hell*, Samantha Power, who currently serves as President Obama's Special Assistant on the National Security Council, stated:

Neither President Ford nor President Carter, who took office in January 1977, was going to consider sending U.S. troops back to Southeast Asia. But it is still striking that so many Americans concluded that *nothing at all could be done*. Even the 'soft' response options that were available to the United States were passed up.¹¹⁹

President Ford, aware of the situation, initially denounced the Khmer Rouge's actions; however after less than a month of rhetoric he became silent.¹²⁰ There is no record of President Carter uttering a word about the massacres in Cambodia for the first two years of his presidency.¹²¹ In April, 1978, Carter makes his first public denouncement of the Khmer in a message to an independent Norwegian commission.¹²² He said:

America cannot avoid the responsibility to speak out in condemnation of the Cambodian government, the worst violator of human rights in the world today. Thousands of refugees have accused their government of inflicting death on hundreds of thousands of Cambodian people through the genocidal policies it has implemented over the past three years. It is an obligation of every member of the international community to protest the policies of this or any nation which cruelly and systematically violates the right of its people to enjoy life and basic human dignities.¹²³

As Carter notes himself, America sat idly by for three years.¹²⁴ In 1979, Carter's National Security Advisor, Sgigniew Brzezinski, said "I encouraged the Chinese to support Pol Pot. Pol Pot was an abomination. We could never support him, but China could."¹²⁵ The following year, Ray Cline, former Deputy Director of the CIA, visited a Khmer Rouge camp inside Cambodia as a senior foreign-policy adviser to then-President-elect Ronald Reagan. A Khmer Rouge press release reports that Cline "was warmly greeted by thousands of villagers."¹²⁶

The United States supported the Khmer in an effort to exact revenge against Vietnam and to foster an alliance with China, an ancient foe of Vietnam.¹²⁷ The U.S. encouraged Chinese arms shipments to the DK through Thailand and facilitated Khmer diplomats serving as representatives to the United Nations long after their government ceased to exist in January 1979.¹²⁸ Richard Holbrooke, Former Secretary of State and the U.S. Representative to the United Nations, stated that the United States insisted on feeding the Khmer Rouge and through exerting influence on the World Food Program, over

¹¹⁹ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 123 (2003).

¹²⁰ *Id.*; Kiernan, *supra* note 62 (saying that Ford told Indonesian President Suharto on December 6, 1975 that he encouraged Thailand and China to support the Khmer in Cambodia so as to slow the growing influence of the North Vietnamese).

¹²¹ POWER, *supra* note 135, at 126.

¹²² *Id.*

¹²³ Jimmy Carter, Human Rights Violations in Cambodia Statement by the President (April 21, 1978), <http://www.presidency.ucs.edu/ws/?pid=30693>.

¹²⁴ Ben Kiernan, *The Cambodian Genocide and Imperial Culture*, AZTAG DAILY (Beirut), available at <http://www.yale.edu/cgp/us.html> [hereinafter *Imperial Culture*] (saying it cannot be overlooked that in its war with neighboring Vietnam, the U.S. dropped half a million tons of bombs and killed over 100,000 peasants); WILLIAM BLUM, PETER SCOTT & LARRY BLEIDNER, *KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WWII* 155 (1995).

¹²⁵ *Imperial Culture*, *supra* note 124.

¹²⁶ BLUM et als., *supra* note 124, 150.

¹²⁷ Ratner, *supra* note 57, at 950.

¹²⁸ Hill & Schoor, *supra* note 76, at 177.

\$12 million in food was given to between 20,000 and 40,000 Khmer guerillas via the Thai Army in 1980.¹²⁹

By November 1981, the CIA had fifty agents overseeing Washington's Cambodian operations from Thailand according to Ray Cline, former Deputy Director of the CIA and a foreign policy advisor to President Reagan.¹³⁰ The U.S. government made a cogent, proactive, and ultimately regretful decision to support a government it knew was abhorrent to further its foreign policy objectives. Having been embarrassed in Vietnam, a humbled American executive branch chose to enable murders so that it could obtain a degree of satisfaction in watching the struggles of a former adversary.

IV. THE RWANDAN GENOCIDE

"When I came out, there were no birds," said one survivor who had hidden throughout the genocide. "There was sunshine and the stench of death." The sweetly sickening odor of decomposing bodies hung over many parts of Rwanda in July 1994: on Nyanza ridge, overlooking the capital, Kigali, where skulls and bones, torn clothing, and scraps of paper were scattered among the bushes; at Nyarubuye in eastern Rwanda, where the cadaver of a little girl, otherwise intact, had been flattened by passing vehicles to the thinness of cardboard in the front of the church steps; on the shores of idyllic Lake Rivu in western Rwanda, where pieces of human bodies had been thrown down the steep hillside; and at Nyakizu in southern Rwanda, where the sun bleached fragments of bone in the sand of the schoolyard and, on a nearby hill, a small red sweater held together the ribcage of a decapitated child.¹³¹

In Rwanda, the conditions that led to genocide slowly developed over approximately a thirty-year span of time. Shortly after the Hutus gained control of the government through the nation's first legislative elections in 1961, a period of neglect and state-sponsored subjugation of the minority Tutsi population began.¹³² By allowing criminal actions against this faction to go unchecked, even relished, a culture of disregard and disrespect for the Tutsis quickly escalated.¹³³ When the small-scale and rather isolated butchery of the minority population went completely unimpeded and uncensored by the authorities, the proverbial ball was already well on its way, rolling toward its eventual objective of genocide.¹³⁴

A. ORGANIZATION

The Hutu government progressed by exaggerating conditions and circumstances that were already in place. Shortly after Rwandan President Habyarimana's plane was shot down on April 6, 1994, official orders came down from interim government spokespersons, including the Municipal Judge of Kibungo, for the general population to kill the Tutsi.¹³⁵ Within thirteen weeks after President Habyarimana's death, at least half a million

¹²⁹ LINDA MASON & ROGER BROWN, *RICE, RIVALRY & POLITICS: MANAGING CAMBODIAN RELIEF* 135, 159 (University of Notre Dame Press, 1983); WILLIAM SHAWCROSS, *THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST & MODERN CONSCIENCE* 289, 345, 395 (Andre Deutsch ed., 1984).

¹³⁰ WILLIAM SHAWCROSS, *SIDESHOW: NIXON, KISSINGER & THE DESTRUCTION OF CAMBODIA* (Andre Deutsch ed., 1979).

¹³¹ ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA I* (Human Rights Watch, 1999).

¹³² Peter Uvin, *Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence*, 31 *COMP. POL.* 3, 261 (1999) (discussing the tolerance, as well as moral and financial support, by the highest levels of government).

¹³³ JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA SPEAK* 55 (Farrar, Straus & Giroux, 2003).

¹³⁴ PHILIP VERWIMP, *PEASANT IDEOLOGY AND GENOCIDE UNDER HABYARIMANA*, in *GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES*, at 30 (Susan E. Cook ed., 2006) (suggesting that from 1990-1993, over two thousand Tutsis were murdered by the regime. Their deaths were covered up in similar fashion to the Nazis in the years prior to WWII); *But see* Uvin, *supra* note 132, at 260 (proposing that as many as ten thousand Tutsi were arrested).

¹³⁵ HATZFELD, *supra* note 133, at 10; DES FORGES, *supra* note 131, at 6 (stating that early organizers included military and administrative officials, politicians, businessmen, and others with no post at all).

people were killed, including as many as three-quarters of the Tutsi population.¹³⁶ Simultaneously, thousands of Hutus were killed because they opposed the campaign of annihilation against their Tutsi neighbors.¹³⁷ Authorities organized and conducted daily assemblies of their loyal Hutu forces, giving instructions for the day's activities.¹³⁸ They would arrange patrols, settle disputes over loot, and lay out objectives for their manhunts.¹³⁹ In the early days of the killing, government officials distributed the names, addresses and in some instances license plate numbers of high-priority targets that needed to be "dispatched."¹⁴⁰

Reports and minutes were taken daily at local-level meetings and then distributed up the chain of command through administrative channels.¹⁴¹ Interim President Sindikubwabo identified his government as "a government of saviors" that would come directly to the people "to tell you what it expects of you."¹⁴² Ministers and other high-ranking officials went to the countryside, giving rousing speeches and insisting on support for the genocide, promising rewards for supporters and threatening opponents.¹⁴³ Without this organization from the top, some argue that the farmers and laymen who actually did all of the killing would be unsure of what to do and eventually go home to their fields.¹⁴⁴

B. THE ROLE OF IDENTIFICATION CARDS

In Nazi Germany, only a few months prior to *Kristallnacht*, in July 1938, the "J-stamp" was introduced on national ID cards and later on passports.¹⁴⁵ Ethnic classification on ID cards was first instituted in Rwanda by the Belgian colonial government in 1933 and was retained after independence.¹⁴⁶ Prior to independence, nine Hutu leaders declared their intention to retain the classification cards in what has been dubbed the "Hutu Manifesto" on March 24, 1957.¹⁴⁷ They wrote, "We are opposed vigorously, at least for the moment, to the suppression in the official or private identity papers of the mentions 'mu**hutu**' [or] 'mu**tutsi**' [emphasis added]."¹⁴⁸ Of the nine authors of this document, Gregoire Kayibanda became Rwanda's first president in 1961 and Juvenal Habyarimana succeeded him in 1973— both retained the ethnic group

¹³⁶ DES FORGES, *supra* note 131, at 1.

¹³⁷ *Id.*

¹³⁸ *Id.* at 8 (describing how orders were handed down through the ranks all the way to local leaders who conducted meetings throughout the communes and read instructions to the population); Uvin, *supra* note 132, at 262.

¹³⁹ *Id.* (suggesting that local police, soldiers, and the National Police (*gendarmes*) played a significant role. They were responsible for the first major killings in the capital and other urban centers and later directed all of the most devastating massacres across the nation).

¹⁴⁰ HATZFELD, *supra* note 133, at 161; DES FORGES, *supra* note 131, at 9, 99-101 (citing that assailants went, systematically, from home to home in certain neighborhoods killing Tutsis and Hutus opposed to the new government).

¹⁴¹ DES FORGES, *supra* note 131, at 8.

¹⁴² Uvin, *supra* note 132, at 260; DES FORGES, *supra* note 131, at 322.

¹⁴³ DES FORGES, *supra* note 131, at 232-33 (saying it was made clear that the orders came from the top. Creating an atmosphere where citizens became determined to provide their own security was a major objective. All meetings were mandatory; whistles and drums were used to summon the population).

¹⁴⁴ HATZFELD, *supra* note 133, at 182 (saying that it was only after the military and police began savagely murdering the Tutsis that the civilians stepped in with their machetes, hammers and clubs; Uvin, *supra* note 148, at 260 (noting that it was the administrators who drove the Tutsi from their homes and to government buildings, churches and schools, where the Hutu masses could massacre them, dispose of the corpses, and direct them on the properties to loot and the land to be confiscated).

¹⁴⁵ Jim, Fussell, Prevent Genocide International, Address at the Seminar Series of the Yale University Genocide Studies Program (Nov. 15, 2001), available at <http://preventgenocide.org/prevent/removing-facilitating-factors/IDcards/index.htm> (saying that these actions preceded the yellow Star of David badges on clothing).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

affiliation display on ID cards.¹⁴⁹ In November 1990, Habyarimana announced his intention to abolish the ethnicity display, but the U.S. Ambassador to Rwanda, Robert A. Flaten encouraged him to retain them.¹⁵⁰

In “shaping, defining and perpetuating ethnic identity,” ID cards with the designation “Tutsi” was a marking of death once the 1994 genocide began; the identification cards were a great facilitator of genocide.¹⁵¹

Soldiers had orders to take identity cards from those whom they killed. According to one witness, [Captain Ildephonse] Nizeyimana regularly received these cards from his men as they reported on the progress of the killings. They often appeared at his house shortly after a volley of gunfire was heard and handed the cards to the captain with the report, “Mission accomplished.” In the captain’s absence, his wife received the cards.¹⁵²

In addition to facilitating the location of Tutsis with greater ease, the ID cards created a psychological distance between victims and killers thus making the nature of the killers’ tasks easier.¹⁵³ While the majority of countries around the world issue national identification cards to all adults over the age of 15, the U.S., Britain, Canada, and Australia have not pursued plans to adopt such measures after heated debates about government control and privacy issues.¹⁵⁴

C. MOTIVATION TO KILL

Those who showed bravery in the field or who happened to possess the most adept weaponry for killing were appointed to leadership positions.¹⁵⁵ Only through success in achieving the ultimate objective of killing the most Tutsis as possible could one hope to attain respect and upward mobility in this system.¹⁵⁶ There were tangible incentives for those who participated.¹⁵⁷ Food, alcohol, military uniforms, and cash were very powerful enticements for the impoverished and hungry.¹⁵⁸ Many were told if they did not take Tutsi’s property they would lose their own.¹⁵⁹

Through exerting influence from the top and using the financial benefits of looting as leverage, the Rwandan government was successfully able to use their station of power to nurture and later command a

¹⁴⁹ PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 90 (Farrar, Straus, & Giroux eds., 1998).

¹⁵⁰ *Id.* (saying that the French ambassador discouraged the group affiliation from appearing on the cards discontinued assistance to Rwanda in April, 1991, until such a time when the group affiliation was removed).

¹⁵¹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 123 (Sept. 2, 1998); Fussel, *supra* note 161 (suggesting that in times of crisis, classification of targeted persons on the basis of group affiliation makes such individuals readily identifiable for possible detention, deportation, or death).

¹⁵² DES FORGES, *supra* note 131, at 501.

¹⁵³ CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND*, ch. 18 (Harper ed., 1993).

¹⁵⁴ Fussel, *supra* note 145; See also Gregory H. Stanton, *Blue Scarves and Yellow Stars: Classification and Symbolization in the Cambodian Genocide*, Presented at the Annual Meeting of the American Anthropological Association (1987), available at <http://www.genocidewatch.org/images/AboutGen89BlueScarvesandYellowStars.pdf>.

¹⁵⁵ HATZFELD, *supra* note 133, at 55.

¹⁵⁶ *Id.*

¹⁵⁷ CHARLES K. MIRONKO, *IBITERO: MEANS AND MOTIVE IN THE RWANDAN GENOCIDE*, in *GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES*, at 168 (Susan E. Cook ed. 2006) (saying that a severe shortage of land in a country that was becoming increasingly overpopulated was in the minds of many as was the confiscating property, businesses and cattle); See G. PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 142 (Columbia University Press, 1995).

¹⁵⁸ DES FORGES, *supra* note 131, at 10-11 (stating that pillaging farms for animals and crops, confiscating building materials, homes, and vehicles were all encouraged. Hutus who only wanted to pillage and not physically harm the Tutsis were often punished).

¹⁵⁹ MIRONKO, *supra* note 157, at 168; Uvin, *supra* note 132, at 260.

genocidal force composed of the general population.¹⁶⁰ Like the organizers, “the killers who executed the genocide were not demons nor [sic] responding to ineluctable forces. They were people who chose to do evil. Tens of thousands, swayed by fear, hatred, or hope of profit, made the choice quickly and easily,” though hundreds and thousands of others chose to participate under duress or fear for their own lives.¹⁶¹ The culture of fear that existed in Rwanda has been characterized as a “systematic, centralized, and unconditional.”¹⁶²

D. PROPAGANDA

In supporting public speeches and demonstrations against the Tutsis, coupled with denouncements from the mainstream media, the Hutu populace was showered with propaganda from all sides condoning the suppression of their neighbors.¹⁶³ The Hutus were also instructed via political meetings and the radio to cease sharing land and cooperating in farm related tasks with Tutsis.¹⁶⁴ Hutus were told not to intermarry with the Tutsi because it would pose conflicts when it was time to kill them off in the future.¹⁶⁵

The Nazi’s had a similar outlook in the years leading up to the Holocaust. Declared at the annual Nazi rally in Nuremberg in 1935 and approved on September 15th of that year, *Gesetz zum Schutze des Deutschen Blutes un der Duetschen Ehre* (“Law for the Protection of German Blood and German Honor”) forbade marriage and sexual relations between Jews and those of German blood.¹⁶⁶ This law, coupled with *Reichsbürgergesetz* (“Law of the Reich Citizen”), which was designed to deprive Jews of German citizenship, were two of the early Third Reich race laws.¹⁶⁷ These laws are substantively similar to those edicts issued by the Hutu in Rwanda in the years prior to genocide.¹⁶⁸

“With a high illiteracy rate and many people living in rural areas, where movement is greatly restricted, tight government control of the airwaves enabled the Rwandan authorities to suppress crucial information about the war and the killing of Tutsi civilians.”¹⁶⁹ Propagandists created events to deceive the public into believing the necessity of force.¹⁷⁰ The “attack” on Kigali on October 4, 1990¹⁷¹ and the foiled plot to

¹⁶⁰ MIRONKO, *supra* note 157, at 168 (saying that the author, Dr. Mironko of Yale University, argues that the reasons why ordinary Hutu peasants killed their neighbors was not because of race or ethnicity, but rather promise or expectation of economic gain, settling old scores, rivalries unrelated to ethnicity, and most notably the coercion).

¹⁶¹ DES FORGES, *supra* note 131, at 2.

¹⁶² MIRONKO, *supra* note 157, at 157 *citing* G. PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 141 (C. Hurst ed., 2d ed. 1998); Uvin, *supra* note 132, at 265-266.

¹⁶³ HATZFELD, *supra* note 133, at 179; *See also* DES FORGES, *supra* note 131, at 10-12 (stating that both on the radio and in public meetings, authorities “disseminated detailed false information” such as Tutsis storing weapons in churches, killing local officials and plotting to overthrow the government).

¹⁶⁴ BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA & STATE-SPONSORED VIOLENCE IN RWANDA 1990-1994 26 (International Centre Against Censorship, 1996) [hereinafter BROADCASTING] (saying that in one month, six to seven thousand persons were detained in the capital, ninety percent Tutsi, because they were targeted. President Habyarimana explained that so many Tutsi intellectuals were arrested because in order to prepare for an attack, only Rwandans of the same ethnic group could be trusted).

¹⁶⁵ HATZFELD, *supra* note 133, at 179; MIRONKO, *supra* note 173, at 163.

¹⁶⁶ EDWIN P. HOYT, *HITLER’S WAR* 21 (McGraw-Hill Book Co., 1988); ISRAEL GUTMAN, *ENCYCLOPEDIA OF THE HOLOCAUST* (Macmillan Publishing Co., 1990).

¹⁶⁷ *Id.*

¹⁶⁸ Socio-economic and varying governmental differences between the two societies helps to account for why formal, published directives appear only the case of Nazi Germany and not Rwanda.

¹⁶⁹ BROADCASTING, *supra* note 164, at 45 (explaining that most countries in sub-Saharan Africa to this day still do not have an independent broadcasting service or any accountability).

¹⁷⁰ DES FORGES, *supra* note 131, at 66, 73 (saying that radio commentators and newspaper journalists touted “Tutsi Unity” on a daily basis to spread fear of an uprising); BROADCASTING, *supra* note 164, at 28 (describing that “on several occasions, Radio Rwanda provided patently false and inflammatory reports”).

¹⁷¹ *See* BROADCASTING, *supra* note 164, at 25 (saying “Government officials and Radio Rwanda convincingly reported that the city had been the target of an RPA onslaught, and some reports even claimed that corpses of rebels had been found in the capital. This explanation of events was relayed by most of the international media, including the *New York Times* and several wire services).

murder Hutu leaders in Bugesera in March 1992, were “created” events by State-run Radio Rwanda, like many others in the years before the outbreak of genocide to spread hatred for Tutsis.¹⁷² Throughout the genocide, Radio Rwanda and Radio-Television Libre des Millnes Collines (RTL)M¹⁷³ instigated slaughter and gave specific directions on how to carry out their orders.¹⁷⁴ On April 12, 1994, this message came across the Radio Rwanda airwaves:

We ask that people do patrols, as they are doing, in their neighborhoods. They must close the ranks, remember how to use their usual tools [i.e., weapons] and defend themselves . . . I would ask that each neighborhood try to organize itself to do communal work to clear the brush, to search houses, beginning with those that are abandoned, to search to marshes of the area to be sure that no *inyenzi* have slipped in to hide themselves there . . . so they should cut this brush, search the drains and ditches . . . put up barriers and guard them, choosing reliable people to do this, who have what they need . . . so that nothing can escape.¹⁷⁵

RTL)M broadcasted this advisory directed to listeners in the Rubungo commune:

Courage! Don’t wait for the armed forces to intervene. Act fast and don’t allow these enemies to continue their advance! If you wait for the authorities, that’s your problem. They are not the ones who are going to look out for your houses during the night! You must defend yourselves.¹⁷⁶

Many newspapers and journals, most notably *Kangura*, were instrumental in targeting and gaining the support or at the very least, complacency of educated officials and businessmen for the genocide.¹⁷⁷

E. SOCIAL CAMPAIGNS FOR GENOCIDE

i. Moral Justification

Playing off of the ethnic strife that was developing even before Rwanda’s independence in 1962, the Communist government sought to foster an “us versus them” perspective.¹⁷⁸ If a Hutu did not go along with the system underway, they too risked being killed. If a Hutu resisted the call to arms against the Tutsi, those close to them would be in danger.¹⁷⁹ Some citizens believe that their government, a “moral authority,” gave them legitimate orders that absolved them of the evil they were committing.¹⁸⁰

¹⁷² DES FORGES, *supra* note 131, at 66; *See generally* BROADCASTING, *supra* note 164, at 25-28.

¹⁷³ BROADCASTING, *supra* note 164, at 109, 120-32 (explain that the RTL)M reached its height during the genocide and broadcasted twenty-four hours a day for the first several weeks after the President’s plane crash and then on a more limited schedule thereafter. The RTL)M was also instrumental in tracking down influential Tutsis who were trying to escape the county and identifying potential hiding places used by Tutsis).

¹⁷⁴ DES FORGES, *supra* note 131, at 248; BROADCASTING, *supra* note 164, at 84-97.

¹⁷⁵ DES FORGES, *supra* note 131, at 249.

¹⁷⁶ *Id.* at 251, 316 (stating “the importance of RTL)M was underscored by a group of men from the Nyarwungu sector, Musebeya, who stated that from the time of the plane crash, they started listening to the radio. Those who had no radios visited neighbors who had them so that they could know what might be coming next. The genocide, they said, was a concept they understood from the radio, not having known before what it meant.”).

¹⁷⁷ DES FORGES, *supra* note 131, at 66; *See* BROADCASTING, *supra* note 164, at 35, 62-70 (saying that *Kangura* was the first and most notorious newspaper to publish systematic and abusive material about the Tutsis. *Kangura* was also responsible for the well-known “10 Hutu Commandments.” In issue number 7 in December 1990, the paper published a list of forty-one Tutsi merchants in Kigali, claiming the list came directly from the authorities and that these were the names of traitors).

¹⁷⁸ MIRONKO, *supra* note 157, at 168.

¹⁷⁹ *Id.*; DES FORGES, *supra* note 131, at 12; *See generally* RICHARD ORTH, RWANDA’S HUTU EXTREMIST INSURGENCY: AN EYEWITNESS PERSPECTIVE *in* GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES, at 215 (Susan E. Cook ed. 2006).

¹⁸⁰ DES FORGES, *supra* note 131, at 12; ORTH, *supra* note 179, at 220.

Community leaders and clergy members told the masses that they were justified in their actions.¹⁸¹ In their meetings, local leaders called for “self-defense” against “accomplices.”¹⁸² Platforms of political parties had included killing off the Tutsis since 1992.¹⁸³ In his November 1992 speech, one candidate insisted that the Tutsis leave while they still could.¹⁸⁴ He said:

The time has come for us also to defend ourselves. Why do we not arrest these parents who have sent their children away and who do we not exterminate them? I would like to tell you that we are now asking for those people to be put on a list and for them to be brought to court so that they can be judged before us. If they [the judges] refuse . . . we should do it ourselves by exterminating this scum.¹⁸⁵

When confronted with reports of the first killings, authorities simply denied them.¹⁸⁶ As a result of the inaccessible location of many of the massacres this seemed to be an easy solution.¹⁸⁷ When a massacre could not be covered up, authorities declared the Tutsis had brought it upon themselves by declaring an unjust war and by attacking Hutus.¹⁸⁸

ii. Acclimation to Killing and Denying Responsibility

In creating genocide, Hutu officeholders gradually developed an atmosphere of disregard and hostility for the minority Tutsi population.¹⁸⁹ By first allowing for crime against Tutsis to go unpunished and then encouraging the public to rally behind their extermination—which ultimately led to the approval of violent rampages—Hutu politicians set the stage for the Tutsis demise.¹⁹⁰ They slowly added fuel to the fire until the circumstances compounded enough for a total war against this ethnic group to develop.

A prime factor leading to the genocide in Rwanda was provided by the population’s numbness to death as a result of war.¹⁹¹ Jean Hatzfeld, a war correspondent for the French newspaper *Libération* and author of the book *Machete Season* states that “all genocides in modern history have occurred in the midst of war . . . it systematizes death, normalizes savagery, fosters fear and delusions . . . and unsettles morality and human values.”¹⁹² War appears to undermine the ethical integrity of a society as well as its populace at an individual basis, enabling such ideas as mass-murder to appear sane if not ethical.¹⁹³ Lubrication of the value system was further aided by the vast role of alcoholism in the Hutu ranks.¹⁹⁴

Constant inebriation dulled the murderer’s senses making their tasks easier to accomplish. Even so, over time, the duties they performed became habitual and routine, even mundane.¹⁹⁵ Killing, while at first shocking and emotionally charged, slowly developed into a daily activity, seen as a societal necessity. Survivors and witnesses speak of the killers approach as if they were “government workers putting in a day

¹⁸¹ DES FORGES, *supra* note 131, at 10.

¹⁸² *Id.* at 8.

¹⁸³ ORTH, *supra* note 179, at 222; HATZFELD, *supra* note 133, at 177; DES FORGES, *supra* note 131, at 83-87.

¹⁸⁴ *See generally* DES FORGES, *supra* note 131, at 99-101.

¹⁸⁵ *Id.*

¹⁸⁶ ORTH, *supra* note 179, at 223; DES FORGES, *supra* note 131, at 90-91.

¹⁸⁷ DES FORGES, *supra* note 131, at 90 (saying that certain areas that were far from the capital and could not be accessed by investigators as they were controlled by the military).

¹⁸⁸ *Id.* at 91; HATZFELD, *supra* note 133, at 177.

¹⁸⁹ *See generally* MIRKANKO, *supra* note 157, at 180-83.

¹⁹⁰ Bhavnani, *supra* note 9, at 653.

¹⁹¹ DES FORGES, *supra* note 131, at 212 (describing at Mugonero hospital, after hours of slaughter, assailants tossed tear gas canisters in among the bodies so that if any survivors coughed among the bodies they could be located and killed).

¹⁹² HATZFELD, *supra* note 133, at 54.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ DES FORGES, *supra* note 131, at 212; *But see* Michael N. Barnett, *The UN Security Council, Indifference, and Genocide in Rwanda*, 12 CULTURAL ANTHROPOLOGY 4, 570 (1997).

at the office . . . killers quit at day's end, go home and feast on food and drink they had pillaged or been given, ready to come back the next morning, rested and fit for 'work.'"¹⁹⁶

iii. Euphemisms

Shortly after the President's plane crash, voices on the radio began calling for the extermination of these "cockroaches" from their midst.¹⁹⁷ Killing was known as "work" and machetes and guns were called "tools."¹⁹⁸ As hunting was common in this mostly rural nation, the use of hunting metaphors during the genocide was common.¹⁹⁹ Hutu "hunters" were not ordered to kill Tutsis, but rather told, "Let no snake escape you."²⁰⁰ Hutu's often used hunting dogs to track down Tutsi and flush them out of the bushes they may have hidden in.²⁰¹ *Ibirtero*— machetes, spears and clubs— the weapons used to kill Tutsis were the same as if they were killing a common animal.²⁰²

F. WAS IT INEVITABLE? THE UNITED STATES AND THE UNITED NATIONS' ROLE IN RWANDA

In the words of one expert, "This [Rwanda] was the most easily preventable genocide imaginable."²⁰³ If there is anything worse than genocide it is the knowledge that it did not have to happen; the Rwandan genocide was not inevitable. In a 1998 report to The Carnegie Commission on Preventing Deadly Conflict, Col. Scott Feil of the U.S. Army concluded that a force of merely 5,000 well-equipped and trained men inserted into Rwanda between April 7 and 21, 1994 could have prevented genocide.²⁰⁴ UN Assistance to Rwanda ("UNAMIR") Commander General Romeo Dalaire stated, "The killings could have easily been prevented if there had been the international will to accept the costs of doing so . . ."²⁰⁵ Dalaire's statement begs the question, what is the cost of human life and why was the international community, namely the United States, unwilling to commit?

In 1998, President Clinton apologized to the Rwandan people for the "ignorance" of the United States in not intervening, however scholars insist that the fear of domestic political backlash was the rationale for not acting.²⁰⁶ President Clinton stated:

During the 90 days that began on April 6 in 1994, Rwanda experienced the most intensive slaughter in this blood-filled century we are about to leave . . . as you know better than me, [this] took at least a million lives. Scholars of these sorts of events say that the killers, armed mostly with machetes and clubs, nonetheless did their work five times as fast as the mechanized gas chambers used by the Nazis.²⁰⁷

The politics of the United States were simple enough. In October 1993, the U.S. had lost eighteen Army Rangers in Somalia and it would have been politically difficult at home to engage in another peacekeeping mission so soon.²⁰⁸ The U.S. made a conscious decision.

¹⁹⁶ *Id.*

¹⁹⁷ MIRKANKO, *supra* note 157, at 182.

¹⁹⁸ DES FORGES, *supra* note 131, at 8 (suggesting that killing of Tutsis was called environmental culling or sanitation).

¹⁹⁹ MIRKANKO, *supra* note 157, at 182.

²⁰⁰ *Id.* at 182-83.

²⁰¹ *Id.*; DES FORGES, *supra* note 131, at 10; Barnett, *supra* note 195, at 578.

²⁰² MIRKANKO, *supra* note 157, at 182.

²⁰³ HOWARD ADELMAN, *GENOCIDISTS AND SAVIORS IN RWANDA* 4 (1999).

²⁰⁴ Scott R. Feil, *Preventing Genocide: How Early Use of Force Might Have Succeeded in Rwanda* (Washington D.C.: Carnegie Commission on Preventing Deadly Conflict, 1998).

²⁰⁵ Romeo Dalaire & Bruce Poulin, *Rwanda: From Peace Agreement to Genocide*, 24 CAN. DEFENSE Q. 3 (1995).

²⁰⁶ Richard N. Haas, *The Squandered Presidency: Demanding more from the Commander-in-Chief*, 79 FOREIGN AFF. 3 (2000).

²⁰⁷ President Bill Clinton, Address to the Rwandan People at Kigali International Airport (March 25, 1998), *available at* http://www.cbsnews.com/2100-202_162-5798.html.

²⁰⁸ DES FORGES, *supra* note 131, at 176 (stating that the U.S. was not ignorant, but rather no stake in Rwanda, no interests to guard, and there were "political interests at home to cater to").

While many might accept the reluctance of Americans to come to Rwanda's aid, it is quite another thing to prevent others. A full two weeks into the genocide, the United States Ambassador to the United Nations, Madeleine Albright, was the most vocal advocate of removing all but a skeletal UN team from Rwanda.²⁰⁹ She said that the United States "adamantly refused to accept publicly that a full-fledged, Convention-defined genocide was in fact taking place"—an already depleted UNAMIR force was then reduced to 270 men.²¹⁰ As Tony Marley, a Political Military Advisor for the U.S. State Department from 1992-95 and a Clinton Administration insider, explained, "If we acknowledge it was genocide, that mandated by international law that the US had to do something . . . If we acknowledged it was genocide and didn't do anything . . . what [would be] the impact on U.S. foreign policy relations with the rest of the world following inaction after admitting it's genocide . . ."²¹¹

Just as was the case in Cambodia, the U.S. Government chose to ignore its moral obligation to save lives it knew were in serious jeopardy. While the United States did not covertly aid the genocidal force in Rwanda, as it did in Cambodia, it used its political might to thwart the efforts of the other, more conscientious, nations to come to the aid of the innocent Rwandans in danger through its clout in the United Nations. This course of action is perhaps more objectionable than directly aiding in the massacres.

V. WHAT DOES THE UNITED STATES STAND FOR?

[Rwanda] sits as the greatest regret I have from the time I was U.N. ambassador and maybe even as [S]ecretary of [S]tate, because it is a huge tragedy, and something that sits very heavy on all our souls, I think.

- Former U.S. Secretary of State Madeleine Albright, February 25, 2004²¹²

You look at something like Darfur, and it just breaks your heart.

- Former U.S. Secretary of State Colin Powell, September 20, 2008²¹³

[O]ne of the real regrets I've had is that we haven't been able to do something about Sudan.

- Former U.S. Secretary of State Condoleezza Rice, November 13, 2008²¹⁴

Is there a reason why apologizing for inaction in genocide has become so common among outgoing U.S. Secretaries of State? Will Secretary Clinton be apologizing for a new travesty in January 2013 or will the nation have to wait until 2016? It is time to evaluate the United States' policy on intervening upon the observation of pre-genocide symptoms.

After examining the U.S. role in Cambodia and Rwanda, one is confronted with a very self-serving, underhanded, and deceitful view of American foreign policy. The American Government was fully aware of the genocidal campaigns underway in both nations and had an opportunity to do something, anything, to assist, and yet it did nothing. In the case of Cambodia, the U.S. covertly aided the Khmer regime while it was in power and continued to do so after its heinous deeds were well-known. Though supporting arms and food shipments to the Khmer Rouge as well as providing tactical support through a well-manned CIA mission in neighboring Thailand, the United States' stance in this matter is unmistakable. In Rwanda, the U.S. used its political might as a U.N. Security Council member to prevent peacekeeping troops from coming to the aid of a desperate Tutsi population.

²⁰⁹ U.N. Security Council resolution adjusting UNAMIR's mandate and authorizing a reduction in its strength, U.N. Doc S/RES/912 (April 21, 1994); BOUTROS BOUTROS-GHALI, UNVANQUISHED: A US-UN SAGA (Random House, 1999).

²¹⁰ *Id.*

²¹¹ Tony Marley, The Triumph of Evil, PBS *Frontline* interview, available at <http://www.pbs.org/wgbh/pages/frontline/shows/evil/interviews/marley.html>.

²¹² FRONTLINE: GHOSTS OF RWANDA (PBS television broadcast Feb. 25, 2008).

²¹³ THE NEXT PRESIDENT: A WORLD OF CHALLENGES (CNN television broadcast Sept. 20, 2008).

²¹⁴ MEET THE PRESS WITH DAVID GREGORY (NBC television broadcast Dec. 21, 2008).

While one can rationalize, even appreciate, the U.S. desire to keep American boots off the ground in Cambodia following the war in Vietnam and conflicts in both Rwanda and Somalia, it would have been better had they done nothing at all. Unfortunately, the U.S. acted out of vengeance, distain, and perhaps even fear when confronted with these situations. Ignoring grave human rights violations, the American government knowingly funded a regime that was annihilating its own population in hopes of irritating the Vietnamese. When dealing with Rwanda, the Government showed its true colors in hiding behind the legalese of international human rights treaties so as to avoid confrontation. By refusing to provide a name to the horrific actions that were taking place in Africa, perhaps the U.S. thought their problem would go away. It did not.

The U.S. has not done enough when faced with genocide. Undoubtedly, when confronted with devastating reports of mass murder, many considerations need to be taken into effect. However, the Government would have increasingly more flexibility in its response if it were to recognize genocide before it takes place. By taking notice of methods discussed, U.S. foreign services, clandestine agencies, aid workers, and Armed Forces can put their government in a position to react to a fluid situation before it is too late. The U.S. must keep vigilant, expanding its surveillance and physical presence in regions of the world that are war-torn, impoverished, and historically rich with ethnic strife.

When a new constitution is adopted that calls into question the citizenship large segments of a nation's population, the U.S. should be ready to react. When a politician who vows to annihilate an ethnic minority is elected to office, the U.S. should be ready to react. When the doors on every library, hospital, place of worship, and law office are shuttered in unison, the U.S. should be ready to react. Through advanced recognition and the diligent pursuit of the truth, the United States may act before there is bloodshed, thereby saving itself infinite resources and protecting the lives of countless innocents.

VI. CONCLUSION

In 2000, the leading Republican presidential candidate was asked by a television interviewer what he would do as President "if God forbid, another Rwanda should take place." George W. Bush replied, "We should not send our troops to stop ethnic cleansing and genocide outside our strategic interest. I would not send the United States troops into Rwanda."²¹⁵

How many times can the United States sit on the sidelines and say "never again" as if it was a catch phrase from a timeless movie? Where do our interests truly lie? We must learn from the past and have the fortitude and forthrightness to stand up for what is right, even if it may initially be unpopular in some circles. Instead of focusing our efforts commemorating genocide victims or punishing the perpetrators as it did in Cambodia and Rwanda, the U.S. needs to act proactively and look for the early warning signs discussed, particularly in poverty-stricken and war-torn areas.²¹⁶ By rejecting and condemning policies that make genocide more likely, the United States of America will ensure its status as a moral beacon in the international community, save the lives of more innocent non-combatants, and protect its own national security.

²¹⁵ *This Week* (ABC television broadcast Jan. 23, 2000) (transcript available with ABC).

²¹⁶ Fussel, *supra* note 145.

STUDENT NOTE

Major League Security: *Overcoming Legal Challenges of Sporting Event Security Systems*

Jorge Martinez

ABSTRACT

This article will discuss emerging threats to major sporting events and suggest methods to defend fans and athletes through strengthening security systems and procedures. One problem with strengthening security systems, however, is that in many cases, increased security means less personal privacy. This article will briefly review security measures that have traditionally been in place, juxtapose newly developed security measures, assess the effectiveness and constitutionality of each measure, and propose a working security system to be used at such events. Ultimately, an ideal security system of the future will have to incorporate developments in various fields and will take time to successfully implement. To that end, a certain amount of trial and error is necessary to determine what level of security will be adequate, all while not intruding on the liberties of those being protected.

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I. BACKGROUND

Sporting events are a staple in nearly all societies across the globe. For centuries, people have been gathering in arenas, stadiums, and coliseums to watch bloody gladiatorial contests, perfectly-executed maneuvers, and athletes achieving Olympic glory. Attending a sporting event is intended to be a fun and exciting occasion, yet the potential for disaster looms, especially in the modern age of terrorism. Considering the possibility of having over 100,000 people packed together in one location, as is the case for many modern sporting events,¹ an accident or deliberate attack has the potential to yield disastrous results.² Aside from any casualties directly caused by an accident or attack, there will likely be even more deaths or injuries in the aftermath, as people stampede to safety and those injured wait to be rescued and receive medical care.³ Consider on February 12, 2012, after the soccer game between Al-Ahly of Cairo, Egypt, and Al-Masry of Port Said, Egypt where crazed fans rushed the field and began to riot.⁴ Aside from the deaths resulting from the melee itself, many people were “crushed to death in the tunnel trying to escape.”⁵

To prevent such a calamity, it is of paramount importance to have systems and procedures in place to adequately protect people who attend such events. An equally important consideration is providing first-rate security, without trouncing the rights of those in attendance.

In recent years, the threat of terrorist attacks has become a global concern. After the 2001 attacks on the World Trade Center and Pentagon, security experts and everyday citizens began to contemplate the potential that terrorist organizations would attack not only political or military targets, but also “soft targets.”⁶ These soft targets can be ones that have cultural meaning or a potentially greater impact than an attack on a military target, in terms of both causing casualties and inspiring fear.⁷ When considering the objectives for which a terrorist organization has to attack, major sporting events are a particularly attractive target. For example, an American football stadium, filled with unsuspecting fans, provides a near ideal soft target for anti-American terrorist organizations.

Moreover, the football stadium represents a cornerstone of the American culture, as a sport essentially unique to the United States. An attack on an event that holds such symbolic value would likely draw more recognition and create more public concern than an attack on a military installation. Further, it is possible for one event to not only draw over 100,000 spectators, but to be broadcast live to

¹ See Calvin Watkins, *Super Bowl misses attendance mark*, ESPN DALLAS/FORT WORTH (Feb. 7, 2011), <http://sports.espn.go.com/dallas/nfl/news/story?id=6096358> (mentioning that the attendance for Super Bowl XLV was over 91,000, which still pales in comparison to the NFL record of 112,376 fans).

² *Id.*

³ See Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 603 (2006) (describing how “hospitals would likely struggle to treat tens of thousands of suddenly wounded persons, and even those unharmed by the attack could be kill [sic] or injured while frantically fleeing the stadium”).

⁴ Jeff MacGregor, *Rush to explain, forget soccer violence*, ESPN COMMENTARY (Feb. 2, 2012), http://espn.go.com/espn/commentary/story/_/id/7531814/the-rush-explain-forget-soccer-violence-egypt.

⁵ *Id.*

⁶ “Soft targets” are targets that are not well-protected, so terrorists can gain access to them relatively easily. See CNN Breaking News 15:30: Baghdad Hotel Blast (CNN television broadcast, Mar. 17, 2004) (defining soft targets as those “readily available” to terrorists); See Caitlin M. Piccarello, *Terrorism, Tourism, and Torts: Liability in the Event of A Terrorist Attack on A Sports or Entertainment Venue*, 12 VILL. SPORTS & ENT. L.J. 365, 366 (2005) (describing the vulnerability of “soft targets”).

⁷ *Panel I: Legal Issues in Sports Security*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 349, 366 (2003) (Paul H. Zoubek describing American sports [as] a very symbolic target of terrorism because it is so associated with the globalization of the American economy and the American culture); See, e.g., Roy Masters, *Super Bowl Gets Peak Rating As Terrorists Target Audience*, SYDNEY MORNING HERALD, Feb. 2, 2002 (describing the Super Bowl as “the citadel of American commercialism” and as a potential target for terrorists).

millions of viewers across the world.⁸ An attack on such an event could bring the type of carnage and notoriety that terrorist groups seek. Despite popular belief, soft targets may have taken the place as the preferred targets for terrorist organizations, partially due to the steady increase in security at government or military targets.⁹ When considering a possible terror attack during a sporting event, it is haunting to realize that terrorists only have to evade security once to be successful. As the Irish Republican Army told the British authorities, after its failed attempt to assassinate British Prime Minister Margaret Thatcher in 1984, “Today we were unlucky. But remember: We only have to be lucky once. You will have to be lucky always.”¹⁰

A sobering reminder of the potential for an attack on a soft target is the October 2005 suicide bombing in Oklahoma.¹¹ The attack was carried out by twenty-one-year-old engineering student Joel Henry Hinrichs III, near the University of Oklahoma football stadium.¹² At the time of the explosion, the stadium was filled with 84,000 fans.¹³ In addition to the proximity of the explosion to the stadium, “other un-detonated explosive devices were found” nearby.¹⁴ While Hinrichs’s intentions in setting off the explosion are debatable, if the explosive was more capable or closer to the stadium, it could have had catastrophic results. Another example of how occupied stadiums present ideal soft targets is the previously mentioned soccer game between Al-Ahly of Cairo, Egypt, and Al-Masry of Port Said, Egypt. Recall that in addition to the rioting fans, many people were “crushed to death in the tunnel trying to escape.”¹⁵

Providing adequate security for all those in attendance at a sporting event—the fans, athletes, and stadium employees—is challenging enough, notwithstanding the potential for external attacks.¹⁶ In addition, because the attention of spectators at sporting events is generally narrowly focused on that event, an individual’s behavior that might normally seem suspicious may go unnoticed.¹⁷ This places an added pressure on event security to be on high alert in what is an extremely distracting and deceiving environment. Aside from being on a constant lookout, security guards and police are also charged with the task of keeping fans from becoming disgruntled as they wait to pass through security checkpoints, as well as keeping entrance lines flowing smoothly.¹⁸ This is a tall order for security personnel, especially those who may not be adequately trained.¹⁹ Considering the multitude of factors that ensure security at a major sporting event, it is important to discuss: (1) security measures of the past and present; (2) new security measures to protect guests and athletes and potential legal challenges; and (3) how to develop the most effective, yet legal, security system.

⁸ See Jared Wade, *Safeguarding the Meadowlands*, RISK MGMT., Dec. 2002, at 18 (claiming sports venues are attractive targets because, “With tens of thousands of people in attendance, an attack on a stadium could cause massive casualties with maximum media exposure”).

⁹ The United States has known for over a decade that increased security at hard targets has shifted terrorists’ attention to soft targets. In 1990, seventy-five percent of all terrorist attacks worldwide were perpetrated against tourist spots, businesses, and other nonofficial targets. Winston P. Nagan, FRSA & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 438 (2004).

¹⁰ Alan Cowell, *What Price to Stay Free of Terrorism?*, NEW YORK TIMES EUROPE (Nov. 5, 2012), <http://www.nytimes.com/2010/11/06/world/europe/06iht-letter.html>.

¹¹ Cinnamon Stillwell, *Terrorism Strikes the Heartland*, ACCURACY IN MEDIA (Oct. 7, 2005), <http://www.aim.org/guest-column/terrorism-strikes-the-heartland/>.

¹² *Id.*

¹³ Cowell, *supra* note 10.

¹⁴ *Id.*

¹⁵ MacGregor, *supra* note 4.

¹⁶ See Caitlin M. Piccarello, *Terrorism, Tourism, and Torts: Liability in the Event of A Terrorist Attack on A Sports or Entertainment Venue*, 12 VILL. SPORTS & ENT. L.J. 365, 366 (2005) (describing the difficulty of security sports and entertainment venues because of the large numbers of people constantly entering and leaving).

¹⁷ McCann, *supra* note 3, at 604.

¹⁸ *Id.* (describing how “stadium security personnel are also disadvantaged by the situational pressure of impatient fans seeking to enter the stadium, as well as by the practical necessity of preventing long and slow-moving entrance lines”).

¹⁹ *Id.* (discussing how “[a]ccording to some experts, stadium security personnel seldom possess sufficient anti-terrorist training”).

II. SECURITY MEASURES: PAST AND PRESENT

In the past, sports stadiums and arenas around the world have implemented a wide variety of systems and methods for securing their premises. Traditionally, security and crowd control methods relied on having uniformed police officers, security guards, and event staff providing a visible presence to guests of a stadium.²⁰

However, in the years since 9-11, many sports organizations have significantly increased their efforts to deter and prevent terrorist attacks, and made security a top priority.²¹ Some of the efforts to improve security include stationing more security personnel through the stadium, enhanced video surveillance, and stricter rules on what guests may bring with them into the facility.²² Drills are also conducted to prepare stadium personnel for any possible attack.²³ For instance, in February of 2011, New Delhi “security agencies conducted a mock drill at the Ferozeshah Kotla stadium, which will host four World Cup cricket matches, to check their preparedness in case of a terror attack.”²⁴ In addition, federal legislation has been set in place creating permanent restrictions on airspace over certain stadiums.²⁵

Yet another recently devised prevention strategy was put forth when the Department of Homeland Security (DHS) designed a “counterterrorism training program for the staff of shopping malls, sports stadiums, amusement parks, office buildings and apartment complexes, amid concerns that terrorists may be planning to strike such targets.”²⁶ This program covers the “‘four Ds’— devaluing the target; deterring would-be terrorists; detecting attacks and preoperational surveillance or other preparations; and defending against attacks.”²⁷ DHS has also co-sponsored a “free, four-hour Terrorism Awareness Training Course” to help stadium and arena security to identify and thwart terrorist attacks.²⁸

Doing their part to protect their patrons, the major American sports leagues collaborated with the International Association of Assembly Managers (IAAM) Safety and Security Task Force in an effort to help protect sports facilities from future acts of terrorism.²⁹ This collaboration included the National Football League (NFL), National Hockey League (NHL), Major League Baseball (MLB), National Basketball Association (NBA), and National Collegiate Athletic Association (NCAA).³⁰ The result was the “Best Practices Planning Guide - Arenas, Stadiums, Amphitheater.”³¹ This guide outlined ways to “[assess] risk factors, [determine] threat levels, and [formulate] safety/security plans” for sports facilities.³² In a more

²⁰ Thomas A. Baker, III, Daniel Connaughton, James J. Zhang, J.O. Spengler, *Perceived Risk of Terrorism and Related Risk Management Practices of NCAA Division 1a Football Stadium Managers*, 17 J. LEGAL ASPECTS SPORT 27, 28 (2007).

²¹ See Thomas George, *N.F.L. Is Tightening Security As Games Resume on Sunday*, N.Y. TIMES, Sept. 18, 2001, at C18, available at <http://www.nytimes.com/2001/09/18/sports/pro-football-nfl-is-tightening-security-as-games-resume-on-sunday.html> (quoting Milt Ahlerich, the N.F.L.’s Senior Director of Security, explaining, “The commissioner said to the owners that the No. 1 priority is security and that we are not going to fall short in that area.”).

²² Wade, *supra* note 8, at 20; See McCann, *supra* note 3, at 606.

²³ Caitlin M. Piccarello, *Terrorism, Tourism, and Torts: Liability in the Event of A Terrorist Attack on A Sports or Entertainment Venue*, 12 VILL. SPORTS & ENT. L.J. 365, 369 (2005).

²⁴ *Mock security drill at Ferozeshah Kotla stadium ahead of World Cup*, TIMES OF INDIA (Feb. 9, 2011), http://articles.timesofindia.indiatimes.com/2011-02-09/news/28546566_1_mock-security-drill-mock-bomb-blast-security-agencies.

²⁵ See, e.g., Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 352, 117 Stat. 11, 420-21 (2003) (establishing flight restrictions over stadiums and similar venues); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 521(a), 118 Stat. 3, 343 (2004) (extending flight restrictions over stadiums and other venues indefinitely).

²⁶ Shaun Waterman, *Training against terrorism uses malls*, WASHINGTON TIMES (Jul. 17, 2003), <http://www.washingtontimes.com/news/2003/jul/17/20030717-095939-8773r/>; *Soft target awareness course*, VIRGINIA DEP’T OF CRIMINAL JUSTICE SERVICES, <http://www.dcjs.virginia.gov/pss/training/alternatives/announcements/307softTargetInfo.pdf>.

²⁷ *Id.*

²⁸ Baker, Connaughton, Zhang, Spengler, *supra* note 20, at 28.

²⁹ *Id.*

³⁰ *Id.*

³¹ Best Practices Planning Guide - Arenas, Stadiums & Amphitheaters (June 27, 2002), http://www.iwi-associates.co.uk/library/2011/iaam_sstf_planningguide.pdf.

³² *Id.*; Fordham Symposium, *supra* note 7, at 352.

dubitable move, the NFL instituted a policy in 2005 that mandated that “all persons attending league games must be physically searched before entering any of the venues where the games are played, the aim being to prevent terrorists from carrying explosives into the stadiums.”³³

III. NEW SECURITY MEASURES AND POTENTIAL LEGAL CHALLENGES

Important considerations in the fight to protect sports venues and their guests from terrorist threats include making use of newly-developed technologies, learning from security developments being implemented elsewhere (airports, government buildings, etc.), and coming up with innovative methods and systems for providing security. It is equally important to recognize the legal and constitutional issues that certain security measures might present and adapt the systems to not trounce the rights of sporting event patrons.

A. BIOMETRICS AND POTENTIAL LEGAL CHALLENGES

Security personnel are now considering the use of a new technology called “Biometrics” in an effort to improve the security of patrons at sporting events. This new technology makes use of “immutable personal characteristics, such as facial features, fingerprints, and retinal patterns, to establish and authenticate identity.”³⁴ Biometrics come in many different varieties which proves to be useful due to the difficulty of mimicking unique physical characteristics.³⁵ One form of implementation is the creation of a database of facial features, fingerprints, and other unique physical characteristics of potentially threatening persons. By scanning the faces or fingerprints of fans upon entry, the venue security can screen out those unwanted attendees.

Moreover, biometrics may be useful and practical for preventing attacks from an arena’s less-frequented corridors. Many consider biometric security and surveillance “viable alternatives to PIN numbers, ID cards, security guards, police, and eyewitness testimony.”³⁶ By using biometric security features, sports venues may improve the access control to sensitive areas. One example is the prevention from people impersonating event staff or security. This idea also applies to those providing deliveries and services to the venue—those who may not be on the stadium’s payroll or have been adequately screened prior to accessing the stadium—yet still have access to areas not open to the public.

Biometric technology does not come without its problems. As with many security systems, a major issue with biometrics is finding a balance between individual liberty and security.³⁷ Opponents of biometric technology have characterized it as a “widespread, random, electronic search of citizens as they go about their affairs.”³⁸ Many of the issues arising from the development and implementation of biometric technology relate to an individual’s right to privacy and Fourth Amendment concerns. In *Katz v. United States*,³⁹ the United States Supreme Court established that the Fourth Amendment protections attach to individuals, not just their homes. Furthermore, the Court held that whether certain actions constitute an illegal search depends, in part, on whether a person under surveillance has a reasonable expectation of privacy.⁴⁰ This could pose a significant risk to the establishment of biometric security systems because it could be successfully argued that an individual has a reasonable expectation of privacy in their fingerprints,

³³ *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2005).

³⁴ Mark G. Milone, *Biometric Surveillance: Searching for Identity*, 57 BUS. LAW. 497 (2001).

³⁵ *Id.* (describing how biometrics includes hand geometry, fingerprints, iris scans, and DNA.).

³⁶ Milone, *supra* note 34, at 497.

³⁷ Steven C. Bennett, *Privacy Implications of Biometrics*, Prac. Law, June 2007, at 17.

³⁸ Milone, *supra* note 34, at 509.

³⁹ *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁴⁰ *Id.*

retina, and other such personally identifiable traits, which are unlike other personal attributes, such as height or gait, that are readily observable by the public.⁴¹

Whether a system would be found to violate an expectation of privacy would likely depend on how invasive the security system is.⁴² For instance, the NFL had once used closed-circuit television cameras to scan the crowd for known criminals during the Super Bowl.⁴³ After public protest about the invasiveness of this technology, the NFL ceased the use of facial recognition systems during the Super Bowl.⁴⁴ On the other hand, with the widespread use of newly-developed technologies that include biometric systems, such as those used in places ranging from airports to public libraries, it is possible that such systems will be seen as being in general public use, making it harder to justify a claim that a privacy expectation is reasonable.

Another concern regarding biometric systems is the threat to privacy arising from the loss of personally identifiable information. As soon as biometric information is recorded into an electronic database, it becomes susceptible to theft and manipulation by hackers, as well as public dissemination.⁴⁵ Because a person cannot change his/her biometric data, as may be done with a PIN code, theft of biometric information can be seen as “permanent identity theft.”⁴⁶ Ultimately, it seems that whether the use of biometric systems infringes on the privacy rights of the public rests not only on the type of information collected, but also on *how* it is collected and used, efforts must be made to secure personally identifiable data when recorded, stored, and transferred.

B. OTHER TECHNOLOGICAL ADVANCEMENTS AND POTENTIAL LEGAL CHALLENGES

The U.S. military has been using a technology called “gunshot detection,” capable of detecting the location of a shooter moments after a weapon is fired.⁴⁷ ShotSpotter is one company that has been at the forefront of the development of gunshot detection technology. ShotSpotter’s system works by using preplaced sensors, scattered around a particular location that capture the sound of a gunshot or explosion and relay the information to officers in the field.⁴⁸ It has been only in the past few years, however, that ShotSpotter has been able to send information directly to individual officers’ laptops on the street.⁴⁹

As the technology develops concurrently with the advent of smartphones and tablet computers, it is not unreasonable to believe that systems, which zero-in on where a shot or blast originated, could soon have the ability to send a shooter location signal to a handheld device in a police officer’s possession. Sports venues could utilize this technology by spreading sensors across a stadium or arena and equipping officers with portable receivers that can receive instantaneous information about the location of a shooter. While this technology may only be useful *after* an attack takes place, it could be a useful deterrent and could improve the chances of neutralizing a terrorist threat before additional harm is inflicted. Using this device as a deterrent would rely heavily upon publicizing the use of the system and its effectiveness in identifying and assisting with the capture of a shooter. Preventing further harm, through the use of this technology, is especially important in the case of a sniper. In a stadium scenario, a sniper would be extraordinarily difficult to locate and, without ShotSpotter’s system, near impossible to pinpoint, even after he/she discharges the weapon.

Concerning systems such as ShotSpotter, which rely on having sensors distributed around a particular location, each of which detect sound and relay information to a central server, a significant legal issue presents itself when considering what sounds these sensors detect and the uses for those sounds. In order to avoid possible

⁴¹ Lauren D. Adkins, *Biometrics: Weighing Convenience and National Security Against Your Privacy*, 13 MICH. TELECOMM. & TECH. L. REV. 541, 552 (2007).

⁴² *Id.*

⁴³ Bennett, *supra* note 37, at 13.

⁴⁴ *Id.* at 14.

⁴⁵ Bennett, *supra* note 37, at 16.

⁴⁶ *Id.*

⁴⁷ See *Sniping at US Forces Beginning to Boomerang*, DEFENSE INDUSTRY DAILY (Feb. 14, 2011), <http://www.defenseindustrydaily.com/sniping-at-us-forces-beginning-to-boomerang-01128/> (describing Boomerang III perimeter systems).

⁴⁸ Ethan Watters, *Shot Spotter*, WIRED (Mar. 2007), <http://www.wired.com/wired/archive/15.04/shotspotter.html>.

⁴⁹ *Id.*

violations of the Fourth Amendment, specifically, that the sensors record conversations or communications in which fans have a reasonable expectation of privacy, it would need to be established that these sensors are tuned to only pick up gunshots and not private conversations. While people attending a sporting event likely do not have a reasonable expectation of privacy in chants or jeers yelled out amidst a crowd of fans, privately-held conversations outside the stadium or in its concourse may qualify; although, the determination of whether there is a reasonable expectation of privacy within a stadium could be muddled by factors such as the volume at which a remark was made, to whom a comment was made, the proximity of the recipient to the person speaking, and whether the fan was in a private box/suite.⁵⁰ If a microphone happened to catch a communication for which there is a privacy interest, and this sound bite was sent to the police or used against someone in a criminal proceeding, this security system would be infringing on the constitutional rights of stadium guests. It is reasonable to see why the American public would be unwilling to have sensors, or more specifically, microphones, spread out around their favorite sporting venues.

Another recently developed technology with the potential to be an invaluable asset is “SportEvac,” as developed by the National Center for Spectator Sport Safety & Security (NCS4). SportEvac determines how a stadium can be evacuated in the shortest amount of time, and how to allow civil emergency workers quick and easy access as fans are evacuating.⁵¹ It also helps to establish how a stadium’s guards and ushers can provide valuable information to civil responders and assist them as the evacuation unfolds.⁵² This software is being developed and tested with funding from the DHS’s Science and Technology Directorate.⁵³ SportEvac works by creating “virtual, three-dimensional stadiums based on models of actual sports facilities. The virtual stadiums are filled with up to 70,000 avatars that are programmed to respond to threats as humans would (read: unpredictably).”⁵⁴ SportEvac’s ultimate goal is to streamline emergency procedures and improve preparedness.⁵⁵ Once SportEvac is fully developed, it will be distributed to universities, and then, ideally, to all other sports facilities.⁵⁶

NCS4 has also made significant headway in developing other technologies that will assist sport venues with securing its guests and ensuring their safety. In addition to SportsEvac, the company is developing a high-definition video system, by which stadium security can screen and maintain a watchful eye over the crowd.⁵⁷ Another system being developed utilizes text messaging to “provide a means of tracking observations and activities enhancing safety and security” and “answer any questions or concerns fans may have such as parking situations, specific locations, medical needs, handicap requests and important weather alerts.”⁵⁸ DHS has already begun to implement its own version of this, called the “If You See Something, Say Something” campaign.⁵⁹ NCS4 is currently testing these technologies at the University of Southern Mississippi—so far with positive results.⁶⁰

⁵⁰ See Christopher Benjamin, *Shot Spotter and Faceit: The Tools of Mass Monitoring*, UCLA J. L. & Tech., 2002, at 2 (explaining that the U.S. Supreme Court also held the Fourth Amendment's requirement for a search warrant only applies to subjective expectations of privacy that the society as a whole would recognize as reasonable or justifiable.).

⁵¹ Christina Hernandez Sherwood, *Software simulates safe and speedy evacuation of crowded stadiums*, SMARTPLANET (Apr. 15, 2010), <http://www.smartplanet.com/blog/pure-genius/software-simulates-safe-and-speedy-evacuation-of-crowded-stadiums/3287>; Allison Barrie, *High-tech terror testing keeps game day safe*, Fox News (Feb. 2, 2012), <http://www.foxnews.com/scitech/2012/02/02/superbowl-terror-testing-makes-game-day-safe/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Pixel Velocity High Definition Video System Person Screening and Crowd Surveillance Evaluation*, NATIONAL CENTER FOR SPECTATOR SPORTS SAFETY & SECURITY, 2010, available at <http://www.usm.edu/sporteventsecurity/reports/AssessmentreportPixel.pdf>.

⁵⁸ *GuestAssist*, NATIONAL CENTER FOR SPECTATOR SPORTS SAFETY & SECURITY, 2010, available at <http://www.usm.edu/sporteventsecurity/reports/GuestAssistsnapshot.pdf>.

⁵⁹ Janet Napolitano, *Super Bowl XLVI: "If You See Something, Say Something"*, DEPARTMENT OF HOMELAND SECURITY (Feb. 2, 2012), <http://www.dhs.gov/files/reportincidents/see-something-say-something.shtm>.

⁶⁰ *GuestAssist*, *supra* note 58.

With regards to SportEvac, or any system that assists venues in creating evacuation and emergency response plans, a legal issue to consider is the distribution of liability if a designed plan fails or makes a disaster situation *worse*. For instance, if the company creating the evacuation plan makes a miscalculation with regard to the number of fans attending an event, the estimated evacuation time, or any other clerical error, there is the possibility that this may result in more casualties than had the system not been used. Companies distributing such software and recommendations to venue owners would need to be sure to clarify to what extent their work is guaranteed and as to how much liability they retain for any shortcomings. On the other hand, sport venue management officials need to ensure that they will have adequate corrective remedies if they rely on representations made by outside security and safety advisors.

As an aside, teams and companies using systems designed to maximize the safety and preparedness of their establishments need to be aware of the dangers present if information about their weaknesses and improvements get out. Arguably, allowing the general public to purchase a computer program that assists in identifying faults and flaws in a venue's security or disaster response could pose a significant issue, because an attacker could easily find and use it, which would be a substantial backfire for the program's purposes. If venue owners recognized this and thought it to be a legitimate concern, organizations like NCS4 might face lawsuits, seeking to prevent the sale of their computer programs to non-approved users, because of the potential liability their product could pose.

C. INTERNATIONAL EFFORTS AND POTENTIAL LEGAL CHALLENGES

In addition to implementing newly-developed technologies and strengthening particular areas of current security systems, it is important to look to security measures being used in other countries and for other purposes. Authorities can then adapt suitable technologies to further improve the security and protection of fans at domestic sporting events. One security system that can be adapted is the Israeli system of interviewing airline passengers.⁶¹ This security screening method is considered one of the most effective worldwide in identifying potential threats and avoiding tragedy.⁶² One of the tenets of this system is extensive training of the security personnel.⁶³ As a practical matter, interrogating 100,000 fans would be out of the question and therefore, a reliable system of selection must be established.

However, the selection process itself presents a legal concern. If security personnel are permitted to question some, but not all guests—on an ad hoc basis—the personal biases of the security officers may take over and they may racially profile or selectively persecute. Furthermore, there are significant differences between questioning sports fans and questioning airline passengers. For instance, an airport security guard could establish if passengers are a threat by asking about what other countries they have been to, if they have luggage, or the purpose of their travel.⁶⁴ At a sporting event, there are few questions that are similarly informative; thus, the fine line between determining if someone is a threat and invading their privacy may be frequently crossed. Consider, as an example, if prior to being permitted to enter a facility, a sports fan had to answer why he was attending a game alone, what other games he had been to that season, or why he did not look excited about the game. These questions would be minimally helpful in determining if someone was a threat and would be invading that person's right to privacy.

Another means of securing a stadium that has been somewhat implemented overseas but can be further developed and used more frequently, is the improvement of stadium designs. For instance, the use of "buffer zones" between ticket collections and stadium entrances, or between fans and athletes, provide security

⁶¹ See *How the Israelis do airport security*, CNN OPINION (Jan. 11, 2010), http://articles.cnn.com/2010-01-11/opinion/yeffet.air.security.israel_1_airport-security-isaac-yeffet-el-al?_s=PM:OPINION (describing the Israeli system).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See generally *Id.* (outlining the signs shown by attempted terrorists).

personnel room to observe venue guests and free space with which to work if they need to respond to an emergency.⁶⁵ Sports facilities architects would be well advised to not only take aesthetic and convenience concerns into consideration when designing or renovating their stadiums, but also how to construct a building that would allow for the quickest and most effective response to an emergency.

Due to most stadiums not being owned by the sports organizations themselves, the amount of control over such design aspects during construction or renovation may be limited. One plausible solution is assigning liability to the stadiums when a league recommendation is not followed. In the alternative, leagues could contractually require that certain safety standards for a stadium be met before the league allows any of its games to be played there.

Another step implemented in Europe, for the enhancement of security at sporting events, is Ukraine's collaboration with NATO to develop and implement anti-terrorism measures for the Euro 2012 European Football Championships, to be played in Ukraine and Poland.⁶⁶ The topics they seek to address include "emergency scenarios that could arise during the soccer matches with the aim of developing tight command-and-control cooperation between various agencies" and educational training where "Ukrainian experts [work] with private and public-sector experts [on] bacteriological, radiological and chemical threats aimed at big international sports competitions."⁶⁷ Should the U.S. seek to establish a similar arrangement, an agreement between the U.S. and NATO, for the collaboration, partnership, and exchange of information would have to be created.

D. SECURING ATHLETES AND POTENTIAL LEGAL CHALLENGES

Many remember the 1972 Munich Olympics, where 11 Israeli athletes and coaches were kidnapped, held hostage, and ultimately killed by the Black September terrorist group.⁶⁸ Equally as memorable as the deaths of these athletes and coaches is the preposterous excuse for security around the village where the athletes were residing during the games. "A single chain-link fence protected the village, and athletes looking for a shortcut home often scaled it after a night out. There was no barbed wire, cameras, motion detectors, or barricades. At the entrance, unarmed guards in powder blue shirts looked more like ushers at Disneyland."⁶⁹ Only about \$2 million was spent protecting the athletes in Munich, as opposed to \$600 million in Athens in 2004.⁷⁰ As the widow of one of those killed, Ankie Spitzer, once said, "Sure the terrorists were responsible, but the Germans were supposed to protect all the athletes . . . [a]fterwards, when [the athletes] were taken hostage, [the Germans] had no clue what to do."⁷¹

Efforts have been made since then to prevent another incident like the one in Munich including some significant steps made in recent years. Such advances could be used to better protect today's athletes in the U.S. and abroad. One of the more recent security enhancements is Player Protect, a "full-service security company for athletes that provides safe drivers, undercover bodyguards and unofficial angels-on-the-shoulder."⁷² Currently Player Protect has contracts with the New York Giants, New York Jets, and New Jersey Nets.⁷³ Among the services provided are picking up athletes in specialty vehicles driven by police

⁶⁵ See Ethan J. Skolnick, *10 years later, how safe are American stadiums?*, NBC SPORTS (Sept. 8, 2011), http://nbcsports.msnbc.com/id/44392881-other_sports/ (describing "buffer zones").

⁶⁶ *Ukraine, NATO working on soccer security*, UNITED PRESS INTERNATIONAL, INC. (Mar. 28, 2012), http://www.upi.com/Top_News/Special/2012/03/29/Ukraine-NATO-working-on-soccer-security/UPI-95631333017000/; *Safety and security crucial for football*, UEFA.COM (Sept. 5, 2009), <http://www.uefa.com/uefa/footballfirst/matchorganisation/stadiumsecurity/news/newsid=882272.html>.

⁶⁷ *Id.*

⁶⁸ Francie Grace, *Munich Massacre Remembered*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-202_162-520865.html.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Aditi Kinkhabwala, *Putting Athletes in Bubbles*, WALL STREET JOURNAL (July 12, 2011), <http://online.wsj.com/article/SB10001424052702303812104576440341706571306.html>.

⁷³ *Id.*

officers, researching the destination locations, and generally acting as lookouts.⁷⁴ This company even forbids its clients from carrying guns, regardless of whether the player has a license to be carrying it.⁷⁵

A concern that has been raised with regard to Player Protect, is the use of its security personnel to observe the *protected* athletes and reporting any unsavory conduct back to the team management, or possibly law enforcement. This issue would hinge upon whether the athletes had a reasonable expectation of privacy in their conversations or actions during the time in which they were being guarded, and what kinds of discretion the contract between the athlete and Player Protect mandated.⁷⁶ While a contract claim might be successful, a privacy claim would likely not be, because a reasonable person who hires a security guard to closely watch and protect them would expect the security team to do just that: closely observe their activities in order to keep them safe. A privacy claim *could* be successful, on the other hand, if a security guard oversteps his/her bounds and begins monitoring the athlete in a way that invades his/her privacy, has no security purpose, and then disseminates that information.

Player Protect has addressed some concerns by using a “blind system,” where the invoice that the team gets only shows a randomly assigned number for a player/client and has no personally identifiable information.⁷⁷ Additionally, the invoice is essentially nothing more than a bill, and does not give the details of the protection provided.⁷⁸ From a practical standpoint, as Charles Way, the Giants' director of player development, agrees, players would not enlist Player Protect if they thought it was a way for their team to spy on them.⁷⁹

Another legal issue could be allocating the liability if a member of an athlete's security team took action and harmed or killed someone, or damaged someone's property. Under the doctrine of *respondeat superior*, the athlete or the team that hired the security guard could be liable.⁸⁰ This doctrine provides that “a principal (employer) is responsible for the actions of his/her/its agent (employee) in the ‘course of employment.’”⁸¹ Ultimately, whether a team or athlete who hires a security guard is liable for their actions will depend on whether the guard's actions were within the scope of their employment; for instance, removing a person who the guard deems a threat to the athlete's safety would fall within that guard's scope of employment.⁸²

IV. CONCLUSION

Considering the legal hurdles to implementing many of the recently developed security methods and technological advancements, perhaps one of the best ways to improve the safety and security at sporting events is to provide more comprehensive training to stadium/arena staff. While simple in theory, the training provided to new employees by the management of a sports facility may lack in-depth coverage, if any at all, related to potential terrorist attacks.⁸³ According to the National Center for Spectator Sport Safety &

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Katz v. United States*, *supra* note 39.

⁷⁷ *Id.*

⁷⁸ Kinkhabwala, *supra* note 72.

⁷⁹ *Id.*

⁸⁰ *Respondeat superior Definition*, DICTIONARY.LAW.COM, <http://dictionary.law.com/Default.aspx?selected=1827> (last visited Apr. 11, 2012).

⁸¹ *Id.*

⁸² “Scope of employment” refers to actions of an employee which further the business of the employer and are not personal business, which becomes the test as to whether an employer is liable for damages due to such actions under the doctrine of respondeat superior (make the master answer). *Scope of employment Definition*, DICTIONARY.LAW.COM, <http://dictionary.law.com/Default.aspx?selected=1827> (last visited Apr. 11, 2012).

⁸³ Stacy Hall, Lou Marciani, and Walter Cooper, *Sport Venue Security: Planning and Preparedness for Terrorist-Related Incidents*, 2008 SMART JOURNAL 6; Peter Keating, *Industry of fear*, ESPN (Sep. 11, 2011), http://espn.go.com/espn/story/_id/6936819/stadiums-increase-budgets-heighten-security-measures-protect-fans-espn-magazine.

Security at the University of Southern Mississippi, only about one-third of all the sports arenas in the United States are taking the steps necessary to adequately protect their facilities.⁸⁴ Before a sporting venue hires contractors to perform security work, the venue management should be proactive and ensure that the personnel it hires has received adequate training.

Increased funding for security would also be of paramount importance in establishing an up-to-date security model for a sports facility. As mentioned beforehand, the difference in funding between the Munich and Athens Olympic Games was about \$598 million, and history has shown that this does have a significant effect.⁸⁵

A proposed model security system must incorporate some aspects of the previously discussed measures, including: biometric scanning, shot detection technology, detailed analysis of emergency exit procedures and plans to implement them, separating fans from the field through use of buffer zones, and trained security personnel to protect athletes. The key is balance; authorities must find an acceptable level of protection that can adequately prevent an attack on one of the countless sporting venues, while preserving the personal liberties of the fans in attendance. This is not something that can be fixed overnight, but with careful monitoring and staggered implementation, security authorities can hopefully soon utilize all the resources at their disposal to make our sporting venues more secure, and allow their sporting events to be enjoyed with peace of mind.

⁸⁴ *Id.*

⁸⁵ Francie Grace, *supra* note 68.

