



OREGON REVIEW OF INTERNATIONAL LAW

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ARTICLES

ROBERT A. KAHN*

Who's the Fascist? Uses of the Nazi Past at the Geert Wilders Trial

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But let us not forget that in the United States we have been blessed with two centuries of secure borders and political stability. Not so our European counterparts, who have experienced Nazism and other destructive social movements on their own soil. Their efforts to control their legacy of extremism should be respected, even if their methods are not ours.¹

In the Netherlands Mein Kampf is outlawed. When it was outlawed, the politically correct leftist and liberal parties applauded it. My point was that for the same reason and (legal) arguments that Mein Kampf was outlawed in the Netherlands, the

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¹ Abraham Foxman, *Introduction to ADOLF HITLER, MEIN KAMPF* xiii, xiv (Mariner Press 1999) [hereinafter Foxman, *Introduction*].

*Koran could and should be outlawed since both books are full of incitement of violence.*²

I THE ANTI-FASCIST CONSENSUS

European hate speech laws rest in part on the idea that Europe's past—in particular its Nazi past—creates a special situation, one that justifies restrictions on speech that would otherwise be incompatible with a liberal democracy. While this trend is most evident in laws that relate directly to the Nazi past (such as those banning denial or trivialization of the Holocaust) the issue is broader.³ To take one example, there is considerable concern about what will happen in Germany (and Europe) when the Bavarian Finance Ministry loses its copyright over the German language rights to *Mein Kampf*.⁴ With the copyright set to expire in 2015, the Finance Ministry has blocked an effort by German academics to release an annotated version of the book that would, through its comprehensive footnotes, “break the peculiar myth which surrounds *Mein Kampf*.”⁵ The Finance Ministry justified its decision as “preventing the distribution of Nazi ideology” and to showing “responsibility and respect for the victims of the Holocaust, for whom republication would always represent an affront . . . to their suffering.”⁶

This is not how Abraham Foxman, National Director of the Anti-Defamation League, sees it. Foxman, despite having some sympathy for the European perspective, wrote an introduction to the Mariner Press edition of *Mein Kampf* appearing in the United States. Foxman called on his readers to: “Commit the evil to memory in order to

² *I Have No Regrets: An Interview with Geert Wilders*, GEERT WILDERS WEBLOG (Jan. 22, 2010, 3:48 PM), http://www.geertwilders.nl/index.php?option=com_content&task=view&id=1642&Itemid=1.

³ For an overview of the development of Holocaust denial laws in Europe, see Robert A. Kahn, *Holocaust Denial and Hate Speech*, in GENOCIDE DENIALS AND THE LAW 77–108 (Thomas Hochmann & Ludovic Hennebel eds., 2011).

⁴ David Gordon Smith, *Should Germany Republish 'Mein Kampf'?*, SPIEGEL ONLINE (July 17, 2007, 3:19 PM), <http://www.spiegel.de/international/germany/putting-hitler-back-on-the-shelves-should-germany-republish-mein-kampf-a-494891.html>.

⁵ *Id.* (quoting Horst Möller of the Institute for Contemporary History). Möller hopes the scholarly edition will end “the oft simple-minded speculation about what is actually in the book.” *Id.*

⁶ *Id.* (quoting the statement of ministry spokeswoman Judith Steiner). More recently, the Finance Ministry has blocked an effort of a newspaper to reprint lengthy excerpts of *Mein Kampf*. See also David Rising, *German State Questions Mein Kampf Publication Plan*, DESERT NEWS (Jan. 17, 2012), <http://www.deseretnews.com/article/700216210/German-state-questions-Mein-Kampf-publication-plan.html>.

reject it; reject the evil, but do not let yourself forget it.”⁷ In justifying the publication of *Mein Kampf*, Foxman referred to “two centuries of secure borders and political stability” in the United States.⁸ This stands in contrast to Europe where, in *Faurisson v. France*, the United Nations Human Rights Committee upheld the French Gayssot Act, which bans questioning the existence of the Holocaust, because of its potential to facilitate the spread of Nazism and anti-Semitism, both of which the court saw as continuing concerns in France.⁹

The use of the Nazi past to justify European hate speech laws is not a doctrinal necessity. Hate speech laws predated the Holocaust and there are other ways of rationalizing them—including as offshoots of an earlier European tradition of using law to protect one’s honor.¹⁰ In fact, one can adopt bright line rules—the clear and present danger test, the gravity of the evil test—that, in theory, are at least indifferent to the type of “danger” or “evil” on offer.¹¹ For example, the Amsterdam trial court, in acquitting Geert Wilders of comparing the Quran to *Mein Kampf* and calling Islam a “fascist” religion, relied on the general principle that hate speech and group defamation charges cannot rest on insults directed at ideas or objects of religious veneration.¹² So, clearly, there are other ways of defending (or

⁷ Foxman, *Introduction*, *supra* note 1, at xiv.

⁸ *Id.*

⁹ *Faurisson v. France*, Communication No. 550/1993 U.N. Doc. CCPR/C/58/D/550/1993, ¶¶ 9.6–9.7 (Nov. 8, 1996).

¹⁰ See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) (describing Germany’s nineteenth century culture of dueling as a source of German insult laws). On the other hand, the decision to expand earlier traditions of speech restriction to cover speech based on anti-Semitism and racism may well owe something to the Nazi experience. See Robert A. Kahn, *Cross-Burning, Holocaust Denial, & the Development of Hate Speech Law in the United States & Germany*, 83 U. DET. MERCY L. REV. 163, 184–86 (2006).

¹¹ For a brief overview of these doctrines, see HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 179–89, 195–99 (Jamie Kalven ed., 1988). For an example of this categorical approach to speech in action consider Flemming Rose, culture page editor of the *Jyllands Posten*, who played a major role in the publication of the Danish cartoons. Speaking in Jerusalem after the controversy, Flemming—who has become something of a free speech advocate—asked Israel to end its ban of *Mein Kampf*. See Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT’L L.J. 253, 258–65 (2010).

¹² Amsterdam District Court, 23 June, 2011, Public Prosecution # 13/425046-09, at § 4.3.2. [hereinafter *Wilders Verdict*] (“Since the suspect addresses the religion and not the people (Muslims) with these utterances, it cannot be proven beyond any reasonable doubt that he incites to hatred against and/or discrimination of Muslims with these utterances, as was charged against him.”) (emphasis in original). For a brief overview of how Wilders’s acquittal was seen in Dutch society, see Robert A. Kahn, *The Acquittal of Geert Wilders and Dutch Political Culture*, University of St. Thomas Legal Studies Research Paper No.

critiquing) European hate speech laws besides focusing their responsiveness to the Nazi past.¹³

Yet references to the Nazi past loomed large at the Geert Wilders trial. While this owes something to Wilders's explicit comparison of the Quran and *Mein Kampf*, it also reflects societies—the Netherlands and, more generally, Europe—that still view themselves through the prism of the Second World War. Thus Wilders was eager to portray himself as a participant in the “good war” against Nazism.¹⁴ On the other side, opponents called Wilders a fascist¹⁵ and argued that Dutch Muslims were in the same situation as Dutch Jews before the Holocaust.¹⁶ These references, paradoxically, occurred in a country where anti-Semitism remains prevalent in both the native Dutch and immigrant communities.¹⁷

Before proceeding, let me offer a caveat. I am not saying references to the Nazi past drove the outcome of the trial—Wilders was acquitted and the *Mein Kampf* / Quran comparison was not the only charge Wilders faced.¹⁸ But the competing claims about Nazism and victimhood provide a way to frame the trial, one the participants seemed to find compelling. Was Geert Wilders a Nazi in training or were Muslim followers of the Quran the true Nazis? And were Dutch Muslims like Jews before the Holocaust, or was Israel continuing “the good war” the Western Allies waged against Hitler?

The rest of this essay explores these questions in greater depth. Part II looks at the extent to which Wilders fits the model of the typical

11-31, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956192 (posted Nov. 8, 2011).

¹³ See Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 123–38 (Ivan Hare & James Weinstein eds., 2009) (taking a critical view of European hate speech laws); Peter R. Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 688 (2006) (viewing laws against Holocaust denial from the perspective of the First Amendment).

¹⁴ See *infra* notes 51–70 and accompanying text.

¹⁵ See *infra* notes 71–104 and accompanying text.

¹⁶ See *infra* notes 105–15 and accompanying text.

¹⁷ See *infra* notes 32–50 and accompanying text.

¹⁸ Wilders was also prosecuted for saying in an interview that if elected he would “[close the] borders, [and allow] no more Islamic people coming to the Netherlands.” *Wilders Verdict*, *supra* note 12 (describing utterance 11). Other comments targeted immigrants and Moroccans. For example, utterance 7 describes Moroccan boys as “violent,” while utterance 8 talks about the Netherlands facing a “tsunami” of foreign cultures. *Id.* For a list in English of the charges against Wilders, see *Summons of the Accused*, District Court Office of the Public Prosecutor, Jan. 20, 2010, available at http://www.geertwilders.nl/images/PDF/dagvaarding_ENG.pdf [hereinafter *Wilders Summons*].

hate speech defendant. While opponents tried to pin the “fascist” label on him, Wilders’s opposition to anti-Semitism (among Europeans as well as Muslims) complicated this effort. To put Wilders’s opposition to anti-Semitism in context, Part III looks at the complex role Jews play in Dutch society—a role that far outstrips the numerical importance of the small Dutch Jewish community.

Part IV looks at how Wilders, when discussing Islam, often makes references to the Second World War. In particular, he often represents himself as fighting the same struggle as the victorious Western Allied armies, especially the Americans. At times he also compares Muslims (and their leftist allies) to the defeated Nazi German forces.

The next two sections turn the tables and look at how his opponents describe Wilders. Part V looks at efforts by opponents to label Wilders a fascist because of his blunt rhetorical style and his attacks on the left and Islam. Part VI turns to an indirect argument: even if Wilders is not a fascist, his victims—the Muslims—are like Jews before the Holocaust.

Finally, the Conclusion looks at the implication of the Wilders trial for the anti-fascist consensus that helps uphold European hate speech laws. With the passage of time, it is tempting to argue that the Holocaust has become history and that Europe’s hate speech laws are outdated.¹⁹ The Wilders trial, however, points in a different direction—nearly seventy years after the end of World War II, Europeans still find the Nazi past (and hate speech laws) relevant.

II

GEERT WILDERS: A TYPICAL HATE SPEECH DEFENDANT?

Geert Wilders, leader of the anti-immigrant Party for Political Freedom (*Partij voor de Vrijheid*—PVV), faced hate speech charges for comments targeting Muslims and Islam.²⁰ While many of these comments directly invoked the Nazi era—as, for example, when Wilders said “walk in the street and see where this ends” and “a conflict is going on and we have to defend ourselves”²¹—other counts were different. For example, in a 2007 article that ran in *De Volkskrant*, a center-left Amsterdam-based paper, Wilders called for a ban of the Quran, which he called a “fascist” book and an “Islamic

¹⁹ Peter Teachout makes this argument. See Teachout *supra* note 13, at 688–92.

²⁰ For an overview of the Wilders trial and how the acquittal was received in Dutch society, see Kahn, *supra* note 12, at 2–4.

²¹ *Wilders Verdict*, *supra* note 12, at § 4.3.2. The court found that these comments reached “the border of what is accepted pursuant to criminal law.” *Id.*

Mein Kampf.”²² In his film *Fitna*, Wilders shows video clips in which Muslims are saying “God Bless Hitler” and “[b]e prepared for the real Holocaust.”²³

Wilders’s comments, and the decision to prosecute them, raise an interesting question—who was the real fascist? Was it Wilders who, as the leader of a right-wing anti-immigrant party was often seen as following in the footsteps of Jean-Marie Le Pen and Jorg Haider, to say nothing of the “original Nazis?”²⁴ This was certainly how Henk Bovekerk saw it. Bovekerk was a college student who received a “10” (the highest score possible) for an undergraduate thesis concluding that Wilders was a “fascist” and the PVV a “fascist” party.²⁵ Nor was he alone. Job Cohen, former Amsterdam mayor (2001–10) and current leader of the Dutch Labor Party (*Partij van de Arbeid*—PvdA) has compared the situation of Dutch Muslims to Jews in the 1930s, a comparison that carries weight given that two of Cohen’s grandparents died in the Holocaust.²⁶

At the same time, however, Wilders uses anti-fascist rhetoric against his Islamic foes. In explaining why the Quran, like *Mein Kampf*, should be banned, Wilders says that the former “should never, absolutely never, be used as a source of inspiration or an excuse for

²² Geert Wilders, *Enough is Enough: Ban the Koran*, GEERT WILDERS WEBLOG (Aug. 10, 2007, 10:04 PM), http://www.geertwilders.nl/index.php?option=com_content&task=view&id=1117.

²³ *Wilders Summons*, *supra* note 18 (describing *Fitna*).

²⁴ In France, Jean-Marie Le Pen’s anti-immigrant National Front party rose to prominence in the 1980s. Since then Le Pen has repeatedly “let the mask drop” by referring to the Holocaust as “a point of detail in . . . history” and noting that the name of a center-right Jewish minister rhymed with crematoria. See Jonathan Marcus, *THE NATIONAL FRONT & FRENCH POLITICS: THE RESISTIBLE RISE OF JEAN-MARIE LE PEN* 125–29 (1995). Likewise, in Austria Joerg Haider, who rose to prominence in the 1980s as the head of the Freedom Party, commented that the Third Reich had “an orderly employment policy” and that the Nazi SS should be honored. See *Profile: Controversy and Joerg Haider*, BBC NEWS (Feb. 29, 2000, 3:56 GMT), <http://news.bbc.co.uk/2/hi/europe/464260.stm>. For more on Haider, see *THE HAIDER PHENOMENON IN AUSTRIA* (Ruth Wodak & Anton Pelinka eds., 2002).

²⁵ Henk Bovekerk, *Prototypical Fascism in Contemporary Dutch Politics* (Fall 2011) (unpublished B.A. Thesis, Tilburg University, available at <http://universonline.nl/wp-content/uploads/2012/01/BA-Thesis-Henk-Bovekerk.pdf>). The high marks led to an outpouring of criticism. See *Student Krijgt 10 voor Scriptie Over “Fascistische PVV,”* DE VOLKSKRANT, Jan. 6, 2012; Jan Dirk Snel, *Tien voor Scriptie Over PVV Schaadt Universiteit*, DE VOLKSKRANT, Jan. 11, 2012.

²⁶ *Cohen: Moslims Worden Buitengesloten, Zoals Joden in de Jaren Dertig*, VRIJ NEDERLAND, Dec. 15, 2010. Cohen, whose paternal grandparents perished at Bergen-Belsen, spoke about how the current situation was similar to the exclusion of Jews his mother witnessed during the Nazi occupation of the country. *Id.*; Russell Shorto, *The Integrationist*, N.Y. TIMES SUNDAY MAG., May 28, 2010, at MM24.

violence”²⁷—a message on one level quite similar to the Bavarian Finance Ministries’ justification of its ban on *Mein Kampf*. In his email interview with Human Rights Service, Wilders made the same argument: “both books are full of incitement of violence.”²⁸ While one can argue that the very act of comparing the Quran and *Mein Kampf* itself had Nazi overtones,²⁹ Wilders’s framing of nonviolence makes it harder to place him with right-wing extremists who see violence as acceptable and *Mein Kampf* as a source of inspiration.³⁰

But Wilders goes further. In a September 2011 speech in Berlin he said that Germany needed a right-wing party “not tainted by ties to neo-Nazis and by anti-Semitism,” adding that the cause of the war was not Germany, but “national-socialism.”³¹ In January 2012 he supported the unsuccessful call on the Dutch government to issue a formal apology for its “passivity” during the Holocaust.³² These statements would appear to separate Wilders from the kind of person the hate speech laws are supposed to protect against.

²⁷ Wilders, *supra* note 22.

²⁸ Wilders, *supra* note 2.

²⁹ See Liz Fekete, *The Muslim Conspiracy Theory and the Oslo Massacre*, 53 RACE & CLASS 30, 36 (2011) (comparing *Fitna* to Joseph Goebbels’ film *The Eternal Jew* in the way both send “subliminal messages” about the other “through the juxtaposition of images”).

³⁰ Compare Wilders to Anders Breivik, who killed seventy-seven people in Norway to defend against a Muslim conspiracy. Breivik cited Geert Wilders 30 times in a manifesto justifying the killings. *Id.* at 32. Wilders took great pains to disassociate himself from Breivik after the event, stating that “we must never use violence” and that “Islam can be successfully fought with democratic means.” Geert Wilders, Speech in Berlin (Sept. 3, 2011) (available at <http://www.geertwilders.nl/index.php/component/content/article/87-news/1764-speech-geert-wilders-in-berlin-3-september-2011-english-version>). This, however, did not upset Breivik who saw Wilders’s comments as “expected” and motivated primarily by Wilders’s need, as a politician, to protect his reputation. See Fekete, *supra* note 29, at 32.

³¹ Wilders, *supra* note 30.

³² The issue came to a head in January 2012. One of the charges involved the failure of Queen Wilhelmina or the Dutch government in exile to speak out about the Holocaust. According to Els Borst, former deputy prime minister and member of the left-liberal D66 party, the Queen “hardly concerned herself with the persecution of the Jews” and the prime minister did not believe the Jews were “real Dutchmen.” *Will Holland Finally Apologize for Passivity in the Holocaust?*, ISRAEL NATIONAL NEWS (Jan. 5, 2012), <http://www.israelnationalnews.com/News/News.aspx/151452#.UCuF09Ce7ZQ>.

According to the Dutch News, Wilders was “scathing” in his remarks about the passivity of Queen Wilhelmina’s government. *Dutch State: Sorry, We’re Not Apologizing*, DUTCHNEWS.NL (Jan. 11, 2012), http://www.dutchnews.nl/features/2012/01/dutch_state_sorry_were_not_apo.php.

III THE SYMBOLIC ROLE OF JEWS AND THE HOLOCAUST IN DUTCH SOCIETY

This brings us to the interesting role Jews and Israel play in Wilders's discourse. One of the strange effects of the Holocaust has been to make the symbolic role of the Jews in postwar European societies increase, even as the absolute numbers decline. Protecting against anti-Semitism is a major reason for hate speech laws. For example, in 1979 the German Federal Supreme Court, in ruling that a Holocaust denial case could be brought under Germany's laws against insult, held that the defendant's estimate that only 2,000,000 Jews were killed in the Holocaust was a "direct attack" on the "self-conception" of Jews living in Germany.³³ The well being of German Jews, in turn, helped reassure Germans they were following their moral obligations arising out of the Holocaust.³⁴

A similar situation exists in the Netherlands where the large number of Jews who perished (74% of the prewar Jewish population, the highest percentage in Western Europe),³⁵ the use of the Dutch civil service to prepare lists of Jews to deport³⁶ and the willingness of many Dutch to "accommodate" the Nazi occupier led, by the 1960s and 70s, to considerable feelings of guilt.³⁷ At the same time, however, a large minority of Dutch (31%) think Jews talk too much about the Holocaust, and a majority (53%) would find a Jewish prime minister unacceptable (even though Job Cohen was the Labor Party candidate for prime minister in 2003).³⁸ To quote Manfred

³³ See ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 18 (2004) (describing the ruling).

³⁴ *Id.*

³⁵ Manfred Gerstenfeld, *Anti-Semitism and Hypocrisy in Dutch Society*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (July 2004), <http://www.jcpa.org/phas/phas-22.htm>.

³⁶ BOB MOORE, VICTIMS AND SURVIVORS: THE NAZI PERSECUTION OF THE JEWS IN THE NETHERLANDS, 1940–1945, at 194–99 (1997) (describing role of Dutch civil service in the Holocaust).

³⁷ For a good overview of the Holocaust in the Netherlands, see *id.* For a discussion of the playing out of the Holocaust in postwar Dutch society, see F.C. Brasz, *After the Second World War: From "Jewish Church" to Cultural Minority*, in THE HISTORY OF THE JEWS IN THE NETHERLANDS 336, 385–91 (J.C.H. Blom, R.G. Fuks-Mansfeld & I. Schöffers eds., Arnold J. Pomerans & Erica Pomerans trans., Litman Library of Jewish Civilization 2002) (describing the extent of guilt feelings). According to Brasz, sentiments about the registration led many to sabotage the 1971 Dutch census after which further censuses were discontinued. *Id.* at 387.

³⁸ Manfred Gerstenfeld, *Symbolic and Other Roles of Jews in Dutch Society*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (Dec. 23, 2008), available at <http://jcpa.org/article/symbolic-and-other-roles-of-jews-in-dutch-society/>.

Gerstenfeld, a Holocaust survivor who grew up in the Netherlands, went into hiding, and is now one of the driving forces behind the request for an official apology: “Dead Jews and their past indeed often play a more important role in The Netherlands than the living.”³⁹

There have also been incidents of anti-Semitism. The newspaper *Trouw* last year left an anonymous comment on its website blaming Jews for the rise of Hitler.⁴⁰ Another set of anti-Semitic incidents involve young immigrants, especially Moroccans—some of which have led to violence against “visible” Jews (i.e., those wearing religious clothing).⁴¹ Finally there are a number of Holocaust related anti-Semitic slogans used by soccer fans.⁴² These are directed at fans of the Ajax Amsterdam soccer team, who refer to themselves as “the Jews.”⁴³ These slogans have been picked up and embellished by Moroccan and Turkish rappers, who also use “the Jew” as a symbol of “hegemonic Dutch society.”⁴⁴

There have been a variety of responses to the upsurge in anti-Semitism. On the one hand, the government has used “decoy Jews” to catch potential wrongdoers.⁴⁵ Others have been less supportive. For

³⁹ *Id.* A similar logic led the Anne Frank House Museum to refuse a screening of an award winning film about Anne Frank’s time in the concentration camps. The Museum director based her objection on the following argument (according to the director of the film): “Anne Frank is a symbol. Symbols should not be shown dying in a concentration camp.” *Id.*

⁴⁰ See Tundra Tabloids, *Dutch Christian Daily Allows Anti-Semitic Tropes in its Comments*, VLAD TEPES (Oct. 11, 2011), <http://vladtepesblog.com/?p=38875>.

⁴¹ See Gerstenfeld, *supra* note 35, at 5–6.

⁴² One of the main chants goes “ Hamas, Hamas, Jews to the Gas.” Wim Dohrenbusch, *Anti-Semitic Incidents Spark Public Debate in the Netherlands*, DEUTSCHE WELLE (Apr. 23, 2011), available at <http://www.dw.de/dw/article/0,,15023408,00.html>.

⁴³ Consequently, many of the fans and players who use the chant deny its anti-Semitic content. For example, Lex Immers, a midfielder for the ADO Den Haag team who was banned for five games for using the chant, explained that “[he] didn’t mean it the way they think,” explaining “the Jews” is a nickname for Ajax Amsterdam. *Id.* The problem of offensive slogans is not limited to the Netherlands or the postwar context. See Sarah Lyall, *Taking on Soccer Violence, One Derogatory Chant at a Time*, N.Y. TIMES, Jan. 27, 2012, at D1 (describing Scottish football slogans that refer back to seventeenth century events).

⁴⁴ See Remco Ensel, *The Sound of Anti-Semitism in Dutch Society* 8 (Sept. 2010) (unpublished draft presented at the Conference on Ethnic Relations, Racism and Anti-Semitism at Queen’s University Belfast) (available at <http://www.dutchantisemitism.nl/Content/Dutchantisemitism/The%20Sound%20of%20Antisemitism.pdf>). On the other hand, some rappers have rejected anti-Semitic appeals. According to Ali B., a well-known rapper: “The Prophet Muhammad, by the way, has reproved of what these tough youngsters do. When you believe in Allah you would never shout ‘cancerous Jews.’” *Id.*

⁴⁵ Aliyah Shahid, *An Unorthodox Approach: Dutch Use Decoy Jews to Stop Crime and Anti-Semitic Attacks in Amsterdam*, DAILY NEWS (Jun. 23, 2010), <http://articles.nydaily>

instance, Fritz Bolkestein, notable for his 1991 call for a public critique of multiculturalism, has now called on “sensible Jews” to consider emigrating to Israel or the United States because “they have no future in the Netherlands.”⁴⁶

Perhaps unsurprisingly, Wilders takes issue with Bolkestein. It is not the Jews, but violent Muslims, who should leave the Netherlands.⁴⁷ Protection of Jews is a theme of his speeches, especially those given in the United States. In Nashville, Tennessee, Wilders spoke about how “Jews are no longer safe on our streets. In Amsterdam, the city of Anne Frank.”⁴⁸ At the Four Seasons Hotel in New York, just after he learned he would stand trial for hate speech, Wilders complained of a Dutch “elite” that had “lost its decency” by financing or participating in demonstrations where “settlers” shout “Death to the Jews.”⁴⁹ “Seventy years after Auschwitz,” he continued, “they know of no shame.”⁵⁰

Paul Sars, Dean of the Humanities Faculty at the University of Nijmegen, was also outraged at Bolkestein’s remarks but questioned Wilders’s motives: “He is against Islam . . . By taking this stance, he can say that [he] is pro-Israel and against . . . [e]verything that’s alien to the Netherlands.”⁵¹ But Wilders’s stance gets him something else as well. By opposing Bolkestein, who was once his mentor, Wilders reinforces his image as a defender of Dutch Jews—not just against Muslims, but also against Dutch anti-Semitism and passivity. This reinforces his worldview in which Dutch elites are unable to solve the nation’s problems, be they Nazi occupation or Islamic immigration. This, as well, makes Wilders an atypical hate speech defendant.

news.com/2010-06-23/news/27068034_1_anti-semitic-attacks-jews-decoy. The program, which has been successful, was the suggestion of a Moroccan born member of parliament.
Id.

⁴⁶ Dohrenbusch, *supra* note 42.

⁴⁷ *Id.*

⁴⁸ Geert Wilders, Speech in Nashville, Tennessee, (May 12, 2011) (available at <http://www.geertwilders.nl/index.php/in-english-mainmenu-98/in-the-press-mainmenu-101/77-in-the-press/1750-a-warning-to-america-speech-geert-wilders-cornerstone-church-nashville-12-may-2011>).

⁴⁹ Geert Wilders, Speech at the Four Seasons Hotel, New York, (Feb. 23, 2009) (available at <http://www.geertwilders.nl/index.php/component/content/article/87-news/1535-speech-geert-wilders-new-york-four-seasons-monday-feb-23-2009>).

⁵⁰ *Id.*

⁵¹ Dohrenbusch, *supra* note 42.

IV FIGHTING IN "THE GOOD WAR"

There is a second way Wilders uses the past to build sympathy for his position. He often makes references to the Western Allies during Second World War, especially to the Americans. In this way, he shows himself as fighting alongside the Americans in "the good war" against Hitler and the Nazis.⁵²

Some of the references relate to Israel, where Wilders lived for two years as a teenager.⁵³ On a grand historical level, these comparisons are not hard to follow. To the extent one views Islam as the next totalitarian movement, and Israel as a "frontline" state, it is not hard to see the Israelis fighting to protect "the West" from Islamic encroachment.⁵⁴ But Wilders's references to the Second World War are much more specific. For example, at an October 2009 speech at Columbia University, he compared young men and women defending Israel to "those brave American soldiers who landed in Sicily in 1943 and stormed the Normandy beaches in 1944."⁵⁵

Nor is this an isolated instance. Speaking again in New York City, this time on the ninth anniversary of 9/11, Wilders invoked the words of Ronald Reagan forty years after the D-Day landings: "We will always remember. We will always be proud. We will always be

⁵² The idea of referring to the Second World War as "the good war" comes in part from Studs Terkel's oral history of Americans in the war. STUDS TERKEL, "THE GOOD WAR": AN ORAL HISTORY OF WORLD WAR TWO (1984). TOM BROKAW, THE GREATEST GENERATION (1998) similarly portrays American involvement in the war in a positive light. Not everyone shares the views of Brokaw and Terkel. See Ashley Smith, *World War II: The Good War?*, 10 INT'L SOCIALIST REV. (2000), available at http://www.isreview.org/issues/10/good_war.shtml (arguing that if one looks seriously the "good war" myth, the United States has nothing to boast about).

⁵³ For a brief overview of Wilders's childhood and teenage years, see Christopher Dickey, *Geert Wilders Says There's No Such Thing as Moderate Islam*, THE DAILY BEAST (Jan. 16, 2012), <http://www.thedailybeast.com/newsweek/2012/01/15/geert-wilders-says-there-s-no-such-thing-as-moderate-islam.html>.

⁵⁴ For example, Tom A. Trento, founder of "The United West" has issued a call to "[s]tand with Israel" to "[p]rotect [f]reedom and [d]emocracy . . . [i]n America, [i]n Israel, and throughout Western Civilization." Tom Trento, *Stand With Israel – Protect Freedom and Democracy* (May 23, 2011), <http://theunitedwest.org/activism-alert/proclamation/>. The group was formed by national security professionals "to change the ground game on how America protects liberty and freedom . . . from Shariah Islam." *Id.*

⁵⁵ Geert Wilders, Speech at Columbia University, New York, (Oct. 21, 2009), (available at <http://www.geertwilders.nl/index.php/component/content/article/87-news/1604-speech-geert-wilders-mp—columbia-university-new-york-october-21-2009>) (quoting Ronald Reagan).

prepared, so that we may always be free.”⁵⁶ Speaking to a Nashville, Tennessee audience in May 2011, Wilders noted that “[m]any American soldiers, including many young Tennesseans, played a decisive role in the liberation of the Netherlands from [N]azi tyranny,” and, speaking on behalf of the Dutch people, expressed thanks.⁵⁷

Now one might be tempted to dismiss these references as an attempt to please American audiences or, in the Nashville speech, as simple politeness. This is harder to do with Wilders’s remarks at the Four Seasons Hotel in 2009, in which he made an extended comparison between American forces during the Battle of the Bulge and the fight against Islam. It is worth quoting Wilders at length:

Late December 1944 the American army was suddenly faced with a last-ditch effort by the Germans. In the Ardennes, in the Battle of the Bulge, Hitler and his national-socialists fought for their last chance. And they were very successful. Americans faced defeat, and death.

In the darkest of winter, in the freezing cold, in a lonely forest with snow and ice as even fiercer enemies than the Nazi war machine itself, the American army was told to surrender. That might be their only chance to survive. But General McAuliffe thought otherwise. He gave the Germans a short message. This message contained just four letters. Four letters only, but never in the history of freedom was a desire for liberty and perseverance in the face of evil expressed more eloquently than in that message. It spelled N-U-T-S. “Nuts.”

My friends, the national-socialists got the message. Because it left no room for interpretation!

I suggest we walk in the tradition of giants like General McAuliffe and the American soldiers who fought and died for the freedom of my country and for a secular and democratic Europe, and we tell the enemies of freedom just that. NUTS! Because that’s all there is to it. No explanations. No beating around the bush. No caveats.

Our enemies should know: we will never apologize for being free men, we will never bow for the combined forces of Mecca and the left. And we will never surrender.⁵⁸

⁵⁶ Geert Wilders, New York City Speech (Sept. 11, 2010) (available at <http://www.geertwilders.nl/index.php/component/content/article/80-geertwildersnl/1712-nyc-speech-geert-wilders>).

⁵⁷ Geert Wilders, A Warning to America—Speech at Cornerstone Church, Nashville, Tennessee (May 12, 2011) (available at <http://www.geertwilders.nl/index.php/in-english-mainmenu-98/in-the-press-mainmenu-101/77-in-the-press/1750-a-warning-to-america-speech-geert-wilders-cornerstone-church-nashville-12-may-2011>).

⁵⁸ Wilders, *supra* note 49.

The passage is noteworthy for several reasons. First, the wealth of detail about a World War II battle given in a speech about Islam is impressive.⁵⁹ Wilders knows how to exaggerate to tell a good story. While the 1944 Ardennes offensive has been called Hitler's last chance, and the 101st Airborne division was surrounded at Bastogne, it was only that unit, and not the entire American army, that was faced with "defeat and death."⁶⁰

Second, Wilders picked a battle that has played a major role in American popular culture, as films like *Battle of the Bulge* (1965) and *Patton* (1970) attest. In choosing to focus on General McAuliffe's rejection of the German surrender offer, Wilders selected an iconic memory from the Second World War.⁶¹

Third, the way Wilders lionizes General McAuliffe helps to distinguish Wilders from traditional figures of the extreme right who seek to rehabilitate Hitler and the Nazis.⁶² This, in turn, makes it harder to cast him as a typical hate speech defendant. Fourth, Wilders used the brevity of McAuliffe's response—"Nuts!"⁶³—to undercut his cultural relativist foes⁶⁴ who seek "explanations" and "caveats" when it comes to responding to the Islamic threat. Like McAuliffe, Wilders is a man of action. Finally, the passage directly links the German forces in the Ardennes to "Mecca" and "the left." In taking this step, Wilders goes beyond his earlier passages, in which he identifies

⁵⁹ Wilders's self-identification with the victorious American forces also distinguishes him from other far-right supporters of Israel. For example, Filip Dewinter, head of the Vlaams Belang party in Belgium, combines his support of Israel with visits to the graves of Nazi soldiers and the use of the SS oath to open a 2001 speech. See, e.g., Robert Mackey, *Support for Israel's Settlements From Europe's Right*, N.Y. TIMES (Dec. 22, 2010, 7:01 PM), <http://thelede.blogs.nytimes.com/2010/12/22/support-for-israels-settlements-from-europes-right/>.

⁶⁰ For a brief overview, see Donna Miles, *Battle of the Bulge Remembered 60 Years Later*, U.S. DEPT. OF DEFENSE AMERICAN FORCES PRESS SERVICE (Dec. 14, 2004), <http://www.defense.gov/news/newsarticle.aspx?id=24591>.

⁶¹ Miles in her review referred to McAuliffe's response as "now famous." *Id.*

⁶² It also distinguishes Wilders from former Senator Joe McCarthy, who first appeared on the national stage in connection with another part of the Battle of the Bulge story. McCarthy argued on behalf of the German SS troops who massacred captured American soldiers in the Belgian town of Malmedy on December 22, 1944. See ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 20-26* (1970).

⁶³ Apparently, when McAuliffe originally received the surrender order, he told a fellow soldier "Us surrender? Aw, nuts!" After a while, he realized some response was necessary at which point the soldier suggested McAuliffe use his original response. See "NUTS!" *Revisited; An Interview with Lt. General Harry W. O. Kinnard*, THE DROP ZONE, <http://www.thedropzone.org/europe/Bulge/kinnard.html> (last visited Aug. 15, 2012).

⁶⁴ Earlier in the speech, Wilders talked about "the surrender ideology of cultural relativism." Wilders, *supra* note 49.

himself as the victorious Allies, and now compares his foes to the vanquished National Socialists.

A final reference to “the good war” concerns one specific way Wilders justifies his comparison of the Quran with *Mein Kampf*. He notes that Winston Churchill, who in the 1930s advocated standing up to Hitler, made the same comparison. For example, in his 2009 Columbia University speech, Wilders said that “the great Winston Churchill was fully right when he, in his book *The Second World War*, called Adolf Hitler’s *Mein Kampf* the new Koran of faith and war.”⁶⁵

It is worth noting that, as a factual matter, Wilders’s invocation of Churchill is subject to question. Churchill was referring to the Quran to call attention to *Mein Kampf*.⁶⁶ Wilders is using a different understanding of *Mein Kampf*—one shaped by the Holocaust—to tarnish the Quran.⁶⁷ Furthermore, Churchill—like Wilders—has very little to say about the comparison itself, aside from noting the “turgid, verbose [and] shapeless” nature of the prose in each book.⁶⁸ This suggests a larger problem with the Quran / *Mein Kampf* comparison (and with the use of the term “Islamofascism” more generally): it is hard to compare “an 800 page monologue exposing Hitler’s insane worldview”⁶⁹ to the founding text of a major world religion.⁷⁰

⁶⁵ Wilders, *supra* note 55.

⁶⁶ See WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GATHERING STORM* 50 (Mariner Books, 1986). In a page long description of *Mein Kampf*, the only reference to the Quran is in the “faith and war” sentence. *Id.*

⁶⁷ Churchill does have other negative comments about Muslims, which Wilders has used in other places. For example, in a speech entitled, “My message to Muslims,” explaining how he became anti-Islam, Wilders quoted Churchill’s description of the “fearful fatalistic apathy” of Muslims and his (Churchill’s) conclusion about the Quran that “No stronger retrograde force exists in the world.” Geert Wilders, *My Message to Muslims*, MUSLIMS DEBATE (Jul. 19, 2010), http://www.muslimsdebate.com/search_result.php?news_id=4399. The Churchill reference appears to be from 2 WINSTON SPENCER CHURCHILL, *THE RIVER WAR: AN HISTORICAL ACCOUNT OF THE RECONQUEST OF THE SOUDAN* 247 (1899). The book describes the British campaign against the Madhist revolution in the Sudan.

⁶⁸ CHURCHILL, *supra* note 66, at 50.

⁶⁹ The comment comes from Wolfgang Benz, director of the Center for Antisemitism Research at the Technical University of Berlin, who was arguing against releasing a version of *Mein Kampf* with commentary. Smith, *supra* note 4.

⁷⁰ For a criticism of Islamofascism along these lines, see Gabrielle Marranci, *A Wolf in Sheep’s Clothing: The Neologism ‘Islamofascism,’* 8–13, in *Thinking Thru’ Islamophobia Symposium* (May 2008), available at http://independent.academia.edu/YahyaBirt/Papers/742095/Governing_Muslims_after_9_11. Marranci, an Italian anthropologist, argues that fascism—unlike radical Islam—is characterized by “a nationalist movement, based on the strong leadership of a *Dux*” and “an autarkic and protectionist view of economy, and is very suspicious of any form of religion.” *Id.* at 9. She does, however, find an element of

On the other hand, just as Churchill was an early opponent of Hitler, Wilders can cast himself as an early opponent of Islam. This fits well with Wilders's references to the Normandy beaches, the Battle of the Bulge, his support for Israel, and his call for the Dutch to re-examine their passivity during the Holocaust. Each of these references associates Wilders with the "good guys" in World War II. This positioning, in turn, not only makes it easier to lump Islam and national-socialism together, it makes it harder for Wilders's political opponents to cast him as a right-wing extremist in the mold of Jean-Marie Le Pen or Jorg Haider.⁷¹

V

PERHAPS WILDERS IS A FASCIST AFTER ALL

And yet they do. As we have seen, Henk Bovekerk, a Dutch college student, received a "10" for a thesis stating that Wilders is a fascist. He is not alone. Bovekerk's thesis relies heavily on a pamphlet titled, *The Eternal Return of Fascism*, a pamphlet Dutch philosopher Rob Riemen wrote and distributed to all members of the Dutch parliament in 2010.⁷² Riemen writes:

What you can clearly see with Wilders is the cultivation of feelings of unease and fear in society. Societal unease is blamed on a single scapegoat: Muslims. He is also an authoritarian, charismatic leader who has little time for democracy. As with the fascists in the 1930s,

pre-fascist rhetoric in the tendency of neoconservative proponents of the Islamofascism concept to speak of "Civilization," "Intellectual enemies," and "real Truths." *Id.* at 10.

⁷¹ One interesting aspect of Wilders's speeches about Islam is the absence of references to Soviet Communism, a comparison often made by proponents of the Islam = fascism position. For example, Andrew Bostom, in a 2010 blog post about Wilders, invokes a 1954 article from Bernard Lewis that spoke of the similarities between Islam and Soviet-style totalitarianism. See Andrew Bostom, *Geert Wilders, Bernard Lewis, Free Speech, and Totalitarian Islam*, ANDREWBOSTOM.ORG (Oct. 17, 2010), <http://www.andrewbostom.org/blog/2010/10/17/geert-wilders-bernard-lewis-free-speech-and-totalitarian-islam/>. This also distinguishes Wilders from Flemming Rose, who in describing his views about Muslims draws on his experiences as a journalist in the Soviet Union. See Kahn, *supra* note 12, at 258–60. The difference here may relate to the historical experiences of the Netherlands and Denmark. While Denmark was a frontline state during the Cold War, the Netherlands was somewhat insulated from Cold War tensions. Conversely, the Nazi occupation was much harsher in the Netherlands than in Denmark.

⁷² Bovekerk, *supra* note 25, at 5–6. For more on Riemen, see Michel Hoebink, "Wilders is a Fascist," RADIO NETHERLANDS WORLDWIDE (Nov. 8, 2010, 6:19 PM), <http://www.rnw.nl/english/article/wilders-a-fascist>. Riemen is founder of the Nexus Institute, which has invited speakers such as Jürgen Habermas and Francis Fukuyama.

the Freedom Party is more a movement than a party and Wilders avoids all debate with his opponents outside of parliament.⁷³

In response, historian and former Member of Parliament for the center-right Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie*—VVD) Arend-Jan Boekestijn called the comparison a “conversation killer” noting that it would “cast doubts on the motives of one and a half million Wilders voters.”⁷⁴ He added that “[f]ascism is a serious accusation” which involves “glorification of violence, political dictatorship and—in the German variety—racism.”⁷⁵

Boekestijn does a great job of highlighting the stakes of an accusation of fascism.⁷⁶ A fascist supports violence, is a potential dictator, and supports “German” racism. Wilders, who sides with the Americans in the Battle of the Bulge, opposes the Quran for its violence and opposes Dutch passivity during the Nazi occupation seems fairly insulated from this charge. And yet the charge persists.

The question is why. To explore this, a look at recent Dutch history is helpful. In 1995 Hans Janmaat was tried, and convicted of hate speech charges. His offense was to say “we shall abolish the multicultural society as soon as we get a chance and get in power.”⁷⁷ A 2008 op-ed piece in the *NRC*, a Dutch newspaper, looking back on the Janmaat trial from the perspective of Wilders, called Janmaat’s comments “almost polite” and said that the prosecution was now seen as unwarranted.⁷⁸ Yet the same author also pointed out that Janmaat was “an extreme right-wing member of parliament with an anti-immigrant message,”⁷⁹—qualities that before the rise of Pym Fortuyn and Geert Wilders were outside the anti-fascist consensus.

A brief description of Janmaat and his Centre Democrat party may explain why. In addition to imposing curbs on immigration, Janmaat sought to restrict cabinet positions to Dutch nationals, a category for

⁷³ Hoebink, *supra* note 72 (quoting Riemen).

⁷⁴ *Id.* (quoting Boekestijn).

⁷⁵ *Id.*

⁷⁶ There are other arguments about Wilders’s potential fascism that do not involve World War II. For example, a writer from a socialist perspective argued against the comparison given the PVVs lack of a “street presence”—a key part of earlier fascist movements. See Maina van der Zwan, *Geert Wilders and the Rise of the New Radical Right*, 131 INT’L SOCIALISM (June 28, 2011), available at <http://www.isj.org.uk/?id=743>.

⁷⁷ See *Processen als die Tegen Wilders: Zij Werden Wél Veroordeeld*, VOLKSKRANT (Neth.) (June 23, 2011) (describing prosecution of Janmaat).

⁷⁸ Folkert Jensma, *Freedom of Expression or Freedom to Insult?*, NRC.NL (Mar. 27, 2008), <http://vorige.nrc.nl/article1886350.ece>.

⁷⁹ *Id.*

him that excluded Jews.⁸⁰ This led to a perception that the Centre Democrats were a rightwing extremist party and led to a variety of actions being taken against them, including a concerted effort by mainstream parties to prevent the Centre Democrats from achieving parliamentary representation.⁸¹ This was not unusual—the electoral successes of right-wing extremists, such as Jean-Marie Le Pen and Jorg Haider met with a similar response.⁸² In a Europe traumatized by the Second World War, Nazi occupation, and the Holocaust, there was great effort placed on avoiding the type of elite toleration of right-wing extremists that scholars like Robert O. Paxton saw as easing Hitler's path to power.⁸³ As a result, politicians in Europe (and the Netherlands) were suspicious of parties that appear to follow in Hitler's footsteps.

While Janmaat seemed to fall in this category, applying this label to Wilders poses a much greater challenge. And yet a number of people made just that argument. For example, Jérôme Jamin, who studies politics and philosophy at the University of Liege, described Wilders as part of a “new” right-wing extremism in which racist appeals play a more covert role.⁸⁴ This new images is well suited to a country like the Netherlands, which views itself as “open” and “tolerant.”⁸⁵ But any change on Wilders's part, says Jamin, is superficial—while the words and faces have changed, the need to identify an “other” as an enemy has not.⁸⁶

The desire to unmask Wilders as a “fascist” can lead to interesting results. For example, Bovekerk describes one of the qualifying aspects of fascism as an emphasis on “the gut rather than the brain,”

⁸⁰ *Guide to the Main Political Parties*, NIS NEWS BULLETIN, (May 3, 1994), available at http://www.nisnews.nl/dossiers/immigration/030594_54.htm.

⁸¹ *Hans Janmaat (1934–2002)*, HISTORIEK.NET (Neth.) (Jan. 17, 2008), http://historiek.net/overige/personen/personen-algemeen/214?tmpl=_print&print=1&page=-.

⁸² See Cas Muddle, *Conclusion: Defending Democracy and the Extreme Right*, in WESTERN DEMOCRACIES AND THE NEW EXTREME RIGHT CHALLENGE 193, 194–95 (Roger Eatwell & Cas Muddle eds., 2004) (describing efforts of French and Austrian mainstream parties to keep the National Front and Freedom Party out of power).

⁸³ Bovekerk, who relies heavily on ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* (2004), makes this argument. See Bovekerk, *supra* note 25, at 25 (citing PAXTON, at 96–97). Whether this argument is historically accurate—there are many competing explanations for Hitler's rise to power (Versailles, the Great Depression, etc.)—matters less than its continuing hold on postwar European elites.

⁸⁴ Jérôme Jamin, *Vieilles Pratiques, Nouveaux Visages: Geert Wilders et l'Extrême Droite en Europe*, 55 VACARME 43–45 (2011).

⁸⁵ *Id.* at 43.

⁸⁶ *Id.* at 45.

an idea he takes from Paxton's *The Anatomy of Fascism*.⁸⁷ To show that Wilders satisfies this standard, Bovekerk relates how a journalist who infiltrated Wilders's media operation was told not to "go too deep into the material" and not to discuss "nuance" with "outsiders" lest "[e]verybody . . . fall asleep," starting with journalists.⁸⁸ Another article, while not directly calling Wilders a fascist, noted his tendency to use short, direct sentences that lack clauses that attribute meaning away from the author of the sentence.⁸⁹

Bovekerk has other arguments, however, that carry more weight—even if some of them apply better to Wilders's supporters than to Wilders himself. For example, he argues that fascist leaders and parties have a tendency to "discredit" the left, the way fascist parties did during the interwar years.⁹⁰ In making the argument with regard to the PVV, Bovekerk relies on *De Schijn-Élite van de Valse Munters* [The Fake Elite of the Counterfeiters] a book written by Martin Bosma, a PVV member who argues that the real lesson of the Second World War was not the racism, authority, or hostility of the Nazi state. Rather, it was, to use Bovekerk's summary, that "[e]conomically, Hitler was a socialist and therefore a Left-winger."⁹¹ Bovekerk also quotes J.J. De Ruiter, who describes Bosma's world view in similar words: "The current Left is the heir of Hitler and his band, and of the guilt of many of the deaths of World War II."⁹²

While none of these comments are attributable to Wilders, he speaks of the "combined forces of Mecca and the left" as enemies in his Four Seasons speech where he took up the Battle of the Bulge.⁹³ Moreover, the Hitler = Socialist formula takes on a revisionist, neo-Nazi cast to the extent that it shifts responsibility for Hitler's crimes away from the National Socialists.⁹⁴ This may be one reason why, despite his support for Israel, Dutch Jewry, and an apology for Dutch

⁸⁷ Bovekerk, *supra* note 25, at 48.

⁸⁸ *Id.* at 48-49.

⁸⁹ Maarten Van Leeuwen, "Clear vs. "Woolly" Language Use in Political Speeches: The Case of the Controversial Dutch Politician Geert Wilders (2009), available at <http://www.pala.ac.uk/resources/proceedings/2009/vanleeuwen2009.pdf>. Van Leeuwen calls Wilders a "controversial" politician who addresses his audiences with "radical standpoints" that break through "political etiquettes." *Id.* at 1, 2.

⁹⁰ Bovekerk, *supra* note 25, at 41.

⁹¹ *Id.* at 47.

⁹² *Id.* at 46 (quoting De Ruiter).

⁹³ Wilders, *supra* note 49.

⁹⁴ In this regard, Bosma's arguments bear some resemblance to efforts the far right to deny the Holocaust and restrict Hitler's involvement in it in order to undermine any "taboo" on anti-Semitism the Holocaust may have created.

passivity during the Holocaust, Wilders's anti-fascist *bona fides* are still suspect.⁹⁵

Bovekerk's final argument is that fascists have an "us versus them" view of the world.⁹⁶ According to Bovekerk, Wilders distinguishes between "good, tolerant and democratic Holland" and "bad, intolerant and undemocratic Islam."⁹⁷ To that end, Wilders favors preventative detention of Muslims who threaten the state, closing the border to "non-western immigrants (Turks and Moroccans)" for five years, a ban on the construction of mosques, and a replacement of the ban in the Dutch constitution on religious discrimination with a statement that "[C]hristian/[J]ewish/humanistic culture should remain dominant in the Netherlands."⁹⁸ According to Bovekerk, these "exclusionary policies towards the 'alien and the impure'" show how the PVV, "driven by nationalism and racism, divides the world along Manichean lines."⁹⁹ This characteristic, along with Wilders's discrediting of the left and his penchant for speaking to the gut, qualifies Wilders, at least for Bovekerk, as a prototypical fascist.¹⁰⁰

But hidden in Bovekerk's language there is a caveat. By "prototypical," Bovekerk means "early stage."¹⁰¹ In fact, in defending his thesis that Wilders is a "fascist" he is careful to explain that one should not expect him to act like Mussolini or Hitler; this only comes much later, if at all.¹⁰² It also turns out that, for Bovekerk at least, "[f]ascism exists at the level of Stage One [i.e. prototypical Fascism] within all democratic countries," a concession that weakens his conclusion.¹⁰³ What is more, there are other, rather critical ways of

⁹⁵ The clash between the competing images of Wilders—participant in the Good War against Nazi Germany or potential fascist—came to a head following a visit by Wilders to Monschau, Germany, a town on the northern shoulder of the Battle of the Bulge. The mayor, citing Wilders's right-wing populism, asked that he not return. *Wilders Niet Meer Welkom in Monschau*, DE TELEGRAAF (Neth.) (Mar 16, 2010), available at http://www.telegraaf.nl/binnenland/6295972/___Wilders_niet_meer_welkom_in_Monschau_.html. In response, Diana West wrote a letter to the mayor saying that her father visited the town in 1944 as part of the 102nd Cavalry Reconnaissance Squadron where, like Wilders today, he fought to preserve liberty against "supremacist totalitarianism." Letter from Diana West to Margareta Ritter, Mayor of Monschau (Mar. 16, 2010) (available at <http://www.dianawest.net/Home/tabid/36/EntryId/1319/Dear-Mayor-of-Monschau.aspx>).

⁹⁶ Bovekerk, *supra* note 25, at 31.

⁹⁷ *Id.* at 32.

⁹⁸ *Id.* at 32–33, 36–37 (quoting Wilders).

⁹⁹ *Id.* at 40.

¹⁰⁰ *Id.* at 59.

¹⁰¹ *Id.* at 26.

¹⁰² *Id.* at 19.

¹⁰³ *Id.* at 27.

viewing Wilders that do not rely on fascism. For instance, John Bowen makes the argument that Wilders's anti-Islamic arguments—especially those about toleration of gays and women's rights—reflect how not too long ago “most Dutch people held religious views about homosexuality and women's rights that were not too different from those now ascribed to Muslims by their opponents.”¹⁰⁴ According to Bowen, Wilders—and others like him—are using the Muslim migrant as a space in which to work out their own heritage.¹⁰⁵ One might argue with some force that the Dutch opponents of Wilders do much the same when they debate about whether or not he is a fascist.

VI

LIKE JEWS IN THE 1930S

But there is a second, more telling parallel to the Nazi past. Are Muslims the new Jews? As we have seen, this comparison was made by Labor Party leader Job Cohen, who put an emphasis on the “singling out” process.¹⁰⁶ Interestingly, he made this statement despite being well aware, as former mayor of Amsterdam, of the anti-Semitism of some Muslim youth.¹⁰⁷ Manfred Gerstenfeld, who has written at length about Muslim anti-Semitism, also gives credence to the comparison. He relates how Liesbeth van der Horst, director of the Resistance Museum in Amsterdam has to comfort Moroccan children who visit the museum and conclude: “The Jews were a group that stood apart in Dutch society and were deported. We are today a separate group so that could happen to us.”¹⁰⁸ To hammer home the point, Gerstenfeld asks: if “[s]upposedly well-integrated Jews, those who resemble other Dutchmen so closely that they are often hardly recognizable as Jews, are not seen as authentic Dutch by many Dutchmen . . . what can Muslims expect regarding their integration into Dutch society?”¹⁰⁹

¹⁰⁴ John R. Bowen, *Europeans Against Multiculturalism: Political Attacks Misread History, Target Muslims, and May Win Votes*, BOS. REV. (July-Aug. 2011), http://bostonreview.net/BR36.4/john_r_bowen_european_multiculturalism_islam.php.

¹⁰⁵ *Id.*

¹⁰⁶ Cohen, *supra* note 26.

¹⁰⁷ For example, as mayor of Amsterdam Cohen had to determine what slogans could be allowed at a pro-Palestinian rally. Cohen accepted “anti-Israel slogans, but not anti-Jewish ones.” He rejected “a banner equating a swastika to a Star of David” because “[t]he swastika is so connected to racism that it crosses a line.” Gerstenfeld, *supra* note 35.

¹⁰⁸ Gerstenfeld, *supra* note 38. According to Gerstenfeld, van der Horst reassured the children by pointing out that the Germans, not the Dutch, organized the mass killings of Jews. *Id.*

¹⁰⁹ *Id.*

From this perspective, Arend-Jan Boekestijn's explanation that more than a million and a half Dutch voted for Wilders is less reassuring. To the contrary, it reinforces the concern that the anti-Muslim measures Wilders endorses have a fair measure of public support. The argument is further reinforced by public opinion surveys registering the fear of Wilders in the Muslim community. For example, Wilders's weblog contains an article from the English language website of *NRC Handelsblad*, entitled "Half of Dutch Muslims wants [sic] to leave because of Wilders."¹¹⁰ The article reports that 57% of Dutch Moroccans and Turks feel less comfortable given the growing popularity of the PVV, 75% thought Wilders had intensified negative feelings against Muslims, while nine in ten thought a Wilders government would be a "fiasco."¹¹¹ Moreover, the same survey that found only 53% of Dutch citizens would accept a Jew as prime minister, was even worse for Muslims—only 27% would accept a Muslim prime minister.¹¹²

When one views the Nazi past not through Wilders's status as a fascist, but from the perspective of Muslims as potential victims, the case for prosecuting Wilders becomes clearer. If the 75% of the survey were correct in thinking that Wilders "intensified negative feelings" against them, and this could be traced to specific comments Wilders made, then one has the basis of a hate speech prosecution.¹¹³ The prosecution would rest on the power of Wilders's comments to inspire acts of hate and discriminatory violence. The charges would not depend on whether Wilders satisfied Henk Bovekerk's (or Robert Paxton's) criteria for fascism. Nor could Wilders escape the charges by pointing to his support of Jews, his opposition to Muslim anti-Semitism, or his appreciation of the acts of valor for the Western Allied soldiers in World War II.

To a large extent, this is how the prosecution unfolded. Most of the charges against Wilders involved statements about immigration, street crime, and other subjects that—unlike the *Mein Kampf* / Quran comparison—did not directly invoke the Nazi past. And, as noted above, the court that ultimately acquitted Wilders had the most

¹¹⁰ *Half of Dutch Muslims wants to leave because of Wilders*, RADIO NETHERLANDS WORLDWIDE (June 30, 2009), available at http://www.geertwilders.nl/index.php?option=com_content&task=view&id=1590.

¹¹¹ *Id.*

¹¹² Gerstenfeld, *supra* note 38.

¹¹³ The threat is even greater given that Wilders posted an article about the polling data on his weblog, in effect sending the message that he is glad Muslims are scared.

trouble with his call to Dutch citizens to confront Muslims in the streets.¹¹⁴ (On the other hand, the Amsterdam Appeals court—which authorized the charges in 2009—placed great emphasis on Wilders’s use of the *Mein Kampf* and fascist labels. It mentioned “Mein Kampf,” “fascist,” or “Nazi” over 30 times in its opinion—although most of these references were not substantive).¹¹⁵

And yet the prosecution of Wilders still took place in the shadows of the Holocaust. One of the legacies of the Holocaust is a heightened sensitivity to the power of words to cause harm. Small things that would not otherwise attract attention do so if they involve the Nazi past. For example, last winter a number of branches of the British bookstore Waterstones placed stickers on *Mein Kampf*, describing it as “the perfect Christmas present.”¹¹⁶ After complaints and newspaper coverage, the bookstore apologized. Likewise, the Amsterdam trial court’s conclusion that Wilders’s call to confront Muslims in the streets was at the border of the acceptable might reflect a sensitivity to the special status of Dutch Muslims in a society that has yet to fully work out its own issues with the Holocaust.

CONCLUSION: THE CONTINUING RELEVANCE OF THE NAZI PAST

The debate over “fascism” at the Wilders’s trial raises an additional, more general question, one about the discourse over European hate speech laws in the United States, home of the First Amendment. At first, this would seem to be a match made in heaven. Wilders himself has called for a First Amendment for Europe.¹¹⁷ In addition, proponents of free speech libertarianism, such as Robert Post, tend to downplay the role of Europe’s Nazi past in explaining the persistence of hate speech laws there. For example, in a recent book chapter, Post traces Europe’s hate speech laws to a number of factors, including “European habits of deference to political

¹¹⁴ *Wilders Verdict*, *supra* note 12, § 4.3.2.

¹¹⁵ In reading the opinion one gets the sense that the judges were shocked by the comparison—which may be why, when the court turned to its analysis of the case it introduced “Nazi” into the analysis, a word Wilders never used. See *Gerechtshof Amsterdam* (Amsterdam Court of Appeals) 21 Jan. 2009, NJ 2009, 191 m. nt. Y. Buruma, §§ 12.1.3, 12.2.2, and 13.

¹¹⁶ *U.K. Bookseller Apologizes for Promoting ‘Mein Kampf’ as Perfect Christmas Present*, FOX NEWS (Dec. 23, 2011), <http://www.foxnews.com/world/2011/12/23/uk-bookseller-apologizes-for-promoting-mein-kampf-as-perfect-christmas-present/>. The stickers also described the book as “essential read[ing]” for anyone. *Id.*

¹¹⁷ See Adriana Stuijt, *Dutch MP Geert Wilders on Fox TV: Europe Needs a First Amendment*, DIGITAL JOURNAL (Feb. 24, 2009), <http://digitaljournal.com/print/article/267899>.

authority,” but does not make direct reference to the Holocaust or the Nazi occupation.¹¹⁸ He adds that Holocaust denial bans are not only “problematic” but also “rare.”¹¹⁹ Treating such laws as rare is part of a larger strategy of placing European hate speech laws in a broader context, one that makes them seem unreasonable.¹²⁰

Peter Teachout, writing about Holocaust denial, takes a slightly different tack. He concedes that “[d]uring the period immediately following the War . . . there was real and important urgency in establishing once and for all that civilization would never again tolerate what had been done in the name of Aryan superiority.”¹²¹ Now, however, more than sixty years after World War II, there have been “profound changes,”¹²² ones that make anti-denial laws less urgent. These include greater documentation of the Holocaust, the use of the European Union to bind Germany into a web of connections that make the re-emergence of the Nazi past inconceivable, and greater Holocaust education.¹²³ This leads Teachout to wonder if anti-denial laws “have not become anachronistic.”¹²⁴

Whatever one thinks of Post and Teachout’s views of hate speech laws from a normative perspective,¹²⁵ they underestimate the extent to which the Nazi era, including the Holocaust, plays in European understanding of hate speech laws. Laws against Holocaust denial are not rare in Europe—to the contrary a number of European countries have such laws, and for a while Europe-wide bans were seriously

¹¹⁸ See POST, *supra* note 13, at 137.

¹¹⁹ *Id.* at 127.

¹²⁰ For instance, Post’s analysis of hate speech laws refers to the first English translation of Machiavelli’s *The Prince* (which contained an admonition to avoid stirring up hatred) and the 1792 conviction of Tom Paine for seditious libel. *Id.* at 125–26.

¹²¹ Teachout, *supra* note 13, at 688.

¹²² *Id.* at 692.

¹²³ *Id.* at 688–89 n.149.

¹²⁴ *Id.* at 692.

¹²⁵ Some scholars in the United States take a more favorable view of permissibility of hate speech laws in the United States. For instance, Alex Tsesis suggests the First Amendment might not protect “forms of hate speech” that, even if not intimidating, could “incite an audience to commit discrimination at work or in public places.” See Alexander Tsesis, *Dignity & Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 532 (2009); see also ERIK BLEICH, FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM 79–80 (2011) (noting how differences between United States and European regulation of speech diminish when one looks at “hostile environment” claims brought in the employment law context).

considered.¹²⁶ And while Teachout is free to call the need for anti-denial laws “anachronistic,” the laws themselves came into existence relatively recently. For example, the French Gayssot Act was passed in 1990, a time when—according to Teachout—concerns about the Holocaust should have been in decline.¹²⁷

The repeated references to the “fascists,” *Mein Kampf*, and the situation of the Jews in the 1930s at the Wilders trial suggest that fears about the Holocaust and the Nazi past, far from being “anachronistic,” are alive and well in postwar Europe nearly seventy years after V-E day.¹²⁸ This does not mean one has to approve of this state of affairs¹²⁹—one might, from a libertarian perspective, bemoan the impact that the events of the 1930s and 1940s have had on European hate speech law. In his book about Holocaust-related trials, Lawrence Douglas has questioned whether law is capable of speaking “adequately on behalf of humanity’s most traumatic histories.”¹³⁰ One can ask the same question about speech regulation. Is a post-Holocaust Europe ready for a First Amendment? Or is the anti-fascist consensus behind hate speech laws a sign of how the Holocaust has left a continuing rupture in the fabric of European society?¹³¹

¹²⁶ Currently a number of European countries including Belgium, France, the Netherlands, Germany and Austria ban Holocaust denial. See Kahn, *supra* note 3, at 96 n.104 (2011) (noting situation as of 2011). For an overview of efforts to establish a European ban on Holocaust denial, see Laurent Pech, *The Law of Holocaust Denial in Europe: Toward a (Qualified) EU-Wide Criminal Prohibition*, in GENOCIDE DENIALS AND THE LAW 185 (Thomas Hochmann & Ludovic Hennebel eds., 2011).

¹²⁷ For a brief overview of the passage of the Gayssot Act, see Kahn, *supra* note 33, at 105–08.

¹²⁸ Similarly, one could read *Virginia v. Black*, 538 U.S. 343 (2003), which allowed states to ban some forms of cross burning as showing that slavery and segregation are not yet “anachronistic” concerns in the United States. See Robert A. Kahn, *Did the Burning Cross Speak? Virginia v. Black and the Debate between Justices O’Connor and Thomas over the History of Cross Burning*, 39 STUD. L. POL. & SOC’Y 75 (Austin Sarat ed., 2006) (describing debate between Justices O’Connor and Thomas over the history of cross burning in the United States).

¹²⁹ Likewise, one can question whether the fear of a Nazi or fascist resurgence in current day Europe is a realistic possibility. On this issue, Teachout is right to point out that times have changed since 1945. Teachout, *supra* note 13, at 688–92. On the other hand, even if fears of a Nazi resurgence are irrational, they are an important part of European discussions about hate speech laws.

¹³⁰ LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW & HISTORY IN THE TRIALS OF THE HOLOCAUST* 261 (2001).

¹³¹ Perhaps the strongest evidence for a continuing rupture—one related to hate speech laws—comes from Germany where anti-Semitic incidents and judicial opinions favoring Holocaust denial led to calls for tougher enforcement hate speech laws. KAHN, *supra* note 33, at 67, 73–77. While these events date back to the 1960s, perhaps the largest scandal arose in 1994 when Judge Ranier Orlet was placed on emergency medical leave after praising defendant Günter Deckert—whom he had just found guilty of racial incitement by

Regardless of how one answers these questions, the questions themselves attest to the continuing influence of the Nazi past on debates in Europe over banning hate speech. Perhaps Europeans should try to move beyond the past, or—to use Teachout's words—perhaps “[i]t is time [for Europe] to trust again in democracy.”¹³² One might even agree with Teachout and Post that laws against Holocaust denial should be “rare.” Indeed, the rancor and confusion caused by the competing charges of fascism at the Wilders trial may well cause someone to long for a time when the Nazi era ceases to loom as large over European public life.

But the time has not yet come. In 2012, Europeans are still dealing with the Holocaust. This year has already seen Manfred Gerstenfeld's call for a Dutch apology for passivity during the Holocaust.¹³³ In addition, a Dutch filmmaker is currently standing trial for filming a former Dutch Nazi in a German nursing home.¹³⁴ Meanwhile, a German prosecutor is seeking prison for an 89-year-old man accused of war crimes in the Netherlands.¹³⁵ Perhaps it will take another generation—one in which the last victims, perpetrators, or bystanders have passed away—to move to a genuinely post-Holocaust perspective on hate speech law.

This may happen one day. But doubts remain, in part because of how the Nazi past (and especially the Holocaust) has become part of a broader discourse about the rejection of “racial and religious bigotry.”¹³⁶ Here, Khaled Abou El Fadl's essay on Geert Wilders—written while El Fadl was in the Netherlands as a visiting professor—is enlightening. El Fadl begins by discussing the rise of Geert

denying the Holocaust—for raising questions about “Jewish pretensions about the Holocaust.” *Id.* at 154. In the ensuing debate, concerns were raised about “Germany's reputation abroad,” *id.* at 73 (quoting then Chancellor Helmut Kohl), as well as the impact of denial on the political legitimacy of the Federal Republic of Germany. *Id.*

¹³² Teachout, *supra* note 13, at 692.

¹³³ See *supra* note 32 and accompanying text.

¹³⁴ *Dutch Journalists to Stand Trial for Filming Nazi*, RADIO NETHERLANDS WORLDWIDE (Jan. 19, 2012, 10:57 AM), available at <http://www.rnw.nl/english/print/592790>.

¹³⁵ David Rising, *German Prosecutor Seeks to Jail Nazi War Criminal*, SEATTLE TIMES (Jan. 19, 2012), http://seattletimes.com/html/nationworld/2017274945_apeuger_many_nazicriminal.html. Since then, the person in question—Klaas Carel Faber—has died. See *Nazi War Criminal Klaas Carel Faber Dies in Germany*, BBC NEWS (May 26, 2012), <http://www.bbc.co.uk/news/world-europe-18219795>.

¹³⁶ See Khaled Abou El Fadl, Editorial, *Fascism Triumphant?*, 10 POL. THEOLOGY 577, 577 (2009).

Wilders.¹³⁷ He notes that Islam bashing has become a “lucrative industry”¹³⁸ and asks whether Wilders realized that he and his supporters were “marching down the same path of every other fanatic who used fear and hate to demonize millions of people.”¹³⁹ El Fadl refers to the Bosnian Genocide, the Serbian rape camps, and the Armenian Genocide,¹⁴⁰ before concluding his article by describing how in the 1930s an “extreme and puritanical nationalism” led to the Holocaust.¹⁴¹

Like Cohen and Gerstenfeld,¹⁴² El Fadl traces a connection between a history of European anti-Semitism culminating in the Holocaust and current anti-Muslim sentiment. In doing this, all three authors help bridge a divide between those who argue that anti-Semitism and the Holocaust belong solely to history and those who argue that European Muslims—in part because of their lack of understanding of the Holocaust—are contributing to a new wave of anti-Semitism.¹⁴³ The example of Jewish and Muslim writers accepting this comparison suggests that even if one argues that Islamophobia has replaced anti-Semitism as the primary expression of European xenophobia, the experience of the Nazi past will still inform Europeans’ understanding of racism and hate speech regulation.¹⁴⁴

In the meantime, sweeping the past under the rug in the name of a universal theory of speech protection (one based largely on the historically contingent experiences of the United States)¹⁴⁵ will not

¹³⁷ *Id.*

¹³⁸ *Id.* at 578.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 581.

¹⁴² See *supra* notes 106–09 and accompanying text.

¹⁴³ Robert Fine, *Fighting with Phantoms: A Contribution to the Debate on Antisemitism in Europe*, 43 PATTERNS OF PREJUDICE 459, 466–67 (2009). Fine frames the debate over European anti-Semitism as a debate between “alarmists” and “deniers” and calls for creating a “cosmopolitan space” between the opposing camps. *Id.* at 466–67, 479. Arguably, Cohen, Gerstenfeld, and El Fadl are creating the “cosmopolitan space” Fine is calling for.

¹⁴⁴ Likewise, Uladzislau Belavusau, an assistant professor at the VU University in Amsterdam, sees regulation of hate speech as based on not only “a traditional post-war *ethos* of militant non racism” but also “a newer *telos* of the peaceful integration of migrants.” Uladzislau Belavusau, *Fighting Hate Speech Through EU Law*, 4 AMSTERDAM L. F. 20, 34 (2012). Interestingly, Belavusau describes the Wilders acquittal as “controversial” and against the grain of recent punitive measures taken against right-wing politicians. *Id.*

¹⁴⁵ According to Samuel Walker, the departure of the United States from traditional norms—ones that allow for some punishment of hate speech—occurred as a result of the movements in the 1960s for Civil Rights and against the Vietnam War. SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 104–13 (1994).

advance our understanding of the Wilders trial or of the current efforts by Flemming Rose¹⁴⁶ and Geert Wilders to challenge hate speech laws and expand protections for freedom of speech in Europe. Nor will it fully explain the sensitive position of Muslims in Europe who are simultaneously seen as potential Nazi censors eager to rob Europeans of their liberties and, at the same time, as the new Jews, victims of the Nazis for whom hate speech laws are meant to protect.¹⁴⁷

To return to Abraham Foxman, Europeans have “experienced Nazism and other destructive social movements on their soil.”¹⁴⁸ The depth of discussion about fascism at the Geert Wilders trial is a reminder that these movements have had a continuing impact. The same applies to Dutch (and European) hate speech laws. One can object to the methods and (speaking from the United States) point out that they are “not ours.”¹⁴⁹ But the “legacy of extremism”¹⁵⁰ these laws are meant to protect against is still—at least for many Europeans—quite real.¹⁵¹

¹⁴⁶ For more on Rose, see Kahn, *supra* note 12.

¹⁴⁷ See, e.g., David A. Jacobs, Note, *The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 HARV. INT'L L.J. 563, 572–73 (1993) (describing how anti-Semitic songs from the 1930s were reprised with Turks as the new victims).

¹⁴⁸ Foxman, *supra* note 1, at xiv.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ For example, Groningen law professor Fokko Oldenhuis, calling Wilders a “hatemonger,” pointed out that the first Dutch hate speech law, passed in 1934, was directed to protect Jews against Hitler’s rise to power in Germany. Interview with Fokko Oldenhuis, University of Groningen Professor of Religion & Law, *PVV Politician Wilders a Prime Example of Reprehensible Intolerance* (Dec. 15, 2009), available at http://www.rug.nl/corporate/nieuws/opinie/2009/opinie09_51.

LOUISE MALLINDER*

Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States¹

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INTRODUCTION

Our founding fathers faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience’s sake.²

This is a time for reflection, not retribution. . . . We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.³

President Obama’s 2009 inauguration speech emphasized the fundamental nature of America’s commitment to human rights and the rule of law in the country’s self-perception as an idealistic and inspirational society, where the rights of all are protected. Within the United States, such political rhetoric has long highlighted the nation’s

² President Barack Obama, Inaugural Address (Jan. 20, 2009), *available at* <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=all>.

³ Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos) [hereinafter OLC Press Release].

potential to inspire other countries towards greater protection of individual rights. Despite America's much discussed tendency towards "exceptionalism" with regard to the jurisdiction of international law towards U.S. citizenry,⁴ this rhetorical commitment has been substantiated by the leadership role that the United States has played in the promotion of human rights, the rule of law, and transitional justice⁵ around the world. For example, it has provided enormous financial, logistical, and technical support to the work of international and hybrid courts in Nuremberg, Tokyo, the former Yugoslavia, Rwanda, Sierra Leone, Timor Leste, and Cambodia.⁶ Indeed, according to Schabas, "[s]ince international criminal justice first became truly operational, in 1945, it has had no greater friend or promoter than the United States."⁷ Through these actions, the United States has demonstrated support for legal accountability for human rights violations perpetrated by foreign warlords, dictators, and their foot soldiers. In addition, through the rule of law programs of agencies such as the U.S. State Department, the United States has provided considerable financial, personnel, and logistical resources to building rule of law capacity within numerous countries around the world.⁸ It has also contributed to the rule of law at the international

⁴ American exceptionalism has been written about extensively by legal scholars, as well as researchers from other disciplines. *See, e.g.*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM (1998); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN L. REV. 1479 (2003). Part IV.B. explores in more detail the cultural and political aspects of American exceptionalism.

⁵ There is no universally accepted definition of transitional justice, but the phrase refers to a field of research and praxis that explores how states that are transitioning from conflict and repression can address legacies of mass violence. *See* Anne-Marie La Rosa & Xavier Philippe, *Transitional Justice*, in POST-CONFLICT PEACEBUILDING: A LEXICON 368 (Vincent Chetail ed., 2009); Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28 (2009), for an analysis of transitional justice institutions and objectives.

⁶ For example, the U.S. State Department 2011 budget for supporting transitional justice was \$55,000,000. U.S. DEP'T OF STATE, EXECUTIVE BUDGET SUMMARY: FISCAL YEAR 2012, available at <http://transition.usaid.gov/performance/cbj/156214.pdf>; *see also* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS (2004); Annie Bird, Comparing Cases of US Involvement in Transitional Justice (Aug. 2011) (presented at the 6th ECPR General Conference), available at <http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/180.pdf>.

⁷ William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

⁸ A review of recent press releases on the State Department website indicates the breadth of the department's work in this area. *See, e.g.*, Press Release, U.S. State Dep't, Governance and Rule of Law: Two Year Fast Fact on the U.S. Government's Work in

level through its leadership role in organizations such as the United Nations.⁹

However, as has been extensively scrutinized in recent years, the lackluster pursuit of accountability for the widespread abuses committed by American personnel during the so-called “War on Terror”¹⁰ illustrates a disjuncture within domestic and international discourse between the dual perceptions of the United States as a law-abiding nation and America as a law-breaking state. This article seeks to explore this disjuncture through investigating the rationales of the Department of Justice (DOJ) for limiting accountability for the widespread torture of detainees by CIA interrogators. The author acknowledges that this focus excludes other abuses, such as those committed against Iraqi and Afghani civilians by the U.S. military, which are liable for prosecution under the Uniform Code of Military Justice.¹¹ It also excludes the liability of other actors implicated in

Haiti (Dec. 28, 2011), *available at* <http://www.state.gov/s/hsc/rls/179739.htm>; Press Release, U.S. State Dep’t, Rule of Law Programs in Afghanistan (May 4, 2012), *available at* <http://www.state.gov/j/inl/rls/fs/189320.htm>; Press Release, U.S. State Dep’t, Further Collaboration on Rule of Law Development in Moldova (May 21, 2012), *available at* <http://www.state.gov/r/pa/prs/ps/2012/05/190513.htm>; Press Release, U.S. State Dep’t, Pakistan Rule of Law (Nov. 23, 2012), *available at* <http://www.state.gov/j/inl/rls/fs/177705.htm>).

⁹ See United States Legal Counselor On Justice and the Rule of Law, Remarks at a Security Council Debate on Justice and the Rule of Law (June 29, 2010), *available at* <http://geneva.usmission.gov/2010/06/30/justice-and-the-rule-of-law/>.

¹⁰ AMNESTY INT’L, USA: SEE NO EVIL 26 (2011). Amnesty International has contended that “impunity and leniency [have] been the hallmark of the USA’s response to abuses.” *Id.* at 31. To date, criminal accountability for detainee abuse within the U.S. has been characterized as “abysmal” by Human Rights Watch. HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND THE MISTREATMENT OF DETAINEES 6 (2011).

¹¹ As with the crimes of CIA interrogators, there has been impunity for crimes committed by military personnel. For example, a 2006 report authored jointly by three organizations documented “over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees . . . involv[ing] more than 600 U.S. personnel and over 460 detainees.” HUMAN RIGHTS WATCH, HUMAN RIGHTS FIRST AND THE NYU SCHOOL OF LAW, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006). Of the U.S. personnel identified, only fifty-four military personnel had been convicted, forty of whom had been imprisoned, and only ten of these sentences had been for more than one year. *Id.* at 24. The report further found that only half of the cases identified had been adequately investigated. Furthermore, the highest-ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. HUMAN RIGHTS WATCH, *supra* note 10, at 6. In addition, in the 2010 Universal Periodic Review of the United States’ human rights record by the U.N. Human Rights Council, several American and international human rights organizations made submissions denouncing the lack of accountability for prisoner abuse. See U.N. Human

prisoner abuse including contractors, government lawyers, and political officials as these groups are subject to distinct accountability requirements. It focuses on the CIA's participation in coercive interrogations because, despite the domestic and international legal prohibitions on torture, these crimes have been subject to the greatest official effort to ensure impunity for the perpetrators.

To explain why the United States has pursued only limited accountability for prisoner abuse, this article begins in Section II by providing an overview of the nature and extent of the prisoner abuse, its relationship to domestic and international prohibitions on torture, and the efforts by the Bush administration to avoid respecting these prohibitions. In Section III, the article explores the domestic law governing the federal government's use of leniency for political offenses through pardon, amnesty, legislative immunity, and prosecutorial discretion. Given the international dimensions of the prisoner abuse scandal, this section will also explore the unilateral and multilateral involvement of the United States in the decisions of foreign governments to enact amnesty laws. Section IV examines the decisions of the DOJ not to pursue prosecutions for prisoner abuse in some detail by analyzing extensive data relating to the United States' enactment of domestic amnesty laws and pardons, and its involvement in foreign amnesty negotiations. These examples of America's attitudes towards amnesty laws are used to contextualize the current debates, and explain the decisions not to prosecute in light of America's previous use of leniency for political offenses. That analysis is grouped under the following themes: amnesty, empire, and hegemony; amnesty, denial, and justificatory claimsmaking; law, politics, and pragmatism in the use of amnesties; and amnesty, mercy, and the public welfare.

In analyzing American attitudes to amnesty laws, this article will draw on two overlapping datasets. Firstly, for domestic amnesties and pardons, the author has compiled a dataset of the texts of the relevant presidential proclamations. The universe of cases includes all the domestic amnesty laws since independence. In addition to amnesties, each president typically pardons a broad cross-section of offenders,¹² and a small number of these federal pardons are included in this dataset where the motivations, recipients, and/or offenses involved

Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights*, UN Doc A/HRC/WG.6/9/USA/3/Rev.1 (Oct. 14, 2010).

¹² See, e.g., JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009).

could be considered “political.” This dataset focused only on political pardons because, as this article will explore, many of the decisions to grant pardons in these cases faced similar political risks and rewards as the decisions not to pursue prosecutions for prisoner abuse. The selection of the political pardons included in the analysis is drawn from a review of the literature. The author acknowledges, however, that other “political” pardons may have been issued but have not been identified for inclusion, either because they have not been subject to extensive academic scrutiny or due to the subjectivity that can exist when distinguishing “criminal” from “political” offenses.¹³ The amnesties and pardons contained in this dataset are listed in Appendix 1.

Secondly, for the analysis of American engagement with foreign amnesty laws, this article will draw upon the Amnesty Law Database constructed by the author. This database compiles data on amnesties in all parts of the world that have been enacted since the end of the Second World War in response to conflict, repression and political transition. At the time of writing, the Amnesty Law Database contains information on 537 amnesty laws in 129 countries that were introduced between 1945 and June 2011.¹⁴ This article will use the database to identify and analyze instances where the United States has engaged with amnesties in other countries, either by acting unilaterally or through multilateral organizations. In compiling the information on U.S. state practice, the Amnesty Law Database collates a variety of materials, including U.N. Security Council resolutions, State Department press statements, newspaper articles, and academic writings. The cases identified will only paint a partial picture, however, due to the difficulties of accessing detailed information on American involvement in negotiations, particularly for earlier amnesty laws, when many of the political agreements would have been negotiated behind closed doors.

The article will argue that although amnesties and pardons are products of and regulated by law, their use creates exceptions to the law that are motivated by a range of inter-related political concerns,

¹³ See, for example, LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL Transitions: Bridging the Peace and Justice Divide 135–44 (2008), for a discussion of the inclusion of political offenses in leniency measures.

¹⁴ See Louise Mallinder, *Amnesties’ Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 69, 79 (Leigh A. Payne & Francesca Lessa eds., 2012); MALLINDER, *supra* note 13, for further information on the Amnesty Law Database.

such as power, sovereignty, legitimacy, and national security. These concerns have been evident in America's historical engagement with amnesty laws and continue to be central to contemporary debates on accountability for prisoner abuse.

I

LAW AND TORTURE IN THE "WAR ON TERROR"

The "coercive interrogation" strategies¹⁵ developed by the Bush administration to question terror suspects in the wake of September 11, 2001, have become the source of much controversy, both within the United States and internationally.¹⁶ According to the abundant documentation that has become available, it is now established that thousands of foreign prisoners in U.S. detention were routinely subjected to a range of repressive interrogation techniques, which in some cases resulted in the deaths of prisoners.¹⁷ The techniques included waterboarding, stress positions, beatings, wall-slammings, and choking.¹⁸ In addition, prisoners were subjected to forced nudity, extended sleep deprivation and isolation, mock executions, religious and sexually degrading treatment, and threats to torture, rape, or kill detainees or their families.¹⁹ Interrogations were carried out by U.S. military personnel, Central Intelligence Agency (CIA) interrogators,

¹⁵ See ABU GHRAIB: THE POLITICS OF TORTURE (Meron Benvenisti et al. eds., 2004); MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); LAUREL E. FLETCHER & ERIC STOVER, GUANTANAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES (2008); K.J. GREENBERG & J.L. DRATEL, THE TORTURE PAPERS (2005); SEYMOUR M. HERSH, CHAIN OF COMMAND (2004); Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689 (2004), for a detailed discussion of the rationales, development, and nature of the "coercive interrogation" strategies.

¹⁶ This ongoing contestation was apparent in debates resulting from the information released by Wikileaks showing that U.S. officials were aware of prisoner abuse in Iraq and Afghanistan. See, e.g., Phil Stewart, *WikiLeaks Show U.S. Failed to Probe Iraqi Abuse Cases: Reports*, REUTERS, Oct. 22, 2010. In addition, it was visible in the debates on whether information obtained through coercive interrogation permitted the U.S. authorities to locate and assassinate Osama Bin Laden. See, e.g., Jane Mayer, *Bin Laden Dead, Torture Debate Lives On*, NEW YORKER, May 2, 2011.

¹⁷ The exact number of detainees who died because of coercive interrogation is unknown, but by 2005 a U.S. Army report noted that 108 persons had died in U.S. custody. See *Report: 108 Died in U.S. Custody*, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-244_162-680658.html.

¹⁸ CAROLYN PATTY BLUM, LISA MAGARREL & MARIEKE WIERDA, PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTER-TERRORISM OPERATIONS 3 (2009).

¹⁹ *Id.*

and private military contractors, and were sanctioned by the highest levels of government.²⁰

The severity and systematic nature of the coercive interrogation practices arguably violated America's obligations under international and domestic law. Torture is prohibited in international criminal law, international humanitarian law, and international human rights law, which compositely regulate the treatment of prisoners by the United States during its military occupation of Iraq, its conflict-related activities within other states, and even its actions outside conflict.²¹ Within international criminal law, torture has been recognized as a crime by the Convention Against Torture. Under this Convention, where a State official is accused of torture, the State party is required to investigate the facts, and if appropriate, "submit the case to its competent authorities for the purpose of prosecution" or extradite the suspect.²² Under international humanitarian law, all four Geneva Conventions relating to international armed conflicts and occupation state that "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" are "grave breaches," which require states to prosecute or extradite suspects accused of these crimes.²³ In addition, under Common Article 3 to the Geneva Conventions, relating to non-international armed conflicts, "mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment" breach the minimum standards that state parties must respect.²⁴ Finally, the main international and regional human rights conventions recognize freedom from "torture or [from] cruel, inhuman or degrading treatment or punishment" as a non-derogable human right.²⁵ For all three branches of international law, freedom from torture is an absolute right that cannot be limited or restricted in conflict or other times of "public emergency which threaten[] the life of the nation."²⁶

²⁰ In his memoir, former President George W. Bush recalled that when asked by CIA Director George Tenet to approve the waterboarding of Khalid Sheikh Mohammed, he responded "[d]amn right." GEORGE W. BUSH, *DECISION POINTS* 170 (2010).

²¹ See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006).

²² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁴ *Id.* at art. 3.

²⁵ International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

²⁶ *Id.* at art. 4.

These bodies of law can trigger different oversight mechanisms, ranging from human rights treaty monitoring institutions that hold states accountable for violating human rights conventions, to international courts or courts in third states that can pursue individual criminal responsibility for torture.

Within the American legal tradition international law is often viewed as having a subsidiary status to domestic law. However, the international prohibition on torture is reflected in domestic law. For example, the Torture Statute criminalizes torture committed by U.S. citizens overseas and creates obligations to investigate and punish those responsible, with possible sentences of life imprisonment or death.²⁷ In addition, the War Crimes Act of 1996 defines war crimes as grave breaches and violations of Common Article 3 of the Geneva Conventions, including torture where either the victim or the perpetrator is a U.S. national or member of the U.S. military forces.²⁸ It imposes similar penalties to the Torture Statute.

Historically, state sovereignty meant that executive governments in all countries had considerable discretion on whether to prosecute serious human rights violations committed within their borders. However, the growth of international law and its incorporation into American domestic law meant that, by 2002, the Bush administration became concerned that by ordering coercive interrogation techniques, it could expose its officials to serious legal penalties before domestic and international courts.²⁹ As a result, the government pursued various strategies to prevent this, beginning by trying to conceal these practices through extraordinary renditions³⁰ and the “juridical othering” of terrorist suspects.³¹ In addition, it tried to obfuscate the legal status of coercive interrogation techniques, through the now

²⁷ See 18 U.S.C.A. § 2340 (West 2012) (“torture statute”).

²⁸ *Id.* at § 2441.

²⁹ KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 191–92 (2011).

³⁰ See, for example, Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457 (2002); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2006); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585 (2005), for detailed discussion of extraordinary renditions.

³¹ See Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504 (2005). This article explores the concept of *juridical othering* as processes by which there are efforts to define “individuals or groups as juridical others to whom normal rules do not apply,” by for example using terminology such as unlawful combatant. *Id.* at 517.

infamous “torture memos.”³² These memos, which continue to provide the justification for not pursuing prosecutions in the majority of cases of prisoner abuse, were a series of initially classified documents drafted by government lawyers working within the Justice Department’s Office of Legal Counsel (OLC). The first memo, drafted in January 2002, argued that under the American constitution, the U.S. President had the authority to “suspend” the application of the Geneva Conventions to prisoners who were labeled as “enemy combatants,” rather than prisoners of war. This argument was designed to reduce the scope for prosecution not just under the Geneva Conventions, but also under the War Crimes Act of 1996.³³

A further memo dated August 1, 2002, and authored by Assistant Attorney General Jay S. Bybee, sought to undermine the applicability of the international prohibition of torture within U.S. law. It argued that U.S. obligations under the Convention Against Torture do not apply to acts committed outside U.S. territory; that torture constitutes only acts specifically intended to inflict severe pain or suffering; and that the doctrine of necessity could supersede national or international laws prohibiting torture.³⁴ Further memos and letters produced by the OLC detailed what were deemed to be acceptable forms of coercive interrogation.³⁵

The reasoning contained in the torture memos was unpersuasive for military lawyers and legal advisers in the State Department, and “[b]y 2005, a clear consensus was starting to emerge among jurists that the memos were faulty as a matter of law, and would not hold up under international legal scrutiny.”³⁶ The Bush administration responded to these concerns by seeking to ensure legislative immunity for state officials engaged in coercive interrogations through the Detainee

³² See MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS 181-200 (2010); see also DAVID P. FORSYTHE, THE POLITICS OF PRISONER ABUSE: THE UNITED STATES AND ENEMY PRISONERS AFTER 9/11, 60-94 (2011), for an analysis of the role of the government lawyers in providing legal cover for the practices of coercive interrogation. See also Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524 (2008), for a description and analysis of the memos.

³³ Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT’L L. 321, 343 (2009); see also M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2005).

³⁴ Scharf, *supra* note 33, at 344-45.

³⁵ See DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009) (interpreting the torture memos); see also David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (2009).

³⁶ SIKKINK, *supra* note 29, at 206.

Treatment Act of 2005 and the Military Treatment Act of 2006, which will be explored below. In short, following September 11, 2001, the Bush administration sought to establish a legal regime under which serious crimes were perpetrated systematically by state officials across numerous locations and against large numbers of individuals.

During his initial months in office, President Obama was sensitive to the opposition that had developed to coercive interrogation. For example, soon after his inauguration he took a number of measures to end the policy, including stopping extraordinary renditions, closing “Black Sites” where the CIA conducted clandestine interrogations, declaring null and void legal memos issued by the Bush administration, and forbidding the use of enhanced interrogation techniques.³⁷ These policies did not extend, however, to closing the Guantánamo detention center or trying terrorist suspects in civilian courts rather than military commissions.³⁸ Furthermore, the administration has consistently been reluctant to pursue investigations and prosecutions for prisoner abuse. Instead, as the next section will explore, two prosecutorial decisions were taken to prevent prosecutions for the majority of CIA interrogators. To the extent that these decisions have granted impunity for torture, they can be compared to the use of amnesties and pardons.

II

LEGAL FRAMEWORK OF AMERICA’S ENGAGEMENT WITH AMNESTIES

This section will explore America’s power to grant leniency domestically. In addition, as Section IV will supplement the consideration of domestic amnesties with data relating to American attitudes to amnesty laws enacted abroad, this section will also consider America’s ability to engage in debates on amnesty laws around the world.

A. Leniency for Political Offenses Within U.S. Domestic Law

This discussion will explore the following forms of domestic leniency for political offenses: pardon, amnesty, legislative immunity, and prosecutorial discretion. While these are clearly not the sole

³⁷ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

³⁸ See Kenneth Roth, *Empty Promises? Obama’s Hesitant Embrace of Human Rights*, 89 FOREIGN AFF. 10, 11 (2010), for a discussion of the failures of the Obama administration to substantially change the executive policies on human rights.

forms of leniency that are available to domestic politicians and legal professionals,³⁹ they have been selected here as they have all been used to grant leniency for offenders responsible for political offenses, either in America's past or as a result of prisoner abuse. This section will contrast how these forms of leniency are understood within scholarly literature and U.S. practice, and it will analyze the legal basis for their use.

1. *Presidential Pardons*

Legal scholars generally define pardons as “acts of legal leniency that remove only the consequences but not the prospect of adverse court proceedings.”⁴⁰ This means that pardons are granted to individuals *who have been convicted to release them from all or part of their sentence*. However, within the United States, pardoning powers are broader than this definition.

Following American independence from British colonial rule,⁴¹ the power to grant pardons initially resided with the states.⁴² However, at the 1787 Constitution Convention, the power to pardon federal crimes was included in the Constitution and vested in the President.⁴³ States retained the power to pardon offenses under state laws.⁴⁴ Among the main lobbyists for the creation of the federal pardon power was

³⁹ Other forms of leniency commonly used within the American criminal justice system include statutes of limitations, plea agreements, sentence reductions, and the use of immunity. *See generally* 18 U.S.C.A. §§ 213, 217, 221, 227, 229 (West Supp. 2000 & Supp. 2012).

⁴⁰ MARK FREEMAN, *NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE* 14 (2009).

⁴¹ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 585–90 (1991), for a discussion of the power to pardon under British colonial rule.

⁴² Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 204 (1999).

⁴³ *Id.* at 205.

⁴⁴ As Krug notes “[f]ifty-two jurisdictions—the federal government, each of the fifty states, and the District of Colombia—are competent to enact their own criminal laws and laws of criminal procedure, and to establish their own criminal justice systems. . . . [M]ost criminal laws are those of the states, and the vast majority of criminal cases are prosecuted by the state and local authorities.” Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 644 (2002) (footnote omitted). State pardoning powers remain significant and play a major role in the U.S. criminal justice process, but they are beyond the scope of this article. The delimitation of the pardon power between the federal and state-level governments is reviewed at length in Kobil, Kobil, *supra* note 41. See also LARRY N. GERSTON, *AMERICAN FEDERALISM: A CONCISE INTRODUCTION* (2007); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); W. W. Thornton, *Pardon and Amnesty*, 6 CRIM. L. MAG 457 (1885), for a more general discussion of the powers of the state within the U.S. federalist system.

Alexander Hamilton,⁴⁵ who argued that “in seasons of insurrection or rebellion there are often critical moments when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”⁴⁶ As will be explored below, pardons and amnesties were soon used in the way that Hamilton suggested within the United States. For other supporters of the pardon power, its inclusion was necessary to introduce an element of flexibility into an otherwise rigid criminal justice system.⁴⁷ For domestic pardons, both these rationales have become less pressing, as the federal government now faces substantially fewer challenges to its authority than in the early decades of the Union, and greater discretion has been introduced at all stages of the criminal justice process. As a result, presidential pardons for all types of federal offenses (and indeed, state pardons for violations of state law) are used far less often today.⁴⁸

Article II, Section 2 of the United States Constitution provides “[The President] shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”⁴⁹ This power has been interpreted broadly to enable the President to pardon any crime, with the exception of impeachment⁵⁰ or offenses under state laws. To obtain a pardon, individual recipients must consent to being pardoned, with admissions of guilt being viewed as consent. Although during and after the Civil War Congress sought to restrict the President’s power to pardon,⁵¹ in

⁴⁵ William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501 (1977).

⁴⁶ THE FEDERALIST NO. 74, at 339 (Alexander Hamilton) (Pa. State Univ. ed., 2001).

⁴⁷ Duker, *supra* note 45, at 502–03.

⁴⁸ See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000).

⁴⁹ U.S. CONST. art. II, § 2, cl. 1. See also *United States v. Wilson*, 32 U.S. 150 (1833), for a definition of pardons.

⁵⁰ The extent to which this exception prevents presidents pardoning themselves for criminal acts committed before or during their term of office is unclear. According to Nida and Spiro, the administrations of President Richard Nixon (for Watergate) and President George Bush Sr. (for the Iran-Contra Affair) both considered issuing self-pardons. See Nida & Spiro, *supra* note 42.

⁵¹ See JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–98 (1953); Duker, *supra* note 45, at 475, for an overview of these struggles between Congress and the President. It should also be noted that during the Civil War, Congress itself issued amnesties, and during later debates on an amnesty for Vietnam-era draft dodgers and deserters, there was some discussion of whether Congress was empowered to issue amnesty laws. See Harrop A. Freeman, *An Historical Justification and Legal Basis for Amnesty Today*, L. & SOC. ORD. 515, 529 (1971).

the 1866 *Ex Parte Garland* case, the Supreme Court found the power to be “unlimited.”⁵² It continued by interpreting its effects broadly:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.⁵³

This Supreme Court judgment underscores the fact that pardons with U.S. law differ from understandings of the notion of pardon within the international academic literature on pardons in a number of respects. In particular, in the U.S. context, *pardons can be granted before as well as after conviction*. Though the Constitution does not explicitly mention amnesty laws, the U.S. Supreme Court interpreted the pardon power to include the ability to grant amnesties, as will be discussed below.

2. Amnesties

Developing a general definition of an amnesty law is problematic as within national legal systems, the term “amnesty” may be defined differently, and different bodies may be empowered to grant amnesties.⁵⁴ Furthermore, no accepted definition has yet been developed within international law. As a result, the scope and legal effects of amnesty laws around the world can look very different. However, Mark Freeman has developed a broad and useful definition of an amnesty law as:

[A]n extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offences in a court of law.⁵⁵

This definition illustrates that amnesties are typically distinguished from pardons in that they can apply pre-conviction. However, this

⁵² *Ex Parte Garland*, 71 U.S. 333, 380 (1866).

⁵³ *Id.* at 380–81.

⁵⁴ See René Lévy, *Pardons and Amnesties as Policy Instruments in Contemporary France*, 36 CRIME & JUST. 551 (2007).

⁵⁵ FREEMAN, *supra* note 40, at 13.

distinction is not so pronounced within the United States, where pardons can be granted pre-conviction.

The U.S. Supreme Court, when interpreting amnesties as falling within the presidential pardon power, has explored the distinction between the two forms of leniency within U.S. law. For example, in 1877, Justice Field, delivering the opinion of the Supreme Court in *Knote v. United States*, wrote:

Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offense of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offense. This distinction is not, however, recognized in our law. The Constitution does not use the word ‘amnesty;’ and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.⁵⁶

Since independence, successive presidents have issued amnesty laws and pardons for American citizens who have refused to adhere to federal laws. As illustrated in Appendix 1, the dataset compiled for this research on U.S. domestic practice has identified forty-three amnesties and pardons for political offenses enacted between 1795 and 1999. However, as will be explored below, since the 1990s, national sovereignty to grant amnesty for serious human rights violations has been eroded by the growth of international human rights law and international criminal law. As a result, when seeking to protect its armed forces and intelligence personnel from prosecution, the Bush administration turned to other mechanisms to deliver immunity.

3. Legislative Immunity and “Pseudo” Amnesties

As amnesty laws are generally intended to achieve political objectives such as encouraging rebels to surrender and abide by national laws, the stated goal of granting amnesty is often clearly expressed in the legislation. However, where states seek to grant immunity for human rights violations or for crimes committed by the state itself, often such states try to avoid criticism by concealing that they are in fact granting an amnesty. Such measures can be characterized as “pseudo amnesties,” which Freeman defines as “legal measures that have the same juridical effect as amnesties but are

⁵⁶ *Knote v. United States*, 95 U.S. 149, 152–53 (1877).

drafted in a disguised form and given titles that explicitly omit the word *amnesty*.”⁵⁷ Arguably, such “pseudo” amnesties have been used within the United States to grant legislative immunity to U.S. personnel implicated in prisoner abuse through the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006.

The Detainee Treatment Act of 2005 was initiated by John McCain and other members of Congress responding to allegations of prisoner abuse. The Act was originally designed to prohibit and prevent such abuse. However, it was bitterly resisted by the Bush administration, which eventually had language inserted into the legislation that granted immunity to U.S. personnel engaged in interrogations.⁵⁸ Section 1004(a) of the Act states “[i]n any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government” who engaged in the interrogation of terror detainees and who

*were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.*⁵⁹

The inclusion of this section was intended to “circumvent” the prohibitions on the mistreatment of detainees in sections 1002 and 1003 of the Act.⁶⁰ It implicitly provides that where U.S. personnel acted within the parameters outlined in the torture memos, they would be deemed to be unaware that their actions were unlawful, even though the memos had deliberately sought to reinterpret the law to limit prosecutions.⁶¹

In 2006, the U.S. Supreme Court found in *Hamdan v. Rumsfeld* that the military commissions that had been established to try “enemy combatants” violated the U.S. Uniform Code of Military Justice and

⁵⁷ FREEMAN, *supra* note 40, at 13 (emphasis in original).

⁵⁸ Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 257–58 (2006).

⁵⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 101–104, 119 Stat. 2680 (2005) (emphasis added).

⁶⁰ Suleman, *supra* note 58, at 264.

⁶¹ SIKKINK, *supra* note 29, at 207.

the Geneva Conventions of 1949.⁶² Although this case did not relate to the policy of coercive interrogations, the decision nonetheless prompted the Bush administration to enact the Military Commissions Act of 2006.⁶³ Section 5 provided that:

No person may invoke the Geneva Conventions or any protocols thereto in any *habeas corpus* or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.⁶⁴

This provision has been criticized as creating further impunity for prisoner abuse by blocking detainees' access to U.S. courts.⁶⁵ In addition, Section 6 of this act revised the War Crimes Act of 1996 to amend the definition of war crimes with retroactive effect. These changes narrowed the definition of "cruel and inhuman treatment" and eliminated the crime of "outrages upon personal dignity, particularly humiliating and degrading treatment."⁶⁶ Matheson contends that as U.S. military personnel remained liable under the Uniform Code of Military Justice, these changes primarily benefited civilian officials and CIA personnel.⁶⁷ The changes have been described as providing "amnesty to any violation of Common Article

⁶² Hamdan v. Rumsfeld, 548 U.S. 557, 624–25 (2006); see generally JONATHAN MAHLER, THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER (2008); Regina Fitzpatrick, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, 20 HARV. HUM. RTS. J. 339 (2007); Mathew Happold, *Hamdan v. Rumsfeld and the Law of War*, 7 HUM. RTS. L. REV. 418 (2007); Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601 (2007).

⁶³ See Julia Y. Capozzi, Note, *Hamdan v Rumsfeld: A Short Lived Decision?* 28 WHITTIER L. REV. 1303 (2006); Jill K. Lamson, Comment, *Hamdan v Rumsfeld and the Government's Response: The Military Commissions Act of 2006 and its Implications on the Separation of Powers*, 39 U. TOL. L. REV. 497 (2008).

⁶⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600 (2006) (emphasis added). This provision was not amended by the Military Commissions Act of 2009.

⁶⁵ See, e.g., Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10, 18 (2007).

⁶⁶ See Military Commissions Act of 2006 § 6. This did not, however, change liability for murder and torture. See HUMAN RIGHTS WATCH, *supra* note 10, at 49.

⁶⁷ Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AMER. J. INT'L L. 48, 52 (2007).

3 . . . that does not rise to the level of MCA-specified ‘grave breaches.’”⁶⁸

The provisions of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 cannot be considered—strictly speaking—amnesty laws, but their effects are similar to those of an amnesty, as they are designed to shield individuals from prosecution for crimes they have committed. Their provisions decriminalized several forms of abusive treatment and created an assumption that officials implicated in acts of torture were doing so on the understanding that their actions were lawful. This assumption has been adopted by the Department of Justice in justifying its first decision not to prosecute.

4. *Decisions Not to Prosecute and “De Facto” Amnesties*

Decisions not to prosecute can be taken at many points within a criminal justice system. As discussed above, the United States, like other countries, empowers both the executive and the legislature to enact measures to restrict prosecutions. Beyond these formal acts of clemency, immunity can arise from actors within the criminal justice system, such as prosecutors, deciding to refrain from exercising jurisdiction. Even in cases where prosecution would be clearly justified, most legal systems allow for selectivity in the identification of persons against whom the law will be enforced and in the charges to be brought. As Cryer notes, “[s]elective enforcement of the law is not inherently wrong,” particularly since no criminal justice system has the capacity to prosecute all offenses.⁶⁹ Therefore, “the question is not whether selective prosecution should occur . . . but when selective enforcement is unacceptable.”⁷⁰

Today it is widely recognized that American prosecutors have substantial discretion,⁷¹ which may be exercised for a wide range of reasons. Sarat and Clarke distinguish between decisions made by prosecutors on “predictions about success” based on the availability of sufficient evidence and witnesses, and decisions concerning the

⁶⁸ Arsalan M. Suleman, *Military Commissions Act of 2006*, 20 HARV. HUM. RTS. J. 325, 335 (2007); cf. Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73, 92 (2007).

⁶⁹ Robert Cryer, *Selectivity in International Criminal Law*, in BUILDING PEACE IN POST-CONFLICT SITUATIONS 153, 153 (Faria Medjoubia ed., 2012).

⁷⁰ *Id.* at 154.

⁷¹ Austin Sarat and Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 389 (2008).

“desirability and appropriateness” of prosecution.⁷² They argue that the second type of decision can be influenced by a wide range of exceptional factors, which do not necessarily “derive from legal norms,” nor correspond to the viability of the prosecution.⁷³ Indeed, as Sarat and Clarke note, “[l]ike executive power in times of emergency or clemency, these decisions bring us to law’s limit.”⁷⁴

Prosecutorial discretion within the United States is thus “broad” and “generally unregulated” by the courts.⁷⁵ However, the Department of Justice has developed the *Principles of Federal Prosecution* to guide federal prosecutors towards objective decision-making when exercising discretion. The principles recognize that prosecutors can exercise discretion at all stages of criminal prosecution; however, this section will focus on decisions to decline prosecutions that would otherwise be viable.⁷⁶ The principles permit federal prosecutors to decline “because no *substantial Federal interest* would be served by prosecution,” and they identify several grounds to justify such decisions.⁷⁷ For example, prosecutors are encouraged to consider “the actual or potential impact of the offense on the community,” which can include economic harms; physical danger to citizens or public property; or the “erosion of the inhabitants’ peace of mind and sense of security.”⁷⁸ In addition, prosecutors may consider “what the public attitude is toward prosecution under the circumstances of the case,” but that “public interest . . . should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds.”⁷⁹ As will be explored below, both public opinion and the impact of coercive interrogation on public security have featured prominently within debates on the desirability of pursuing accountability for prisoner abuse.

⁷² *Id.* at 391.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Krug, *supra* note 44, at 643; see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007).

⁷⁶ The *Principles of Federal Prosecution* note the following moments in which prosecutors can exercise discretion: initiating and declining prosecution, selecting charges, entering into plea agreements, opposing offers to plead *nolo contendere*, entering into non-prosecution agreements in return for cooperation, and participating in sentencing. U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.000, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm.

⁷⁷ *Id.* at § 9-27.230 (emphasis added).

⁷⁸ *Id.*

⁷⁹ *Id.*

The principles also encourage federal prosecutors to consider the economic, physical, and psychological impact of the offense on the victim. The crime of torture is widely recognized as creating profound and long-lasting harms for victims,⁸⁰ which under these principles would seem to indicate that federal prosecutors should, where the evidence permits, err in favor of prosecution. The principles also note that where the accused “occupied a position of trust or responsibility which he/she violated in committing the offense, [this] might weigh in favor of prosecution.”⁸¹ Therefore, for official personnel committing acts of torture, this provision also seems to guide federal prosecutors towards pursuing prosecutions.

When federal prosecutors decline prosecution, the principles state that the prosecutor should “ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.”⁸² However, there is no obligation that the reasons for the decision be communicated to victims or the public.⁸³ The principles are non-binding and do not “require a particular prosecutorial decision in any given case.”⁸⁴ Adherence to the standards can only be enforced internally within the DOJ, and Podgor has found perhaps unsurprisingly that prosecutors “do not always adhere to these guidelines.”⁸⁵ The absence of public reasons for the decisions arguably results in a lack of transparency and accountability. The obvious danger is that prosecutors may appear to decline prosecution for arbitrary or self-serving reasons, such as shielding perpetrators of serious crimes from public scrutiny, or succumbing to political

⁸⁰ See, e.g., MANU ACTIS ET AL., *THAT INFERNO: CONVERSATIONS OF FIVE WOMEN SURVIVORS OF AN ARGENTINE TORTURE CAMP* (2006); *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004); Gabriela Fried, *Piecing Memories Together After State Terror and Policies of Oblivion in Uruguay: The Female Political Prisoner’s Testimonial Project (1997–2004)*, 12 *SOC. IDENTITIES* 543 (2006); Derrick Silove, *The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework*, 187 *J. NERVOUS & MENTAL DISEASE* 200 (1999).

⁸¹ United States Attorneys’ Manual, *supra* note 76, at § 9-27.230.

⁸² *Id.* at § 9-27.270.

⁸³ See Sarat & Clarke, *supra* note 71, at 392. See also MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* 82 (2009), for a discussion of the need for prosecutions to justify their decisions not to pursue prosecutions in cases where there is a *prima facie* case.

⁸⁴ U.S. Attorneys’ Manual, *supra* note 76, at § 9-27.120. Podgor describes the principles as “policy statements and not legislative rules.” Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 *CORNELL J.L. & PUB. POL’Y* 167, 169 (2004).

⁸⁵ Podgor, *supra* note 84, at 169.

pressure. It can also be problematic where there is a “conflict of interest” resulting in DOJ lawyers investigating crimes that were sanctioned by the Department, as was the case with the torture memos.⁸⁶

The absence of prosecution where it results from an active decision not to prosecute made for arbitrary reasons can be interpreted as a “de facto” amnesty, where it creates “a situation in which there is impunity in practice, notwithstanding the absence of a legally-enacted amnesty law.”⁸⁷ Impunity has been defined in the U.N.’s Principles to Combat Impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings.”⁸⁸ As the decisions taken by the DOJ in 2009 and 2011 not to prosecute CIA personnel for prisoner abuse where taken in the absence of any alternative forms of accountability,⁸⁹ they appear to fall within this definition of impunity, and hence could be considered “de facto” amnesties.

Although President Obama signed an Executive Order repudiating the legal advice in the torture memos,⁹⁰ in its first decision not to prosecute, the DOJ relied on them to justify its decision. On April 16, 2009, the DOJ announced that “intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.”⁹¹ The DOJ further stated that it had informed the CIA that the government would provide free legal

⁸⁶ David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (Oct. 8, 2009), available at <http://www.nybooks.com/articles/archives/2009/oct/08/the-torture-memos-the-case-against-the-lawyers/?pagination=false>.

⁸⁷ FREEMAN, *supra* note 40, at 17.

⁸⁸ Comm. on Human Rights, Econ. and Soc. Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* 6 (2005).

⁸⁹ There have been some attempts by victims of prisoner abuse to sue U.S. state officials for torture. However, U.S. federal courts held that torture fell within the “scope of employment” of federal officials and is hence subject to the absolute immunity doctrine. *See, e.g.*, *Rasul v Bush*, 542 U.S. 466 (2004); *see also* Elizabeth A. Wilson, *Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL’Y 175, 198–99 (2008).

⁹⁰ Exec. Order No. 13,491, *supra* note 37.

⁹¹ Press Release, Dep’t of Justice, Department of Justice Releases Four Office of Legal Counsel Opinions (Apr. 16, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-ag-356.html>.

representation to all employees accused of prisoner abuse in domestic, international or foreign courts, or congressional investigations, and would indemnify employees for any financial penalties they incurred.⁹² In justifying such strong support for intelligence personnel who had acted within the parameters of the torture memos, the Attorney General proclaimed that “[i]t would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.”⁹³ This decision left open the possibility for prosecution for those interrogators who exceeded the guidance in the memos.

The exception from liability based on the torture memos was challenged on July 29, 2009, when the DOJ’s Office of Professional Responsibility (OPR) released a report describing the memos as containing “seriously flawed arguments” and not constituting “thorough, objective or candid legal advice.”⁹⁴ On this basis, the OPR report recommended that the DOJ “review certain declinations of prosecution regarding incidents of detainee abuse.”⁹⁵ This suggests that even where CIA personnel acted according to the torture memos, there may be grounds to reopen investigations against them. The Attorney General responded by announcing in August 2009 that he was appointing a special prosecutor to conduct “a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”⁹⁶ In his statement, despite the OPR’s recommendations, he reiterated that the review would not focus on those who had acted under the advice in the OLC memos, but would instead only focus on those who had exceeded it.

Based on the two-year “preliminary review,” which investigated the treatment by CIA interrogators of 101 prisoners, on June 30, 2011, the Attorney General announced full criminal investigations were warranted in only two cases relating to deaths in custody.⁹⁷ The

⁹² *Id.*

⁹³ *Id.*

⁹⁴ DEP’T OF JUSTICE, OFFICE OF PROF. RESP., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 226 (2009).

⁹⁵ *Id.* at 261.

⁹⁶ Press Release, Dep’t of Justice, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>.

⁹⁷ Press Release, Dep’t of Justice, Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees (June 30, 2011), available at

announcement did not provide any details on the nearly 100 cases where the investigations had been dropped and it was not clear whether they related to any deaths in detention.⁹⁸

Given the severity of these abuses and the official status of those alleged to be responsible, the DOJ's decisions not to prosecute seem to deviate from its *Principles of Federal Prosecution* and have been characterized as granting impunity to those responsible for ordering, perpetrating and providing legal validation for prisoner abuse.⁹⁹ As such, they can be viewed as "de facto" amnesty for crimes committed by U.S. personnel against non-nationals. As the following section will explore, the United States has also at times been willing to support foreign amnesties for crimes committed by non-U.S. nationals.

B. America, International Law, and Foreign Amnesties

As noted above, unlike many exercises of leniency within the United States, the abuse of prisoners by CIA personnel is not purely a matter of domestic law. Torture is criminalized by international law that is binding on the United States, the victims were foreign nationals, and most of the crimes were committed outside American territory. This means that international legal requirements on amnesty and the duty to prosecute serious crimes are applicable to debates on the extent to which prosecutions have been pursued for prisoner abuse. Therefore, to evaluate America's attitude towards amnesty laws, it is necessary to examine not only domestic practice, but also the United States' international engagement with amnesties.

Until recent decades, amnesty laws were primarily viewed as exercises of state sovereignty that were largely unrestrained by international law, but international actors regularly became involved

<http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>. In his statement, the Attorney General did not identify the two cases that will be investigated, but it has been reported that one case concerns Gul Rahman, who froze to death in 2002 after being stripped and shackled to a cold cement floor in a secret American prison in Afghanistan known as the Salt Pit. See Marjorie Cohn, *Avoiding Impunity: The Need to Broaden Torture Prosecutions*, JURIST (July 8, 2011), available at <http://jurist.org/forum/2011/07/marjorie-cohn-torture-investigation.php>. The other case is reported to concern Manadel al-Jamadi, who died in 2003 at Abu Ghraib prison in Iraq. He was suspended from the ceiling by his wrists, which were bound behind his back. See *id.* On June 16, 2011, the U.S. Department of Justice opened a grand jury investigation in the death of Manadel al-Jamadi. *U.S. Opens Grand Jury on CIA Detainee's Death*, RADIO NETH. WORLDWIDE (June 16, 2011).

⁹⁸ Eric Lichtblau & Eric Schmitt, *U.S. Widens Inquiries Into 2 Jail Deaths*, N.Y. TIMES, July 1, 2011, at A1.

⁹⁹ Cohn, *supra* note 97.

in mediating and implementing foreign amnesties. Since the late 1990s, three distinct legal regimes—international humanitarian law, international human rights law, and international criminal law—have arguably evolved to impose some restrictions on the ability of states to grant amnesties for crimes under international law.¹⁰⁰ At present, none of these regimes explicitly prohibits amnesties. The restrictions must therefore “be ‘read into’ a unified narrative of what the differentiated regimes collectively require.”¹⁰¹ For crimes against humanity and war crimes committed in non-international armed conflicts, such interpretations are reliant on customary international law.¹⁰²

Under the *Charming Betsy* doctrine, U.S. courts are required, wherever possible, to construe national statutes to “be consistent with international law so as to avoid interpretations that will give rise to international discord.”¹⁰³ The absence of international restrictions on national amnesty laws until the late 1990s meant that previously, U.S. enactment of amnesties or legislated support for foreign amnesties rarely risked conflicting with its international obligations. However, under the *Charming Betsy* doctrine, the evolutions in the duty to prosecute require U.S. courts to impose greater scrutiny on national legalization that conflicts with this duty.

As has been extensively explored in academic literature, America’s relationship to international law, and particularly to international

¹⁰⁰ CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE *LEX PACIFICATORIA* 243 (2008); see also FREEMAN, *supra* note 40; OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, RULE-OF-LAW-TOOLS FOR POST-CONFLICT STATES: AMNESTIES, HR/PUB/09/1 (2009); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283 (2007); Louise Mallinder, *Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?*, in BUILDING PEACE IN POST-CONFLICT STATES 9 (Faria Medjouba ed., 2012).

¹⁰¹ BELL, *supra* note 100, at 249.

¹⁰² Article 38 of the International Court of Justice (ICJ) Statute requires that determinations of whether such a duty to prosecute exists under customary international law must be based on state practice and *opinio juris*. The ICJ Statute also provides that judicial decisions and academic research can be ‘subsidiary’ sources of international custom. At present, some subsidiary sources strongly support the existence of the duty to prosecute crimes against humanity and serious violations committed in non-international armed conflicts. However, State practice appears much less supportive of such a duty. See Mallinder, *supra* note 100, for a more detailed discussion of the status of amnesty laws under customary international law.

¹⁰³ Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1352 (2006). In its judgment, the Supreme Court held “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

treaties, is often described as “exceptionalist.”¹⁰⁴ For example, Ignatieff has identified the American habit of “support[ing] multilateral agreements and regimes, but only if they permit exemptions for American citizens or U.S. practices.”¹⁰⁵ This has been evident in U.S. engagement with international legal regimes, such as the International Criminal Court, that could result in foreign prosecutions of U.S. nationals.¹⁰⁶ This exceptionalism suggests that American attitudes to crimes committed by foreign nationals against foreign victims will not translate neatly onto the attitudes that may motivate domestic legal and policy decisions on leniency for crimes committed by U.S. personnel. Nonetheless, where the United States has called for, endorsed, or assisted in the implementation of foreign amnesties, it does reveal that although America may support accountability and rule of law programs around the world, in certain contexts and for certain crimes, it feels that amnesty may be necessary and permissible. Consequently, this section will consider unilateral pressure applied by the United States on other states in relation to amnesties, and its engagement in amnesty negotiations through participation in multilateral institutions.

1. Unilateral Involvement in Foreign Amnesties

As the author has explored elsewhere,¹⁰⁷ within conflicted or transitional states, domestic debates on whether to enact amnesty laws are often subject to international scrutiny and involvement. This involvement can come through international actors proposing that an amnesty be introduced; mediating peace negotiations that result in an

¹⁰⁴ Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 389, 433 (2009); see also Jamie Mayerfeld, *Playing by our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347 (2000), for a discussion of U.S. ratifications of human rights treaties.

¹⁰⁵ AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 4, at 4.

¹⁰⁶ See, e.g., Giovanni Conso, *The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 J. INT’L CRIM. JUST. 314 (2005); M.E. Lantto, *The United States and the International Criminal Court: A Permanent Divide*, 31 SUFFOLK TRANSNAT’L L. REV. 619 (2007); Gerhard Hafner, *An Attempt to Explain the Position of the USA Towards the ICC*, 3 J. INT’L CRIM. JUST. 323 (2005); Schabas, *supra* note 7; Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93 (1999).

¹⁰⁷ MALLINDER, *supra* note 13, at 323–59.

amnesty;¹⁰⁸ providing technical assistance during the drafting of amnesty legislation; or granting financial, logistical, or technical support to the amnesty's implementation.¹⁰⁹ At each of these stages, international support or opposition to an amnesty can be expressed through diplomatic, economic, legal, and military means. For individual states, involvement in foreign amnesties is often inconsistent with the result that the same state may endorse an amnesty in one country, while criticizing or failing to respond to a similar amnesty in another state. Furthermore, even within a state, different parts of the government may take divergent approaches. For example, during the later years of the Cold War, the U.S. Congress tried to condition aid to South American countries on their protection of human rights, whilst the U.S. armed forces and the CIA trained and supported amnesties for groups involved in perpetrating human rights violations in the region.¹¹⁰

Within the Amnesty Law Database, data has been collated on American unilateral involvement in twenty-nine amnesty laws enacted between 1977 and 2011. These amnesty laws ranged from amnesties for serious human rights violations to amnesties for political dissidents. This involvement has been categorized into diplomatic, economic, legal and military actions, and one amnesty process may have triggered multiple forms of involvement. As noted in the introduction, the author does not suggest that this data is comprehensive; but nonetheless, as summarized in Table 1, it does indicate some trends in U.S. involvement.

¹⁰⁸ See Jacob Bercovitch & Gerald Schneider, *Who Mediates? The Political Economy of International Conflict Management*, 37 J. PEACE RES. 145 (2000); SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1965), for discussions of America's role as a mediator.

¹⁰⁹ For example, in January 2012, the U.S. State Department urged that an amnesty be granted to the former Yemeni President Ali Abdullah Saleh. Although the amnesty was condemned by the U.N., the U.S. State Department spokesperson stated: "This is part and parcel of giving these guys confidence that their era is over and it's time for Yemen to be able to move forward towards a democratic future." *United States Defends Immunity Law for Yemeni President Saleh*, GUARDIAN (London), Jan. 10, 2012, available at <http://www.guardian.co.uk/world/2012/jan/10/us-backs-yemen-immunity-for-saleh>. This amnesty was approved by the Yemeni Parliament on January 21, 2012, and President Saleh arrived in the United States on January 26, 2012, a few weeks before he was due to formally step down. See Tim Fitzsimons, *Amnesty Plan for Yemen President Ali Abdullah Saleh Supported by US*, GLOBAL POST (Washington), Jan. 10, 2012; Sebastian Smith, *Yemen's President Saleh Arrives in US for Treatment*, AGENCE FRANCE PRESSE, Jan. 29, 2012.

¹¹⁰ CHANDRA LEKHA SRIRAM, *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION* 26 (2004).

Table 1. American Unilateral Involvement in Foreign Amnesties

	For	Against
Diplomatic	18	5
Economic	4	2
Legal	3	1
Military	6	0
Total	31	8

As will be explored in Part IV, U.S. unilateral action has at times focused on encouraging the negotiating parties to enact broad, unconditional amnesties that encompass the most serious human rights violations, which Trumbull has interpreted as suggesting a belief among U.S. government officials that amnesties do not violate customary international law.¹¹¹ In contrast, in other contexts, the United States has pressured the negotiators to exclude the most serious crimes from amnesty laws¹¹² and to pursue prosecutions for human rights violations.¹¹³ Overall, however, Table 1 indicates that where the United States has become actively involved in foreign amnesty processes, through exercising diplomatic, legal, financial, or military pressure, it has been considerably more likely to encourage or coerce states to enact amnesty laws than to withhold them. The global military and economic dominance of the United States makes it difficult for weak, conflicted, or transitional states to resist such pressure.¹¹⁴ American involvement in the amnesty decisions of other states can have significant consequences, not just for the states in question, but also for the development of international law as state practice can shape the emergence of customary international law in relation to amnesties for violations of international offenses.

¹¹¹ Trumbull, *supra* note 100, at 297. Trumbull makes this argument in relation to all third-party negotiation, rather than just U.S. diplomatic interventions.

¹¹² For example, in 1996 international mediators in Guatemala, including the United States, lobbied against the enactment of a blanket amnesty law, see Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 202 (1996).

¹¹³ For example, Cassel highlights that acting “under Congressional pressure, the U.S. has at times used aid leverage to insist on prosecution of particular human rights cases in such countries as Chile, El Salvador, and Guatemala.” *Id.* at 207.

¹¹⁴ See, e.g., *infra* text accompanying n.151 (discussing the Haitian amnesty process).

2. *Multilateral Involvement in Foreign Amnesties*

The United States can also influence foreign amnesty decisions through its participation in multilateral institutions, notably as a permanent member of the U.N. Security Council (UNSC).¹¹⁵ The Security Council is the world's "central site of law-making and law-enforcement in matters related to peace and security," and through participation in it, its permanent members, including the United States, can "control it much more easily than the typical processes of international lawmaking and [-]enforcement."¹¹⁶ This can enable the United States and the other permanent members "to make law merely for others, without being bound themselves."¹¹⁷

From the creation of the United Nations to the end of the Cold War, the Security Council was deadlocked between the two superpowers.¹¹⁸ This caused inaction, which combined with a tendency among states and international actors to view amnesty laws as matters of state sovereignty.¹¹⁹ As a result, for the first few decades of its existence, the UNSC did not routinely engage in amnesty debates within conflicted or transitional states. Following the fall of the Berlin Wall in 1989, the Security Council became more active in responding to serious human rights violations. This was particularly evident in the creation of the ad hoc tribunals for the Former Yugoslavia and Rwanda,¹²⁰ and the increased willingness to authorize peacekeeping troops to intervene in situations of mass violence.¹²¹ These developments were mostly "actively furthered by U.S. governments interested in the added legitimacy that Council actions and authorizations confer."¹²² Concurrently to these developments,

¹¹⁵ Cassel, *supra* note 112, at 206–07.

¹¹⁶ Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 398 (2005).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., JOHN PRADOS, *KEEPERS OF THE KEYS: A HISTORY OF THE NATIONAL SECURITY COUNCIL FROM TRUMAN TO BUSH* (1991); *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* (David M. Malone ed., 2004).

¹¹⁹ See Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOBAL POL. 1 (2008).

¹²⁰ See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹²¹ See, e.g., ROBERT M. CASSIDY, *PEACEKEEPING IN THE ABYSS: BRITISH AND AMERICAN PEACEKEEPING DOCTRINE AND PRACTICE AFTER THE COLD WAR* (2004); RICHARD N. HAASS, *THE RELUCTANT SHERIFF: THE UNITED STATES AFTER THE COLD WAR* (1997); Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245 (1996).

¹²² Krisch, *supra* note 116, at 398.

the UNSC also began to involve itself more directly in the amnesty decisions of nation states.

The Amnesty Law Database has collated data on UNSC resolutions and statements on its involvement in eleven amnesty laws enacted between 1996 and 2009.¹²³ As with the United States' unilateral involvement, the UNSC's involvement has been categorized into diplomatic, economic, legal, and military actions, and one amnesty process may have triggered multiple forms of involvement. For each of these actions to have been taken, the United States had to refrain from exercising its veto, from which it can be inferred that the U.S. either supported the action or acquiesced to it. Again, the data collected is not a comprehensive sample of UNSC decisions on amnesty, but the results are shown in Table 2:

Table 2. United Nations Security Council involvement in amnesty laws

	For	Against
Diplomatic	6	2
Economic	0	0
Legal	0	4
Military	3	0
Total	9	6

This table illustrates that the UNSC has been more likely to endorse amnesty laws than to object to them. However, on four occasions the UNSC objected to amnesty on legal grounds. These objections relate to amnesties in Croatia in 1996, Sierra Leone and the Democratic Republic of Congo in 1999, and Darfur in Sudan in 2006. These instances indicate that the UNSC members were willing to state that amnesty laws for genocide, war crimes and crimes against humanity violated international law. However, as discussed below, the United States' unilateral approach contradicted the position of the UNSC regarding the 1999 amnesty in Sierra Leone. This conflicting embrace by America of both accountability and amnesty will be

¹²³ This does not include U.N. Security Council resolutions that referred to amnesty laws in general, but rather specific laws that were proposed or enacted in a particular country. See, e.g., S.C. Res. 1325, ¶ 11, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (“[E]mphasiz[ing] the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.”).

explored in section IV in relation to domestic amnesties and support for foreign amnesties.

III

INSTRUMENTALIZING AMNESTY: AMERICA'S USE OF CLEMENCY PAST AND PRESENT

The above sections have demonstrated that within the domestic legal system of the United States there are several mechanisms by which different organs of the state grant leniency to offenders. Furthermore, the United States has at times been willing to endorse foreign amnesty laws, even for crimes under international law. This acceptance of leniency conflicts with the leadership role America has played in the development of international justice. However, it does demonstrate a continuity of approach with the limitations placed on accountability for prisoner abuse. This section will examine this continuity by exploring the motivations for American enactment of or support for amnesties, which will be used to contextualize and explain the legal and political rationales used to justify limiting the pursuit of justice for torture.

Part V will draw upon the pardons and amnesties included in two datasets relating to the United States' engagement with amnesty laws. These historic examples will be analyzed in relation to four broad, overlapping themes that are drawn deductively from scholarly literature on presidential pardons and international law, together with the texts of the pardons and amnesties. These are amnesty, empire, and hegemony; amnesty, denial, and justificatory claims-making; law, politics, and pragmatism in the use of amnesties; and amnesty, mercy, and the public welfare. The themes are not to be viewed as precise categories, but rather as Weberian "ideal" types or heuristic models, and aspects of individual amnesty or pardon processes may relate to multiple themes. The relevance of each theme to the contemporary efforts to limit accountability will also be explored.

A. Amnesty, Empire, and Hegemonic Power

The concept of empire has its roots in the ancient Roman idea of *imperium*, which can be translated as the power to command. Within different aspects of Roman law, *imperium* referred to statutes, the legal authority of public officials, and to the territory over which the Roman Empire exercised power.¹²⁴ Thus, Roman *imperium* entailed

¹²⁴ ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 493-4 (1953).

the *direct* exercise of power by a state over its subjects. With the onset of the Industrial Revolution, European nations hungry for both raw materials and markets developed a form of imperialism that was based on the overwhelming military, economic, and political power of the colonial state over the peoples it subjugated. This power was often justified by a belief in the racial, intellectual, and religious superiority of the colonizing nations.¹²⁵ Empire during the colonial period shared with the Roman Empire an understanding of imperialism as supreme political power exercised by the metropolis over defined territories within its control.

The granting of amnesties has long been closely associated with the exercise of power and sovereignty.¹²⁶ For example, in 1922 Carl Schmitt developed his now famous definition of the sovereign as “he who decides on the exception” to the law.¹²⁷ Similarly, Strange has argued that “officially sanctioned mercy, like severity, ultimately expresses the politics of rule.”¹²⁸ Within these approaches, there is an assumption that by granting amnesty, the sovereign is expressing power that he or she already holds. However, of course, amnesties may be granted at moments when the sovereign has been weakened and wishes to reassert his or her power. As will be explored below, the use of amnesties to assert power and ensure compliance with laws imposed by the state were featured in the building of the American “empire” from independence until the end of the World War I.

World War I marked the apex of direct territorial forms of empire, and in the following decades, historic empires were dismantled and most colonial peoples gradually gained their independence. Although territorial control has remained central to understandings of

¹²⁵ There are diverse theories of this era of imperialism. For example, Marxist traditions emphasize economic dominance. *See, e.g.*, VLADIMIR ILYICH LENIN, *IMPERIALISM THE HIGHEST STAGE OF CAPITALISM* (1939); J.A. HOBSON, *IMPERIALISM: A STUDY* (1967). Other scholars have placed more emphasis on cultural aspects of colonialism. *See, e.g.*, EDWARD W. SAID, *ORIENTALISM* (1978). For a compelling history of this period of Empire, see also E.J. HOBBSAWM, *THE AGE OF EMPIRE, 1875–1914* (1987).

¹²⁶ The relationship of mercy to power has been explored more fully in KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Kieran McEvoy & Louise Mallinder, *Amnesties, Transitional Justice and Governing through Mercy*, in *THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY* (Jonathan Simon & Richard Sparks eds., 2012).

¹²⁷ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985).

¹²⁸ Carolyn Strange, *Introduction* to *QUALITIES OF MERCY: JUSTICE, PUNISHMENT AND DISCRETION* 3, 5 (Carolyn Strange ed., 1996).

imperialism,¹²⁹ in the latter half of the twentieth century the concept evolved to recognize the diverse ways powerful states can exert dominance *indirectly* over the politics and economies of other countries. These indirect methods can entail powerful states forcing less powerful nations to bend to their will through granting or withholding military, financial, or political support. Alternatively, where the powerful states are hegemonic, they may exert “consensual dominance,” whereby weaker states adopt the ideological positions of the powerful.¹³⁰ As will be explored below, following World War II, America attained the status of a hegemonic state, and has used this status to influence or directly impose amnesties in other parts of the world in order to enhance its own power.

1. Amnesty and the Building of the American “Empire”

The United States has long been reluctant to acknowledge its potential or actual role as an empire. As a nation that was forged in a struggle for independence against the tyrannies of the British Empire, the United States seeks to portray itself rather as “the friend of freedom everywhere.”¹³¹ Indeed, unlike the empires of Rome, the Ottomans, the Hapsburgs, Napoleon, or the British, America does not seek to establish expansive colonies across the world.¹³² Nonetheless, the issue of “empire” arose early in America’s history. For example, George Washington, whilst leader of the Continental Army following its victory in the American Revolutionary War, referred to the “foundation of our Empire” in his *Circular to the States*, on June 8, 1783.¹³³ At this stage, the term “empire” was used to denote Americans’ mission of settling the landmass of the continent, rather

¹²⁹ Mona Domosh, *Selling Civilization: Toward a Cultural Analysis of America’s Economic Empire in the Late Nineteenth and Early Twentieth Centuries*, 29 *TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS* 453, 455 (2004). Indeed, in the post-World War II era, new territorial empires emerged, for example, the Soviet Union.

¹³⁰ See Christine Bell et al., *The Battle for Transitional Justice: Hegemony, Iraq, and International Law*, in *JUDGES, TRANSITIONS, AND HUMAN RIGHTS* 147, 153 (John Morison et al. eds., 2007) (discussing Gramsci’s theory of hegemony).

¹³¹ Michael Ignatieff, *The American Empire (Get Used to It)*, *N.Y. TIMES*, Jan. 5, 2003.

¹³² It does, however, retain control over the following islands: Puerto Rico, U.S. Virgin Islands, American Samoa, Guam, Northern Mariana Islands, and several other outlying islands. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (1997). Furthermore, it exercises administrative control over dependent territories, including Guantánamo Bay in Cuba. See Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16–23, 1903, T.S. No. 418.

¹³³ GEORGE WASHINGTON, *CIRCULAR TO THE STATES* (1783), reprinted in *THE FOUNDERS CONSTITUTION* 218, 219 (Philip B. Kurland & Ralph Lerner eds., 1987).

than overseas expansion. From this period until the Civil War, U.S. territory gradually expanded through a series of treaties with the British, Spanish, and French who had all exercised control over parts of the North American continent. By 1861, the United States already claimed control over most of the landmass of present-day America.¹³⁴

During this expansionist period, the federal government sought to employ amnesty laws to entrench its power against those who challenged it and to encourage insurgents to adhere to national laws. For example, in 1795 President George Washington proclaimed a “full, free and entire pardon . . . of all treasons, misprisions of treason, and other indictable offenses against the United States” for the participants in the Whiskey Rebellion.¹³⁵ During this rebellion, farmers in the western counties of Pennsylvania rioted against the imposition of an excise tax on whiskey. This violence was viewed as a direct threat to the government’s authority, causing President Washington to respond by “[r]aising an army larger than the troops he commanded during most of the war with England and leading them himself into Pennsylvania”¹³⁶ In the face of such concerted action, the rebellion soon collapsed and an agreement was reached on September 2, 1794, which proclaimed that if the rebels adhered to the laws of the United States and paid the taxes on whiskey, they would be granted a pardon the following July. Washington duly complied with this promise and pardoned two leaders of the rebellion who had been convicted,¹³⁷ along with the other participants. The pardon was, however, conditional on the recipients continuing to adhere to the laws, and it excluded every convicted person who failed to comply with the agreement.¹³⁸ When a similar rebellion erupted in 1799, President Adams followed Washington’s example by enacting an amnesty for the insurgents.¹³⁹ For both the 1795 and 1800 amnesty

¹³⁴ In addition, from 1822 to 1847 Liberia was a protectorate of the United States.

¹³⁵ Proclamation of Pardons in Western Pennsylvania (July 10, 1795) [hereinafter Washington Proclamation], *reprinted in* I A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 [hereinafter PRESIDENTIAL PROCLAMATIONS VOL. I], at 181 (James C. Richardson ed., 1899) (proclamation by George Washington granting pardon to certain persons formally engaged in violence and obstruction of justice in protest of liquor laws in Pennsylvania).

¹³⁶ ALFONSO J. DAMICO, *DEMOCRACY AND THE CASE FOR AMNESTY* 27 (1975).

¹³⁷ P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 253–54 (1997).

¹³⁸ Washington Proclamation, *supra* note 135.

¹³⁹ Proclamation (May 21, 1800), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. I, *supra* note 135, at 303–04 [hereinafter Adams Proclamation] (proclamation by John

proclamations, government forces had suppressed the rebellions several months before the proclamations were issued, which meant that the amnesties were not used to encourage the insurgents to end their violent struggle, but rather to encourage them to continue to abide by the law once the government forces had returned to barracks.

The outbreak of the American Civil War between 1861 and 1865 triggered a series of amnesty laws for draft dodgers and rebels. The first amnesty for the insurgents was offered in 1863, while the war was raging, in order “to suppress the insurrection and to restore the authority of the United States.”¹⁴⁰ It was conditional on the beneficiaries taking an oath to “henceforth faithfully support, protect, and defend the Constitution of the United States . . . and . . . abide by and faithfully support all” congressional acts and presidential proclamations relating to slavery.¹⁴¹ Following the war’s conclusion, several subsequent amnesty laws were issued culminating in an unconditional amnesty for treason proclaimed by President Johnson in 1868, when many in the South were resentful of the Reconstruction government and federal occupying forces, and paramilitary groups sought to resist the integration of freed slaves into the nation’s political life. Johnson’s 1868 amnesty proclamation sought to overcome these lingering resentments and “to secure a complete and universal establishment and prevalence of municipal law and order in conformity with the Constitution of the United States.”¹⁴² This

Adams granting pardon to certain persons engaged in insurrection against the United States in the counties of Northampton, Montgomery, and Bucks, in the state of Pennsylvania). This insurrection, known as the “Fries” or “House Tax” rebellion, arose in the counties of Northampton, Montgomery, and Bucks in eastern Pennsylvania in 1799. It was aimed at preventing the execution of a law directed at the valuation of houses, land, and slaves for the purposes of taxation. German-American farmers who protested against the law had been arrested by a federal marshal, which prompted 100 men, led by Jacob Fries, to assail the marshal to demand the release of the farmers. The federal government again gathered a large number of troops, causing the insurgents to surrender without resistance. Fries and one other leader of the rebellion were convicted of treason and sentenced to be hanged. However, in May 1800, President Adams, acting against the advice of his cabinet pardoned the convicted men and the other insurgents. *See* Ruckman, *supra* note 137, at 254.

¹⁴⁰ Proclamation No. 111 (Mar. 26, 1864), *reprinted in* VI A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 218 (James D. Richardson ed., 1907) [hereinafter PRESIDENTIAL PROCLAMATIONS VOL. VI] (proclamation by Abraham Lincoln concerning amnesty); *see also* Proclamation No. 108 (Dec. 8, 1863), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra*, at 213–15 (proclamation by Abraham Lincoln regarding amnesty and reconstruction).

¹⁴¹ Proclamation No. 108, *supra* note 140.

¹⁴² Proclamation No. 170 (July 4, 1868), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 655–56 (proclamation by Andrew Johnson granting pardon to

illustrates that during the first phase of American “empire” in which the United States sought to consolidate its control over the continent; amnesties were used as a means of reducing dissent against federal power and ensuring compliance with federal laws.

Following the end of the post-Civil War Reconstruction period, America’s “empire” began to spread beyond its landmass with the Spanish-American War. This war resulted in the Paris Peace Treaty of 1898, in which Spain ceded to the United States control over Cuba, Puerto Rico, Guam, and the Philippines.¹⁴³ As the United States ruled over its new territories, it intermittently used amnesties to undermine dissent similar to how amnesties had been used within the United States. For example, in 1902, President Theodore Roosevelt proclaimed under his constitutional pardoning powers “a full and complete pardon and amnesty” to all persons in the Philippines who participated in insurrections against Spanish and American rule. To benefit, individuals were required to pledge to “recognize and accept the supreme authority of the United States of America in the Philippine Islands” and to “maintain true faith and allegiance” to the United States.¹⁴⁴ As the American empire spread overseas, amnesty laws continued to be used to ensure adherence to federal laws and acceptance of the power of the government.

2. Amnesty and the Exercise of Hegemonic Power

From World War II, American power on the international stage shifted from direct exercises of power over peoples and territories, towards more hegemonic forms of dominance. This conception of empire resulted in the United States intervening financially, diplomatically, and militarily in the governance of states around the world. Following the end of the Cold War, America became the world’s sole superpower. This power means that even though America became “an empire without consciousness of itself as such,”¹⁴⁵ or “[a]n [e]mpire in [d]enial,”¹⁴⁶ it nonetheless was and is

all persons participating in the late rebellion, except those under indictment for treason or other felony).

¹⁴³ Treaty of Peace, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754. The treaty itself contained an amnesty in Article VI. Subsequently, the United States also had protectorate control over Nicaragua between 1912 and 1933.

¹⁴⁴ Proclamation No. 483 (July 4, 1902), *reprinted in* A SUPPLEMENT TO A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 392–94 (George Raywood Devitt ed., 1903) (proclamation by Theodore Roosevelt granting pardon and amnesty to participants in insurrection in the Philippines).

¹⁴⁵ Ignatieff, *supra* note 131.

capable of (and frequently does) influencing the domestic policies of other states.

Although America's dominance enables it to influence the formation of global norms, it too is affected by evolution of those norms.¹⁴⁷ In relation to amnesty laws, it is significant that the United States' emergence as a global hegemonic power coincided with the growth of transitional justice and international criminal law, in which America became a leader. As noted above, these emerging legal frameworks arguably created restrictions of the use of amnesty laws, which the United States invoked in arguing against amnesties in contexts such as Bosnia, which will be explored below. In contrast, during and after the Cold War, the United States frequently endorsed foreign amnesties for its "allies" in the fight against communism¹⁴⁸ or where it wished to broker peace settlements. In these instances, U.S. invocations of international law contradicted its statements elsewhere, as the amnesties were described by U.S. officials as protecting human rights, rather than violating them. Such pragmatism was also evident in domestic pardons for crimes relating to the Iran-Contra affair, which related to questions of presidential involvement in selling weapons to Iran while contravening congressional enactments by funneling the proceeds of weapons' sales to the Contra death squads in Nicaragua.¹⁴⁹ The domestic pardon for the American officials

¹⁴⁶ Niall Ferguson, *An Empire in Denial: The Limits of US Imperialism*, 25 HARV. INT'L L. REV. 64, 64 (2003).

¹⁴⁷ SIKKINK, *supra* note 29, at 204–05.

¹⁴⁸ For example, during the Cold War, the United States provided diplomatic and financial support for dictatorial regimes and in some cases, the United States was directly implicated in horrific episodes of human rights abuses, such as *Operación Cóndor* in Latin America, which received American financial and technical support (many of the personnel involved were trained to inflict terror at the American-run School of the Americas). See, e.g., J. PATRICE MCSHERRY, PREDATORY STATES: OPERATION CONDOR AND COVERT WAR IN LATIN AMERICA (2005); Katherine E. McCoy, *Trained to Torture? The Human Rights Effects of Military Training at the School of the Americas*, 32 LATIN AM. PERSP. 47 (2005); Russell W. Ramsey & Antonio Raimondo, *Human Rights Instruction at the U.S. Army School of the Americas*, 2 HUM. RTS. REV. 92 (2001).

¹⁴⁹ Criminal proceedings were brought against executive branch officials, and Oliver North was convicted for his role in the scandal. The political implications of this pardon were explored in several contemporary articles. See, e.g., Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883 (1992); Harold Hongju Koh, *Begging Bush's Pardon*, 29 HOUS. L. REV. 889 (1992); Carl Levin & Henry Hyde, *The Iran-Contra Pardons: Was it Wrong for Ex-President Bush to Pardon Six Defendants?*, 79 A.B.A. J. 44 (1993); Lawrence E. Walsh, *Political Oversight, the Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587 (1994).

implicated in the affair sought to legitimize American support for the Contras.¹⁵⁰

In some cases, motivated by domestic and international policy priorities, American involvement in foreign amnesties moved beyond endorsement of the amnesty legislation to actively pressuring local actors to grant amnesties. For example, in 1994, when America was faced with a stream of Haitian refugees fleeing the military junta, the U.S. government responded by pressuring deposed, democratically-elected president Jean Bertrand Aristide to agree to a peace deal granting a broad amnesty and permitting the junta leaders to go into exile. In this instance there was strong resistance to the amnesty policy from the Haitian officials, with the result that U.S. involvement extended to drafting the text of the amnesty legislation.¹⁵¹ The U.N. and the Organization of American States endorsed America's amnesty proposal, but their acquiescence was described as "the usual post cold war charade . . . in which the US uses a tame UN to give international legitimacy to the pursuit of its own very particular foreign policy objectives."¹⁵² This example highlights the difficulties faced by smaller states in resisting American pressure to introduce amnesty laws.

At first glance, American engagement with amnesties as an exercise of its hegemonic power contrasts with the domestic amnesties enacted during its empire-building phase. The latter were introduced to encourage law-abiding behavior, whereas the former amnesties were often used to reward the law-breaking behavior of ideological allies. However, there are commonalities in that for both phases of U.S. empire, involvement in amnesty debates was designed to influence the outcome of political conflict in order to suit the priorities of the United States, and to weaken the opponents of American power.

The language of "empire" underwent a resurgence during the Bush presidency. For example, Charles Krauthammer proclaimed a few months before September 11, 2001, that "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position

¹⁵⁰ See Proclamation No. 6518, 57 Fed. Reg. 62,145 (Dec. 24, 1992) (proclamation by George H.W. Bush granting executive clemency).

¹⁵¹ Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 7 (1996).

¹⁵² Dominic Lawson, *The Pressure of Gunboat Diplomacy: Britain Has Offered the U.S. Two Warships to Help Invade Haiti*, FIN. TIMES, Sept. 3, 1994.

to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will.”¹⁵³ More directly, as a Bush administration official told investigative reporter Ronald Suskind, “We are an empire. We make our own reality.”¹⁵⁴ Unlike the preceding decades, during the Bush presidency, America’s “empire” once again engaged in territorial domination in the military invasions of Afghanistan in 2001 and Iraq in 2003. Following the “regime changes” in these countries, the United States used amnesties to weaken insurgencies that challenged its interests. For example, on January 7, 2004, the Administrator of the Coalition Provisional Authority,¹⁵⁵ Paul Bremer, declared an amnesty for over 500 Iraqis¹⁵⁶ who were being held by coalition forces for suspected involvement in insurgency. The amnesty offer excluded anyone who was accused of having “blood on their hands” by, for example, causing death or serious physical injury to an Iraqi citizen or member of the coalition forces.¹⁵⁷ Mr. Bremer, when announcing the amnesty, said that it was expected to contribute to American efforts to win the “hearts and minds” of the Iraqi people, following complaints about heavy-handed tactics.¹⁵⁸ In short, the amnesty was designed to support broader U.S. strategies of governance and control over Iraq.

3. Torture, Hegemony, and Creating Exceptions to the Law

As this section has explored, since independence the United States has grown from establishing control over its current territorial boundaries, through gaining increasing power on the international

¹⁵³ Charles Krauthammer, *The Bush Doctrine*, TIME, Mar. 5, 2001.

¹⁵⁴ See Raymond Michalowski, *Power, Crime and Criminology in the New Imperial Age*, 51 CRIME L. & SOC. CHANGE 303, 310 (2009).

¹⁵⁵ Following the 2003 invasion and occupation of Iraq by the United States and its allies, the occupying powers established the Coalition Provisional Authority (CPA) as a transitional government, which was empowered to exercise executive, legislative, and judicial authority over Iraq. The allies cited U.N. Security Council “Resolution 1483 (2003) and the laws and usages of war” as the legal basis to establish the CPA. Coalition Provisional Authority, Reg. No. 1 (May 16, 2003), available at <http://www.iraqcoalition.org/regulations/>.

¹⁵⁶ This number represented only four percent of the Iraqis believed to be in U.S. custody at that time. See Luke Harding & Richard Norton Taylor, *U.S. Frees Iraqis After British Protest*, GUARDIAN (London) Jan. 8, 2004.

¹⁵⁷ James Rupert, *U.S. Hopes Key Policy Reversal Will Help to Quell Iraq Insurgency*, SEATTLE TIMES, Apr. 24, 2004.

¹⁵⁸ Stephen Farrell, *Prisoners Freed in Bid for Hearts and Minds*, TIMES (London), Jan. 8, 2004, at 20; *US to Release 506 Iraqi Prisoners*, BBC NEWS, Jan. 7, 2004; *U.S. Begins Releasing Iraqi Prisoners: At Least One Vows Revenge*, WHITE HOUSE BULLETIN, Jan. 8, 2004.

stage, to becoming the world's sole superpower. This dominance enables the United States to use international law as an instrument of power, to regulate the behavior of other states and entrench its policies and worldview.¹⁵⁹ However, the regulations of international law also apply to the United States, and can constrain its exercises of dominance. Where this occurs, powerful states, like the United States, have a range of "soft and hard options," including violating the law, creating an exceptional legal regime that applies to the hegemonic state, and changing the applicable rules to suit the hegemon's interests.¹⁶⁰

As was explored above, torture is explicitly prohibited in multiple international treaties and U.S. domestic law. This constrained the legality of the Bush administration's policy of coercive interrogation. As a result, the administration's political and strategic goals came into conflict with the state's obligations under international law. Through the framing of the struggle against terrorism as a "war," and reinterpreting America's legal obligations in the torture memos, the Bush administration attempted to assert its hegemonic power by reshaping applicable international law to create an exception for the United States.

At the domestic level, the decisions not to prosecute prisoner abuse by CIA interrogators differ from the amnesties enacted during the United States' empire-building phase, as, although both benefited persons who were acting outside the United States' federal laws, the rebels in the earlier amnesties were challenging the authority of the federal government, whereas the CIA interrogators committed torture as part of a federally sanctioned policy. Consequently, the rationale for granting the interrogators amnesty is not to dissuade them from future law breaking, but to protect official institutions and personnel and to limit challenges to their legitimacy. In this way, the decisions not to prosecute can be compared to the United States' support for Cold War amnesties, which were designed to protect U.S. allies from accountability. Such forms of amnesty are designed to create exceptions to the law, by exempting those who usually deserve punishment from criminal sanction. By creating such exceptions from its international and domestic legal obligations, the United States has

¹⁵⁹ Krisch, *supra* note 116, at 371.

¹⁶⁰ Bell et al., *supra* note 130, at 153–4 (citing Michael Byers, *Presumptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 171–74 (2003)).

demonstrated not just its ability to assert its power to commit serious human rights violations, but also to evade international standards on accountability that it seeks to encourage nations in other parts of the world to uphold. As the following section will explore, this double standard challenges the United States' self-image as an exemplary state.

B. Amnesty, Denial, and Justificatory Claimsmaking

America has been described as an “exceptional” society since Alexis de Tocqueville wrote *Democracy in America* in 1831.¹⁶¹ This study, and much of the subsequent literature, has found that in comparison to other developed nations, “the United States was created differently, developed differently, and thus has to be *understood* differently—essentially on its own terms and within its own context.”¹⁶² This perception has given rise to a rich literature exploring the uniqueness of different aspects of America's political, cultural, religious, and economic life that is too vast to be explored in this article. Instead, this section will restrict itself to exploring, through the lens of amnesties, how America's perception of itself as an exceptional society has influenced its justifications for involvement in human rights violations and the legal responses to these crimes.

From the earliest Puritan settlements in the “New World,” a self-understanding of America's national values and global role has resonated through the nation's political discourse. This view was presciently encapsulated in 1630 in a sermon by Puritan leader (and later New England Governor), John Winthrop, who described the society that the Puritans sought to create as a “city upon a hill,”¹⁶³ which would provide a shining example for the world through its commitments to liberty, democracy, equality, and religious devotion. Furthermore, he suggested that the success of this society that they were trying to establish would be ensured by the promotion of these goals at home and abroad. This concept, which Goodhart has termed “[p]rovidential exceptionalism,” refers to “a commonplace American belief that theirs is a chosen nation, one upon which Providence has bestowed special blessings and which has been charged with a special

¹⁶¹ *E.g.*, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

¹⁶² Byron E. Shafer, *Preface* to *IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM*, at v (Byron E. Shafer ed., 1991).

¹⁶³ John Winthrop, *Sermon, A Modell of Christian Charity* (1630).

world-historical mission to cultivate and promote its values.”¹⁶⁴ Such conceptions of exceptionalism have been invoked in the rhetoric of nearly every American president, and Presidents Kennedy and Reagan explicitly cited Winthrop in speeches.¹⁶⁵ It was particularly evident in the “Bush Doctrine,”¹⁶⁶ and has continued into the Obama presidency.¹⁶⁷ This self-perception of America as a nation of values has affected why and how clemency has been used by different administrations.

As noted above, amnesty laws seek to prevent specified crimes or offenders being investigated, but when they are issued, they generally entail an assumption that crimes have been committed, and indeed, in some cases, the beneficiaries have been convicted prior to the amnesty’s proclamation.¹⁶⁸ Where amnestied acts are labeled as crimes, this has the potential to convey social disapproval of the acts in a similar manner to the expressivist functions of prosecution.¹⁶⁹ However, in some contexts, states may seek to use the enactment of amnesty legislation to reinterpret or justify these crimes, in order to alter how they are perceived by society.¹⁷⁰ Such forms of denial are prevalent where the state has responsibility for violence.¹⁷¹ Amnesties

¹⁶⁴ Michael Goodhart, *Reverting to Form: American Exceptionalism and International Human Rights*, in HUMAN RIGHTS IN THE 21ST CENTURY CONTINUITY AND CHANGE SINCE 9/11, at 65 (Michael Goodhart & Anja Mihr eds., 2011).

¹⁶⁵ Koh, *supra* note 4, at 1481 n.4.

¹⁶⁶ For example, in his second inaugural speech, President George W. Bush proclaimed: “We are led, by events and common sense, to one conclusion: The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.” President George W. Bush, Second Inaugural Address (Jan. 20, 2005), *available at* <http://www.washingtonpost.com/wp-dyn/articles/A23747-2005Jan20.html>.

¹⁶⁷ For example, in his inaugural speech, President Obama invoked America’s leadership role in the world:

[T]o all the other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born, know that America is a friend of each nation, and every man, woman and child who seeks a future of peace and dignity. And we are ready to lead once more.

President Barack Obama, Inaugural Address, *supra* note 2.

¹⁶⁸ FREEMAN, *supra* note 40, at 12.

¹⁶⁹ Expressing social disapproval of criminal actions is often a central justification for criminal sanctions. However, some restorative forms of amnesty that are offered in exchange for offenders admitting their acts publicly may have a similar expressive role. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997).

¹⁷⁰ Ross Poole, *Enacting Oblivion*, 22 INT’L J. POL. CULTURE & SOC’Y 149, 151 (2009).

¹⁷¹ See generally STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001).

can contribute to such by “wiping the slate clean” regarding the offenders’ criminality, limiting the scope of investigations into particular allegations, or using amnesty legislation to privilege the official account of disputed historical narratives. In this way, an amnesty law may not be simply a tool for *forgetting* the crimes, but rather a legal means to *reinterpret* and *re-present* them as unworthy of punishment. Where amnesties are used to promote such reinterpretations, they are part of official claimsmaking discourse,¹⁷² whereby states hope that by using a legal measure such as amnesty to assert a clear position on the deserving nature of the crimes, this portrayal will become accepted and established within the nation’s collective memory.¹⁷³ Drawing on Stan Cohen’s seminal account of denial, this section will explore how America’s engagement with amnesty laws has been used to reinforce its national self-image through reinterpretation and justification of amnestied crimes.

1. Amnesty and Interpretative Denial

Interpretative denial entails arguing “what happened is really something else.”¹⁷⁴ It can take many forms, ranging from developing euphemisms to conceal or minimize the true nature of particular crimes (for example, labeling torture with the more neutral sounding term “enhanced interrogation”) to developing legal strategies to undermine internationally accepted legal definitions and principles (the torture memos provide a clear example of this approach). Among the amnesties enacted or endorsed by the United States, reinterpretations have included describing crimes as the misguided actions of normally patriotic and law-abiding citizens.

Several of America’s domestic amnesty laws and pardons have reinterpreted offenders’ actions in order to portray them as deserving of mercy due to their heroic or misguided behavior. For example, President Adams’ 1800 amnesty proclamation characterized participants in a rebellion against taxation as “the ignorant, misguided, and misinformed,” who had “returned to a proper sense of their duty.”¹⁷⁵ Subsequently, in 1815, President Madison pardoned a

¹⁷² For a discussion of claimsmaking, see MALCOLM SPECTOR & JOHN I. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* (2000); Joel Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem*, 34 *SOC. PROBS.* 101 (1987).

¹⁷³ For a discussion of how law can shape collective memory, see OSIEL, *supra* note 169; Susanne Karstedt, *Introduction to LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES* 1, 1–23 (Susanne Karstedt ed., 2009)

¹⁷⁴ COHEN, *supra* note 171, at 103.

¹⁷⁵ Adams Proclamation, *supra* note 139.

group of 800 smugglers in Louisiana, known as “the Baratavia pirates,” who had traded illegally with foreign states in violation of American acts on revenue, trade, and navigation. As part of the War of 1812 between the United States and British Empire, Britain tried to capture New Orleans, and they offered the leader of the Baratavia pirates, Jean Laffite, “\$30,000, a pardon, and a captaincy in exchange for assistance in the attack.”¹⁷⁶ He refused and his pirates fought with the U.S. government to defend the city.¹⁷⁷ In recognition of their actions, President Madison proclaimed a pardon for them on February 6, 1815, stating:

[T]hey have abandoned the prosecution of the worse cause for the support of the best, and . . . they have exhibited in the defense of New Orleans unequivocal traits of courage and fidelity. Offenders who have refused to become the associates of the enemy in the war upon the most seducing terms of invitation and who have aided to repel his hostile invasion of the territory of the United States can no longer be considered as objects of punishment, but as objects of a generous forgiveness.¹⁷⁸

In this way, the amnesty proclamation transformed the pirates from criminals, who violated the laws of the United States, to patriotic heroes, who fought to protect America from external enemies.

A similar approach was taken in an 1863 amnesty for Civil War draft evasion and desertion, in which those who surrendered and partook of the amnesty were described as “patriotic and faithful citizens” in contrast to the “evil-disposed and disloyal persons” who engaged in desertion.¹⁷⁹ Similarly, President Johnson’s 1867 amnesty proclamation described the population of the former Confederation as having become “well and loyally disposed” and as conforming, “or, if permitted to do so, will conform” to state or federal law.¹⁸⁰ Patriotic language was also invoked in later pardons. For example, the preamble to President Bush Sr.’s pardon for the Iran-Contra Affair

¹⁷⁶ Ruckman, *supra* note 137.

¹⁷⁷ *Id.*

¹⁷⁸ Proclamation No. 19 (Feb. 6, 1815), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. I, *supra* note 135, at 558–60 (proclamation of James Madison granting pardon to certain inhabitants of Barrataria who acted in the defense of New Orleans).

¹⁷⁹ Proclamation (Mar. 10, 1863) *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 163 (proclamation of Abraham Lincoln recalling soldiers to their regiments).

¹⁸⁰ Proclamation No. 167 (Sept. 7, 1867) *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 547–49 (proclamation of Andrew Johnson offering and extending full pardon to all persons participating in the Late Rebellion).

extolled at length the “true American” patriotism and service of U.S. Secretary of Defense Caspar Weinberger, who had been indicted for perjury and obstruction of justice.¹⁸¹ While it is true that Secretary Weinberger had worked in public service for almost three decades, by emphasizing this aspect of his background, rather than repudiating his role in selling missiles to Iran to fund death squads in Nicaragua, the pardon was used to frame his actions as having been motivated by patriotism, and therefore, justifiable.

2. *Amnesty and Justificatory Denial*

Cohen identified a second form of denial (which he terms “implicatory” denial) as denial that partially acknowledges criticism of the state’s actions, but argues “what happened is justified.”¹⁸² In this approach, crimes come to be seen as acts that, although excessive or disproportionate, were carried out for a greater public good, such as defeating communism or global terrorism. America’s belief in its own inherent righteousness has at times resulted in it developing justificatory forms of denial to explain its involvement in violence or support for repressive foreign allies. For example, politicians often frame America’s participation in international conflicts as a fight against evil, in which all those who act with America, despite their methods, are portrayed as heroes, whereas their opponents are described as “evil.”¹⁸³

¹⁸¹ “Some of the best and most dedicated of our countrymen were called upon to step forward. Secretary Weinberger was among the foremost.” Proclamation No. 6518, *supra* note 150.

Caspar Weinberger is a true American patriot. He has rendered long and extraordinary service to our country. He served for 4 years in the Army during World War II where his bravery earned him a Bronze Star. He gave up a lucrative career in private life to accept a series of public positions in the late 1960’s and 1970’s, including Chairman of the Federal Trade Commission, Director of the Office of Management and Budget, and Secretary of Health, Education, and Welfare. Caspar Weinberger served in all these positions with distinction and was admired as a public servant above reproach. He saved his best for last. As Secretary of Defense throughout most of the Reagan Presidency, Caspar Weinberger was one of the principal architects of the downfall of the Berlin Wall and the Soviet Union. He directed the military renaissance in this country that led to the breakup of the communist bloc and a new birth of freedom and democracy. Upon his resignation in 1987, Caspar Weinberger was awarded the highest civilian medal our Nation can bestow on one of its citizens, the Presidential Medal of Freedom.

Id.

¹⁸² COHEN, *supra* note 171, at 103.

¹⁸³ Ruth Wedgwood, *The Supreme Court and the Guantanamo Controversy*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES 159* (Peter Berkowitz ed., 2005).

Justificatory forms of denial are present in the language of numerous American amnesties and political pardons. For example, President Adams' 1800 amnesty described the 1799 uprising as the "wicked and treasonable insurrection against the just authority of the United States of America," which the state had suppressed "speedily . . . without any of the calamities usually attending rebellion."¹⁸⁴ Later in the wake of the Civil War, the preamble to President Johnson's 1867 amnesty proclamation for those who participated in the "rebellion" opened by affirming the official narrative of the conflict:

[T]he war then existing was not waged on the part of the Government in any spirit of oppression nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of the States, but to defend and maintain the supremacy of the Constitution and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired.¹⁸⁵

In this context, the terms of the amnesty were used to articulate the righteousness of the state's cause.

As Cohen notes, justificatory claimsmaking can also include contextualizing events by asserting that "normal standards of judgment cannot apply because the country's circumstances—terrorism, isolation, nuclear threats—are unique."¹⁸⁶ Such contextualization was evident in America's struggle against the threat of communism during the Cold War, which, as noted above, caused the United States to endorse or even demand broad amnesties for its allies that covered their most atrocious crimes. For example, in 1988, commenting on the agreement of a ceasefire in the Nicaraguan civil war, in which all political prisoners would be released and the Contras would be permitted to participate in national reconciliation, U.S. Secretary of State, George P. Schultz, described the actions of the Contras in Nicaragua as the "determination and sacrifice of the freedom fighters."¹⁸⁷ In a similar way to domestic U.S. amnesties and pardons, the text of these foreign amnesties often sought to portray a particular narrative of a conflict. For example, following the "dirty

¹⁸⁴ Adams Proclamation, *supra* note 139.

¹⁸⁵ Proclamation 167, *supra* note 180.

¹⁸⁶ COHEN, *supra* note 171, at 111.

¹⁸⁷ *Nicaragua: U.S. Keeps Arm's Length from Ceasefire Accord*, INTER PRESS SERVICE, Mar. 24, 1988.

wars” in South America,¹⁸⁸ military crimes that were amnestied were often framed as having been committed in response to the threat from left-wing terrorism, an approach known within South America as the “theory of the two demons.”¹⁸⁹ These narratives chimed with America’s own rationales for its involvement in human rights violations in the hemisphere and elsewhere, and by supporting these amnesties, it may have sought to bolster its own justifications.

More recently, in his 1992 pardon for Caspar Weinberger and others for their conduct related to the Iran-Contra affair, President Bush Sr. used the amnesty legislation to highlight what the State perceived to be America’s achievements in the previous six years. In the preamble to the pardon, he stated that, during that period, “the last American hostage has come home to freedom, worldwide terrorism has declined, the people of Nicaragua have elected a democratic government, and the Cold War has ended in victory for the American people and the cause of freedom we championed.”¹⁹⁰ Each of these events had taken place, but they were not directly related to the amnestied acts, or the individuals benefiting from the pardon. It therefore seems that President Bush Sr. included this celebration of official triumphs in the pardon to justify and minimize the granting of clemency to perpetrators of serious offenses.

3. Denial, Claimsmaking, and Prisoner Abuse

The officially sanctioned policies of torture, rendition, and arbitrary detention during the Bush administration are clearly at odds with America’s self-image as a society uniquely founded on commitments to liberty, democracy, equality, and the rule of law. It can be argued that these values were debased by the policies of torture.¹⁹¹ However, rather than focusing on accountability to reassert these values, the politics of denial and claimsmaking have featured in the legal responses to the abuses. For example, when announcing that no prosecutions would be pursued for those who had acted within the

¹⁸⁸ Greg Grandin, *The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala*, 110 AM. HIST. REV. 46, 48 (2005).

¹⁸⁹ The theory of the two demons has been written about extensively with reference to Argentina. See, e.g., Carina Perelli, *Settling Accounts with Blood Memory: The Case of Argentina*, 59 SOC. RES. 415, 431 (1992); Grandin, *supra* note 188, at 52–53; see also Mark Osiel, *The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict*, 18 J. LATIN AM. STUD. 135 (1986).

¹⁹⁰ Proclamation No. 6518, *supra* note 150.

¹⁹¹ Paul Krugman, *Reclaiming America’s Soul*, N.Y. TIMES, Apr. 24, 2009, at A27.

parameters of the legal advice given in the torture memos, President Obama took care to note that:

[t]he men and women of our intelligence community serve courageously on the front lines of a dangerous world. Their accomplishments are unsung and their names unknown, but because of their sacrifices, every single American is safer. We must protect their identities as vigilantly as they protect our security, and we must provide them with the confidence that they can do their jobs.¹⁹²

In this statement, President Obama sought to contextualize prisoner abuse within the unique security threats faced by the United States in the post-9/11 world. By emphasizing the work of the intelligence community in “keeping America safe,” the decision not to prosecute reinforced the arguments made by some commentators that coercive interrogation methods extracted some useful information from detainees.¹⁹³ This demonstrates an official reluctance to consider empirical evidence on international experiences, which demonstrate that torture rarely produces useful information,¹⁹⁴ and may have been counterproductive for American national security.

In contrast to the official discourse of the federal government, legislators¹⁹⁵ and human rights organizations within the United States¹⁹⁶ have argued that investigations and prosecutions are necessary. These campaigns contend that greater accountability would “convey to citizens a *disapproval of violations and support for core democratic values*”;¹⁹⁷ communicate to the world America’s commitment to its international legal obligations;¹⁹⁸ and enhance legitimacy, accountability, and transparency within domestic

¹⁹² OLC Press Release, *supra* note 3.

¹⁹³ *Cheney Enters ‘Torture’ Memos Row*, BBC NEWS, Apr. 21, 2009.

¹⁹⁴ BLUM ET AL., *supra* note 18, at 15–16.

¹⁹⁵ Shortly after President Obama’s inauguration, Democratic Senator Patrick Leahy led a campaign calling for the establishment of a truth commission to investigate prisoner abuse. Senator Leahy portrayed a truth commission as “a middle ground” between divisive prosecutions and impunity. Patrick Leahy, *The Case for a Truth Commission*, TIME, Feb. 19, 2009.

¹⁹⁶ For example, the Commission for Accountability, a coalition of nineteen human rights, faith-based, and justice organizations, called on President Obama to establish a commission to investigate torture, rendition, and detention policies sanctioned by the Bush administration. The investigative commission was intended to complement rather than replace criminal accountability. *About*, COMM’N ON ACCOUNTABILITY, <http://www.commissiononaccountability.org/pages/about> (last visited Feb. 22, 2012).

¹⁹⁷ BLUM ET AL., *supra* note 18, at 15.

¹⁹⁸ FORSYTHE, *supra* note 32, at 212–13.

institutions. These arguments have both legal and political weight, but it seems that, to date, they have been trumped in official policymaking by more pragmatic concerns.

C. Law, Politics, and Pragmatism in the Use of Amnesty

Doctrinal approaches to the production of legal knowledge emphasize the value of consistency, continuity, universality, objectivity, and fairness offered by law.¹⁹⁹ Here, law is portrayed as “separate from—and ‘above,’”—decisions motivated by politics, economics, culture, or religion.²⁰⁰ Where issues are characterized as “legal questions” rather than matters of political or social policy, they are deemed to be “settled and not debatable.”²⁰¹ However, this conceals the extent to which law is constituted by politics and can be instrumentalized within political decision-making. Indeed, as studies of law and politics reveal, “[l]aw is one of the central products of politics and the prize over which many political struggles are waged.”²⁰² Under such pragmatic or instrumentalist views, laws are not honored or valued for their intrinsic nature or status, but rather because of the outcomes that law can help policymakers achieve.²⁰³ This complex interplay between law and politics is often starkly revealed in public or legislative debates on the need for, and the scope of, amnesty legislation. Indeed, as noted by French jurist, Joseph Barthélemy, enacting an amnesty “is an act of high politics.”²⁰⁴ As this section will explore, pragmatic approaches to resolving domestic political disputes, responding to domestic public opinion, and delivering foreign policy priorities have all influenced America’s engagement with amnesty laws.

¹⁹⁹ David Kairys, *Introduction* to *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 2 (David Kairys ed., 3rd ed. 1998).

²⁰⁰ *Id.* at 1.

²⁰¹ David Kairys, *Law and Politics*, 52 *GEO. WASH. L. REV.* 243, 248 (1984). Kairys argues that invoking law “legitimizes the removal of many crucial social issues from public involvement and scrutiny and the imposition of the will and interests of those at the top of the social hierarchy.” *Id.* at 249.

²⁰² Keith E. Whittington et al., *The Study of Law and Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 3, 3 (Keith E. Whittington et al. eds., 2008).

²⁰³ Martti Koskeniemi, *What is International Law for?*, in *INTERNATIONAL LAW* 32, 40 (Malcolm Evans ed., 3rd ed. 2010).

²⁰⁴ JOSEPH BARTHÉLEMY, *L’AMNISTIE* 27 (1920).

I. Amnesty and the Role of Law in National Politics

Among the amnesties proclaimed by American presidents for political offenses committed within the United States, amnesty was often described as necessary to unite the country and focus on the future. For example, President Johnson, in his 1867 amnesty proclamation contrasted the positive outcomes of amnesties with the risks of prosecutions: “[A] retaliatory or vindictive policy, attended by unnecessary disqualifications, pains, penalties, confiscation, and disenfranchisements, now, as always, could only tend to hinder reconciliation among the people and national restoration, while it must seriously embarrass, obstruct, and repress popular energies and national industry and enterprise”²⁰⁵ Here, rebuilding the country after the Civil War was viewed as a political task, in which law could be subordinated to the achievement of political goals.

Although, since the Civil War, the United States has not faced such serious threats to its national unity, subsequent U.S. amnesties have continued to be justified as necessary to end divisive, domestic political contestation. However, such contestation though damaging, poses little threat of armed conflict erupting on American soil. For example, thirty days after President Nixon was forced to resign due to the Watergate scandal, his chosen successor, President Ford, pardoned his predecessor.²⁰⁶ Unsurprisingly, this pardon was criticized as being politically motivated, prompting President Ford to appear before the House of Representatives Judiciary Committee’s Subcommittee on Criminal Justice to justify his decision.²⁰⁷ He argued that the pardon was necessary to “change our national focus . . . [t]o shift attention from the pursuit of a fallen president to the pursuit of urgent needs of a rising nation.”²⁰⁸ He continued that, without pardon, “[d]uring this long period of delay and potential litigation, ugly passions would again be aroused. And our people would again be polarized in their opinions. And the credibility of our free institutions of government would again be challenged at home

²⁰⁵ Proclamation No. 167, *supra* note 180.

²⁰⁶ Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 8, 1974) (proclamation of Gerald Ford granting pardon to Richard Nixon).

²⁰⁷ Duker, *supra* note 45, at 531.

²⁰⁸ President Gerald R. Ford, Statement by the President to be Delivered Before Subcommittee on Criminal Justice Committee on the Judiciary, House of Representatives (Oct. 17, 1974); Proclamation No. 4311, *supra* note 206.

and abroad.”²⁰⁹ In this statement, President Ford identified multiple threats posed by prosecutions including polarizing public opinion, undermining the legitimacy of the state, and weakening national recovery. Here, as with the post-Civil War era, these priorities are primarily political challenges, and hence the pardon was used to create exceptions to the rule of law that would arguably serve political goals.

President George Bush Sr. raised similar arguments in his pardon for the Iran-Contra Affair, in which, after citing a number of historical American amnesties, he declared: “[M]y predecessors acted because it was time for the country to move on. Today I do the same.”²¹⁰ He further highlighted the complex relationship between crime and politics by arguing:

The prosecutions of the individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.²¹¹

This quote is surprising, given that the beneficiaries were being investigated for involvement in criminal acts at the time the pardon was proclaimed. By introducing the pardon, President Bush was clearly trying to transform a legal matter—namely, whether individual acts of criminality should be prosecuted—into a political matter focusing on the government policies under which the crimes were committed.

2. *Amnesty to Satisfy Public Opinion*

Political pragmatism can cause pardons to be enacted to satisfy public demands for leniency. Among domestic amnesties in the United States, pro-amnesty public opinion is most evident for amnesties for draft evasion and desertion. For example, soon after the end of World War II, a campaign emerged to demand amnesty for persons who had been imprisoned or were liable for punishment for

²⁰⁹ Gerald Ford, Remarks on Signing a Proclamation Granting Pardon to Richard Nixon (Sept. 8, 1974), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GERALD FORD 1974, at 101, 102 (1975) [hereinafter Ford].

²¹⁰ Proclamation No. 6518, *supra* note 150.

²¹¹ *Id.*

violating the Selective Training and Service Act of 1940.²¹² A 1946 Gallup poll showed that an amnesty for conscientious objectors was supported by 69 percent of the American public.²¹³ The high degree of public support forced a reluctant White House to respond, and on December 23, 1947, President Truman granted pardon for a limited number of imprisoned deserters.²¹⁴

Pro-amnesties public opinion became a controversial issue again as mass protests against the Vietnam War erupted in the late 1960s, prompting thousands of conscripts to evade the draft or desert, often by leaving the United States.²¹⁵ The protests prompted the judiciary and armed forces to take a more lenient approach to the penalties imposed, but this did not resolve the issue.²¹⁶ By September 16, 1974, one year after the last U.S. serviceman had left Vietnam, President Ford granted amnesty to encourage the deserters to return. However, the amnesty was conditioned on the applicants performing up to two years of “alternative service in the national interest.”²¹⁷ Many “viewed the demand for alternative service as a form of punishment” and only a fraction of deserters or draft evaders applied for amnesty.²¹⁸ Their ongoing resistance prompted a subsequent amnesty in 1977, in which these conditions were removed, allowing most affected persons to return home.²¹⁹ This example suggests that, where sufficient sections of the public resist government policies, it can correspond to public support for amnesties for those who violate the law by their resistance. Where the state responds to public pressure by enacting amnesties, it may be a pragmatic decision to enhance the state’s legitimacy where the opposition to its policies had weakened it.

²¹² DAMICO, *supra* note 136, at 34–35.

²¹³ *Id.* at 35. In contrast, a campaign after World War I to demand amnesty for imprisoned conscientious objectors and other political offenders failed to gather public support and hence was initially unsuccessful; many prisoners had to wait until President Coolidge offered pardon for them in 1924, six years after the war had ended. *Id.* at 34.

²¹⁴ Proclamation No. 2762, 12 Fed. Reg. 8,731 (Dec. 23, 1947) (proclamation by Harry Truman granting pardon to certain persons convicted of violating the selective training and service act of 1940, as amended).

²¹⁵ DAMICO, *supra* note 136, at 6.

²¹⁶ *Id.*

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 7–8.

²¹⁹ Proclamation No. 4483, 42 Fed. Reg. 4,391 (Jan. 21, 1977) (proclamation by Jimmy Carter granting pardon for violations of the Selective Service Act, August 4, 1964–March 28, 1973).

3. *Amnesty and Foreign Policy Priorities*

In addition to pragmatic decisions resulting from national policies or domestic public opinion, the United States has chosen to enact or endorse amnesties as a response to international events. For example, following World War II, America led the establishment of the international tribunals at Nuremberg and Tokyo. With the onset of the Cold War, America's enthusiasm for these tribunals waned as Japan and Germany came to be perceived as potentially useful allies in the struggle against communism. These strategic concerns caused the American head of the occupying forces in Japan, General MacArthur, to shield Emperor Hirohito from prosecution and to press for the introduction of an amnesty. The law was enacted on March 28, 1948, and resulted in unconditional amnesty being granted to all Japanese soldiers, including those accused of serious crimes.²²⁰ Consequently, despite an early commitment to prosecute Japanese war crimes, political concerns took precedence over law.

This pattern continued during the Cold War. For example, nearly all the countries that participated in the United States-backed *Operación Cóndor* program of repression of political dissent in South America also enacted amnesty laws to shield the agents of state terror from prosecution. Many of these amnesties received America's tacit backing or even vocal support. For example, following General Pinochet's 1978 amnesty decree, which granted unconditional impunity to perpetrators of serious human rights violations, the U.S. State Department proclaimed that the decree was "a positive contribution by the government of Chile to the improvement of the human rights situation in that country."²²¹ Here, U.S. officials invoked the language of human rights law, but used it to endorse an amnesty that benefited only those who had violated human rights. In doing so, America sought to shield its supporters from criminal proceedings that would potentially reveal America's complicity in the violence.

More positively, Cold War ideology also caused the United States to pressure Soviet bloc countries to issue amnesties for dissidents whose political views were perceived as more in tune with American policy than with their own governments'. For example, on November 25, 1977, President Carter said it was a "wise and generous act" of

²²⁰ Amnesty Law, Law No. 20 of 1947 (Japan), *reprinted in* 6059 KANPO FUKKOKUBAN 185 (Official Gazette, Reprint ed., Mar. 28, 1947). Freeman notes that "[i]n 1946, General MacArthur released nearly one million political prisoners in Japan." Freeman, *supra* note 51, at 519.

²²¹ *Amnesty Decreed*, FACTS ON FILE WORLD NEWS DIG., May 12, 1978.

Yugoslavia to grant amnesty to political prisoners.²²² Similarly, in 1984, the United States made the release of dissidents a condition for any warming of relations with Poland, and on July 23, 1984, the American State Department welcomed a prisoner amnesty as a “positive step.”²²³ The position America took in relation to the harms inflicted on political prisoners in Eastern Europe during the 1970s and 1980s stands in stark contrast to its policies on amnesties for those who perpetrated disappearances, extrajudicial executions, and torture on dissidents in South America during the same period.

Such Janus-faced approaches to amnesty continued to be featured in American foreign policy during the 1990s. For example, at the same time as the United States was pressuring the Haitian government to grant amnesty for the crimes of the military junta, it provided considerable financial, human, and political aid to the creation and functioning of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Hazan argues that this support sprung from a desire to play “the Tribunal as a moral card against the virulent criticism” from the media and the public of American reluctance to intervene militarily to stop ethnic cleansing.²²⁴ However, with regards to the Balkans, American support for the ICTY led the U.S. Ambassador to the U.N., Madeleine Albright, to proclaim that the United States would “oppose vigorously any . . . amnesty” for war crimes.²²⁵ Ultimately, the U.S. Secretary of State, Warren Christopher, personally negotiated the provisions relating to accountability for war crimes in the 1995 Dayton Peace Accord that ended the conflict in Bosnia. The accord required the parties to the agreement to cooperate with the ICTY and to enact amnesty laws that excluded crimes that fell within the tribunal’s jurisdiction.²²⁶ Whilst these measures represent laudable achievements for justice, America’s pronouncements on the legality of amnesties for war crimes and crimes against humanity were not applied to its involvement in other conflicts.

²²² *Yugoslavia Frees Mihajlov*, FACTS ON FILE WORLD NEWS DIG., Dec. 17, 1977.

²²³ *U.S. Holds Fire on Lifting Sanctions on Poland; Political Prisoner Amnesty Welcomed by the U.S.*, GUARDIAN (London), July 24, 1984.

²²⁴ Pierre Hazan, *The Revolution by the ICTY: The Concept of Justice in Wartime*, 2 J. INT’L CRIM. JUST. 533, 536 (2004).

²²⁵ Madeleine K. Albright, *We Won’t Let War Criminals Walk; With or Without a Balkan Peace Deal, the U.S. Won’t Relent*, WASH. POST, Nov. 19, 1995, at C01.

²²⁶ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina (1995) art. IX, Dec. 12, 1995.

One year after the Dayton Peace Accords, America helped to negotiate the Abidjan Peace Accord for Sierra Leone that offered an unconditional amnesty for the serious human rights violations that had occurred there.²²⁷ It repeated its support for broad amnesties in Sierra Leone in 1999 when it helped to broker the Lomé Accords.²²⁸ The 1999 accords prompted Madeleine Albright, who was by now Secretary of State, to deviate from her position on the Balkans, by describing the amnesty as “the price of peace [that had been] so desperately needed.”²²⁹ By 1999, the United States had spent \$250 million on humanitarian aid to Sierra Leone, and it appears to have run out of patience. As a result, it deviated from the position of the U.N. Security Council to push for a peace agreement including amnesty to end the conflict.²³⁰ The contrast between American approaches to amnesty in the Balkans, and the amnesties in Sierra Leone and Haiti, reveal that during the Clinton administration, the United States declined to adopt legalistic and uniform positions on amnesty laws for serious human rights violations. Instead, the U.S. took a more malleable approach that was adopted to suit its political priorities. Arguably, the privileging of political concerns over legal obligations continues to be evident in the response to prisoner abuse.

4. Prisoner Abuse, National Unity, and the Risks of Politicalization

Part C has demonstrated how America deployed or encouraged the deployment of amnesty laws to achieve a range of political goals. In some instances, the United States used international law to legitimize its preferred policy approaches by, for example, invoking the language of human rights to endorse amnesties for human rights abuses as a means to end abuses. Where international law’s requirements came into conflict with U.S. policy goals, America’s international legal obligations were marginalized. This privileging of pragmatic political concerns has also been evident in the debates on prosecutions for prisoner abuse. For example, in his 2009 statement

²²⁷ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 14, Nov. 30, 1996, 9 AFR. J. INT’L & COMP. L. 414 (1997) [hereinafter Abidjan Accord].

²²⁸ Lomé Peace Agreement Between the Government of Sierra Leone and Revolutionary United Front of Sierra Leone, art. 9, June 3, 1999, 11 AFR. J. INT’L & COMP. L. 557 (1999).

²²⁹ Karl Vick, *Sierra Leone’s Unjust Peace: At Sobering Stop, Albright Defends Amnesty for Rebels*, WASH. POST, Oct. 19, 1999, at A12.

²³⁰ Corinna Schuler, *Sierra Leone—A Wrenching Peace: Sierra Leone’s “See No Evil” Pact*, CHRISTIAN SCI. MONITOR, Sept. 15, 1999.

on the release of the torture memos, President Obama emphasized the need for national unity, rather than accountability:

This is a time for reflection, not retribution. We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past. That is why we must resist the forces that divide us, and instead come together on behalf of our common future.²³¹

Speaking to the press a few days later, President Obama, endorsing the DOJ decision that prosecutions would not be pursued for those who had acted within the guidance outlined in the memos, stated: “As a general view, I do think we should be looking forward, not back. I do worry about this getting so politicised that we cannot function effectively and it hampers our ability to carry out national security operations.”²³² This position reveals two arguments related to pragmatism: firstly, that prosecutions “would criminalize policy differences,” and would create a negative precedent of a U.S. administration launching prosecutions based on the policies of its predecessor.²³³ And secondly, that prisoner abuse was committed to protect national security, and that, given the serious challenges faced by the nation, national unity should be privileged over retribution.

The former argument has primarily been articulated by the political right in the United States, which, according to Forsythe, would view prosecutions as being “motivated by partisan politics.”²³⁴ In contrast, the American political left would see limited prosecutions as insufficient, as they would “scapegoat[e] the little fish while letting policy makers and lawyers off the hook.”²³⁵ Therefore, at opposite ends of the spectrum there is an assumption that decisions on the extent to which prosecutions should be conducted would be influenced by political concerns. As torture is criminalized within domestic and international law—and, in ordinary circumstances, its punishment should be perceived as an exclusively legal matter—the emphasis placed on politics in these debates is striking. Outside

²³¹ OLC Press Release, *supra* note 3.

²³² *CIA Memo Prosecutions ‘Possible,’* BBC NEWS, Apr. 21, 2009. This view was supported by the Attorney General, who stated: “I share the President’s conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these.” U.S. Dep’t of Justice, *supra* note 96.

²³³ Jorge Heine, *Politics as Usual? US Torture Practices 2001–2008 and Transitional Justice*, 13 INT’L STUD. REV. 570, 572–73 (2011).

²³⁴ FORSYTHE, *supra* note 32, at 202.

²³⁵ *Id.*

political circles in Washington, D.C., it seems that there was some public support for investigations. For example, a Gallup poll conducted in early February 2009 indicated that thirty-eight percent of respondents said that they supported criminal investigations of torture claims by the Justice Department, and a further twenty-four percent said they would prefer a non-criminal investigation by an independent panel. In addition, there was international pressure for prosecutions. For example, the U.N. Special Rapporteur on Torture repeatedly called upon America to investigate accusations of torture.²³⁶ Furthermore, investigations of torture and rendition were launched in the courts of foreign states under the principle of universal jurisdiction.²³⁷ Nonetheless, the Obama administration seems to have attempted to sidestep both domestic and international calls for accountability, preferring instead to avoid the anticipated “political storm” that risks undermining the government’s ability to fulfill its other policy priorities, such as economic recovery and health care reform (on which the President needed the cooperation of Congressional Republicans to deliver).²³⁸

The second argument for pragmatism relates to the need for national unity in the face of security threats. For example, following the Attorney General’s announcement in June 2011 that investigations into CIA interrogators would only proceed in two cases, the CIA Director, Leon Panetta, said “I have always believed that [the CIA’s]

²³⁶ Peter Baker & Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. TIMES, Apr. 20, 2009; see also Stephanie Nebehay, *U.N. Rights Chief Urges Obama to Prosecute Torturers*, REUTERS, May 14, 2009; Stephanie Nebehay, *WikiLeaks Files Should Prompt Iraq Abuse Probe: U.N.*, REUTERS, Oct. 26, 2010; U.N. Hum. Rts. Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010); U.N. High Commissioner for Hum. Rts., *U.S. Membership in the Human Rights Council* (May 14, 2009), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BECC7BAC2F03BACBC12575C100394C58?opendocument>.

²³⁷ For example, on April 29, 2009, following a request by human rights lawyers, Spanish investigating magistrate Baltasar Garzón launched a criminal investigation into allegations of torture at Guantánamo made against six Bush administration officials who created the policies that permitted torture to occur. See *Spanish Judge Opens Guantanamo Investigation*, ASSOCIATED PRESS, Apr. 29, 2009; Jason Webb, *Spanish Judge Keeps Guantanamo Probe Alive*, REUTERS, Apr. 17, 2009; *Spanish Judge Asks U.S. if It Will Probe Torture*, ASSOCIATED PRESS, May 5, 2009. The possibility of universal jurisdiction proceedings against Bush administration officials had concerned Donald Rumsfeld as early as 2003. See Memorandum from the Secretary of Defense on the Judicialization of International Politics (Apr. 9, 2003), available at <http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20al%20re%20Judicialization%20of%20International%20Politics.pdf>.

²³⁸ FORSYTHE, *supra* note 32, at 202.

primary responsibility is not to the past, but to the present and future threats to the nation.”²³⁹ This view chimes with the approach of the right wing in American politics that prosecutions would be “unwise in the light of national security needs.”²⁴⁰ A more centrist position was adopted by Senator Patrick Leahy (Democrat-Vermont), Chairman of the Senate Judiciary Committee, who justified his calls for a truth commission to investigate prisoner abuse by portraying a truth commission as “a middle ground” between divisive prosecutions and impunity. He argued that such a commission was necessary “to get to the bottom of what happened—and why—to make sure it never happens again,” and “to bind up the nation’s wounds” and develop “a shared understanding of the failures of the recent past.”²⁴¹ However, this proposal shared with the position of the right wing that prosecutions would undermine national unity, and hence should not be pursued.

These debates on the risks of prosecutions are similar to the problems often faced by newly elected governments in countries that are transitioning from conflict or repression. These fledgling transitional regimes must balance an inclination towards asserting the rule of law with the pragmatic realities of governance. However, for transitional states, disunity often poses a genuine and substantial threat of a return to armed conflict or dictatorial rule, and hence, amnesties are offered to reduce this risk. However, these concerns do not allow “states to sidestep or suspend their fundamental obligations” under international law.²⁴² For the United States, disunity poses the prospect of difficult legislative battles, rather than violent ones. Such political contestations are often a central feature of public discourse in democratic states, and there are a wide number of issues for which it is unrealistic to expect consensus to be reached. As such, the avoidance of contestation does not seem to be a sufficient rationale for failing to fulfill America’s international legal obligations.

Furthermore, failing to hold its torturers accountable may actually undermine American security. For example, it arguably risks

²³⁹ CIA, Message from the Director: DOJ Investigations Moving Toward Closure (June 30, 2011), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-2011/message-from-the-director-doj-investigations-moving-toward-closure.html>.

²⁴⁰ FORSYTHE, *supra* note 32, at 202.

²⁴¹ Leahy, *supra* note 195.

²⁴² BLUM ET AL., *supra* note 18, at 15.

enhancing the credibility of anti-American propaganda, which seeks to incite further terrorist attacks on U.S. targets. This argument was made by Alberto Mora, a former general counsel for the Navy, who contended that “some flag-rank officers believe that Abu Ghraib and Guantánamo constitute ‘the first and second identifiable causes of U.S. combat deaths in Iraq’ because they galvanized *ihadis*.”²⁴³ Similarly, an Air Force major told *Harper’s Magazine* that “hundreds but more likely thousands of American lives [were lost because of] the policy decision to introduce the torture and abuse of prisoners.”²⁴⁴ In addition, by abusing the prisoners within its control, America arguably removed the incentive for its enemies to respect the lives of captured American military personnel. Furthermore, although U.S. counter-insurgency operations are dependent on relations with Muslim communities in the United States and abroad, the abuse of prisoners may have made these communities less willing to cooperate,²⁴⁵ and it reportedly made some foreign governments reluctant to share intelligence.²⁴⁶

D. Amnesty, Mercy, and the Public Welfare

The sovereign’s prerogative of mercy has been an intrinsic part of criminal justice systems around the world for thousands of years. In previous centuries, pardons were necessary “to soften the harshness and correct the injustice of” relatively rigid bodies of criminal law.²⁴⁷ Today, however, pardons have a less central role in many criminal justice systems, as criminal law has developed to incorporate what were previously grounds for pardon (such as insanity and self-defense) into more flexible systems, and to ensure greater due process rights for defendants.²⁴⁸ As a result, pardons have evolved to be proclaimed primarily to serve the “public welfare.”²⁴⁹ This is an amorphous concept that can encompass pardons granted due to the

²⁴³ Nicholas D. Kristof, Op-Ed., *Time to Come Clean*, N.Y. TIMES, Apr. 26, 2009, at WK14.

²⁴⁴ Scott Horton, “*The American Public Has a Right to Know That They Do Not Have to Choose Between Torture and Terror*”: *Six Questions for Matthew Alexander, Author of How to Break a Terrorist*, HARPER’S MAG., Dec. 18, 2008.

²⁴⁵ FORSYTHE, *supra* note 32, at 213–14.

²⁴⁶ Kristof, *supra* note 243.

²⁴⁷ MOORE, *supra* note 126, at 22; *see also* Duker, *supra* note 45, at 479.

²⁴⁸ MOORE, *supra* note 126, at 84.

²⁴⁹ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

personal circumstances of the offender.²⁵⁰ Pardons can be used to recognize and remedy injustices, such as where individuals have been punished for their political or religious beliefs, or alternatively, to prevent abuses of the rule of law where offenders are unlikely to receive a fair trial. As this section will demonstrate, mercy and the public welfare have often been invoked in the proclamation of political amnesties and pardons within the United States.

1. Amnesty as a Recognition of Personal Circumstances

The personal circumstances of pardon beneficiaries have often been used to justify granting mercy for their offenses. For example, when President Harding commuted the sentence of socialist activist Eugene V. Debs on December 24, 1921, he stated it was because “I want him to eat his Christmas dinner with his wife.”²⁵¹ In 1918, Debs had been convicted of sedition under the Espionage Act of 1917 and was sentenced to ten years imprisonment for making speeches denouncing the United States’ participation in World War I. In addition, it appears that sympathy for Richard Nixon played a role in President Ford’s decision to pardon him, as the proclamation describes Nixon as “a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.”²⁵² In addition, when appearing before the House Justice Committee to explain his decision, President Ford stated “it is common knowledge that serious allegations and accusations hang like a sword over our former President’s head, threatening his health as he tries to reshape his life, a great part of which was spent in the service of this country and by the mandate of its people.”²⁵³ He further demonstrated his sympathy by characterizing the Watergate scandal as “an American tragedy in which we all have played a part.”²⁵⁴

Similarly, in pardoning Caspar Weinberger, President Bush Sr. noted that he was “pardoning him not just out of compassion or to spare a 75-year-old patriot the torment of lengthy and costly legal proceedings, but to make it possible for him to receive the honor he deserves for his extraordinary service to our country.” The proclamation further stated that President Bush could not “ignore the

²⁵⁰ See David Tait, *Pardons in Perspective: The Role of Forgiveness in Criminal Justice*, 13 FED. SENT’G REP. 134, 134 (2001).

²⁵¹ Kobil, *supra* note 41, at 601 n.210.

²⁵² Proclamation No. 4311, *supra* note 206.

²⁵³ Ford, *supra* note 208.

²⁵⁴ *Id.*

debilitating illnesses faced by Caspar Weinberger and his wife.”²⁵⁵ This pardon was also extended to five other public officials who had been implicated in the Iran-Contra Affair. As with Weinberger, the proclamation praised their patriotism and argued that they had each “already paid a price—in depleted savings, lost careers, anguished families—grossly disproportionate to any misdeeds or errors of judgment they may have committed.”²⁵⁶ The pardon proclamation also characterized the Iran-Contra affair as “the most thoroughly investigated matter of its kind in our history,” thereby rationalizing that further investigations were not warranted.²⁵⁷ In the expressed motivations for these pardons, the presidents seemed to suggest, in the words of President Coolidge, that further application of the penalties would produce “no good results,” because either the offenders had suffered in other ways for their offenses, or that their offenses should be weighed against their previous contribution to American society.²⁵⁸

2. *Amnesty to Address Criminal Justice Deficiencies*

Decisions to grant amnesty or pardon have also been justified on the grounds of addressing the deficiencies within the criminal justice system. For example, in explaining his rationales for pardoning Richard Nixon, President Ford stated that he had been advised that “many months and perhaps more years will have to pass before Richard Nixon could obtain a fair trial by jury in any jurisdiction of the United States under governing decisions of the Supreme Court.”²⁵⁹ He continued that, were a prosecution to proceed,

a former President of the United States, instead of enjoying equal treatment with any other citizen accused of violating the law, would be cruelly and excessively penalized either in preserving the presumption of innocence or in obtaining a speedy determination of his guilt in order to repay a legal debt to society.²⁶⁰

²⁵⁵ Proclamation No. 6518, *supra* note 150.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Proclamation: Amnesty and Pardon, 43 Stat. 1940 (Mar. 5, 1924) (proclamation by Calvin Coolidge granting pardons to World War I deserters). President Coolidge in 1924 proclaimed a pardon for World War I deserters. Jones and Raish state that this was a partial amnesty that “applied only to persons who had deserted after hostilities had ended and before Congress had declared the war to be over.” Douglas W. Jones & David L. Raish, Comment, *American Deserters and Draft Evaders: Exile, Punishment or Amnesty*, 13 HARV. INT’L L.J. 88, n.250 (1972).

²⁵⁹ Ford, *supra* note 209.

²⁶⁰ *Id.*

The need to intervene in a harsh criminal justice system was also invoked by President Clinton to justify his 1999 pardon of sixteen members of the Armed Forces of Puerto Rican National Liberation (FALN), an armed movement that opposed U.S. control over Puerto Rico.²⁶¹ The pardoned individuals had been convicted and imprisoned for seditious conspiracy relating to the planting of 130 bombs in public places across the United States.²⁶² The pardons were deeply politically controversial, and both the Senate and the House of Representatives passed motions condemning the act of clemency.²⁶³ In justifying his decision, President Clinton stated that “[t]he prisoners were serving extremely lengthy sentences—in some cases 90 years—which were out of proportion to their crimes.”²⁶⁴

3. Mercy, Fairness, and the “Torture Memos”

Within contemporary debates on non-prosecution for torture, the concept of mercy has not been mentioned explicitly, but the justifications given by the Obama administration have resonances with the types of mercy outlined above. For example, both President Obama and Attorney General Eric Holder have talked of the service and patriotism of the U.S. intelligence community, and the need to protect their identities so that they can continue their work when announcing decisions not to prosecute.²⁶⁵

The idea of fairness and due process has repeatedly been raised in relation to the politicized legal advice given in the torture memos. As noted above, section 1004(a) of the Detainee Treatment Act of 2005 provided that any American officials who were involved in interrogations of terrorist suspects would be shielded from prosecution when they “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the

²⁶¹ LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 211–12 (2004).

²⁶² *Id.*

²⁶³ *Id.* at 213.

²⁶⁴ Letter from President Bill Clinton to the Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform (Sept. 21, 1999), *cited in* Love, *supra* note 48, at 1498 n.54. The President further stated that the pardon had international support from persons such as Archbishop Desmond Tutu, former President Jimmy Carter, and Coretta Scott King. *Id.*

²⁶⁵ Eric Holder stated “the men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. They deserve our respect and gratitude for the work they do.” U.S. Dep’t of Justice, *supra* note 97.

practices were unlawful.”²⁶⁶ It further stated, in determining whether they knew their actions were unlawful, the extent to which they relied on the advice from counsel should be taken into account.²⁶⁷ This act attempted to create an ignorance or mistake of the law defense that assumed that officials implicated in acts of torture were doing so on the understanding that their actions were lawful.

Despite this repudiation of the Office of Legal Counsel (OLC) legal advice under the Obama administration, the assumption of ignorance of the law for past interrogation practices arguably remains in place. For example, in June 2011, Eric Holder restated the position he had held from 2009 that the Justice Department “would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the [OLC] regarding the interrogation of detainees.”²⁶⁸ Weiner has argued this decision not to prosecute may have been influenced by the view that such persons “would have a strong defense to any prosecution under the ‘reasonable reliance’ doctrine.”²⁶⁹ Under this doctrine, an accused can invoke the defense of ignorance of the law where he or she acted

in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.²⁷⁰

At face value, this defense would seem to apply to intelligence personnel who followed the official interpretation provided by the OLC.²⁷¹ However, this does not take into account that torture is prohibited under both domestic and international law. Furthermore, under international criminal law, defendants are not permitted to use the defense of “superior orders” to escape accountability for actions that were “manifestly illegal.”²⁷² Given the severity of acts such as waterboarding, which both President Obama and Eric Holder have

²⁶⁶ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 101-104, 119 Stat. 2680 (2005).

²⁶⁷ *Id.*

²⁶⁸ U.S. Dep’t of Justice, *supra* note 97.

²⁶⁹ Allen S. Weiner, *The Torture Memos and Accountability*, 13 ASIL INSIGHTS (2009).

²⁷⁰ MODEL PENAL CODE § 2.04(3)(b) (rev. ed. 1985).

²⁷¹ *Id.*

²⁷² *See, e.g.*, Rome Statute of the International Criminal Court, art. 32, July 17, 1998, 2187 U.N.T.S. 90.

recognized as torture, such actions could be deemed manifestly illegal, and hence ignorance of the law may not be a sufficient defense. Furthermore, it is established law that “advice of counsel—the ‘my lawyer said it was OK defense’—cannot serve as an excuse for violating the law,” particularly where the legal advice is deliberately designed to provide that excuse.²⁷³

CONCLUSION

This Article has explored why the United States has sought to limit accountability for prisoner abuse, despite longstanding domestic and international prohibitions on torture. Through exploring American approaches to amnesty and pardon within the United States and abroad, it has argued that American governments have an established tradition of using legal clemency to exercise and enhance their power, to assert the legitimacy of the state, to justify their policies, to ensure compliance with laws, and to control public discourse and the shaping of public memory. These findings run counter to theoretical assumptions within international law on amnesties in which the concept of amnesty is more frequently associated with forgetting, rather than memory, and with impunity, rather than encouraging lawful behavior. However, what the exploration of American attitudes has revealed is that such binary divisions may be overly simplistic, and that, instead, the relationship between amnesty and power, the rule of law, and memory is much more complex.

Nations, such as the United States, profit from the stability, consistency, and uniformity offered by legal regulation in their relationships within each other and with their citizens. These benefits have prompted the United States to play a leading role in the development of international criminal law and provide considerable support to the prosecutions of human rights abusers in other countries. However, its adherence to international norms has occurred predominantly when they did not conflict with its policy objectives or strategic interests. Instead, as this Article has argued, where the United States selected to pursue policies that ran counter to obligations under domestic or international law, amnesties were among the tools used to create exceptions to the law.

For many offenses under domestic law, creating such exceptions is unproblematic. Within the United States, the Supreme Court has

²⁷³ Bilder & Vagts, *supra* note 15, at 694.

found that the president's power to grant amnesties and pardons is unlimited, except where it conflicts with the Constitution. At the international level, however, torture has been widely accepted to be "non-derogable," which means that states are required to abide by their obligations to prohibit torture and investigate allegations of state involvement in such crimes even "in time of war, public danger, or other emergency that threatens the [state's] independence or security."²⁷⁴ Furthermore, within certain contexts, systematic and widespread torture can constitute a crime against humanity or war crime.²⁷⁵

The United States has often sought to promote individual criminal responsibility for crimes under international law committed in conflicted or transitional states through its support for international tribunals and rule of law programs. In these contexts, transitional regimes often face severe legal, political, moral, and practical challenges that inhibit their ability or desire to conduct prosecutions. However, states' invocations of these challenges as justifications for non-prosecution can trigger international criticism, including from the United States. In contrast, although at the time coercive interrogations were being conducted the U.S. was engaged in conflicts in Iraq and Afghanistan, as well as the metaphorical "War on Terror," it nonetheless was a consolidated liberal democratic state. As a result, pursuing prosecutions for torture, although politically difficult, did not threaten the stability of the state, nor risk overburdening non-existent or corroded legal systems. The United States therefore did not face equivalent challenges to fragile and under-resourced transitional regimes in pursuing prosecutions. However, similar justifications for non-prosecution were used by emphasizing the risk posed by prosecutions to national unity, the threats to national security, and the need to look forward rather than back.

Experiences of transitional states such as Spain, Argentina, Cambodia, and Bangladesh suggest that the decisions not to prosecute are unlikely to close the door permanently on the policy of prisoner abuse. The reopening of investigations and limited prosecutions in these states, decades after the crimes took place and amnesties had been granted, indicates that even where the executive decides not to prosecute systematic human rights violations, this rarely ends demands for truth and accountability. Instead, over the longer term,

²⁷⁴ American Convention on Human Rights, art. 27, Nov. 22, 1969, OAS Treaty Series No. 36.

²⁷⁵ Rome Statute of the International Criminal Court, *supra* note 272, at arts. 7–8.

the legacy of systematic abuse of prisoners is likely to remain a divisive issue within the United States, and one which may require the adaptation of existing legal and policy responses.

APPENDIX 1
AMERICAN AMNESTY LAWS AND “POLITICAL” PARDONS,
1795–PRESENT²⁷⁶

Date	Issued by	Persons Affected	Nature of Action
July 10, 1795	Washington	Whisky insurrectionists (several hundred)	General pardon to all who agreed to thereafter obey the law
May 21, 1800	Adams	Pennsylvania insurrectionists	Prosecution of participants ended; pardon not extended to those indicted or convicted
Oct. 15, 1807	Jefferson	Deserters	Given full pardon if they surrendered within 4 months
Feb. 7, 1812 Oct. 8, 1812 June 14, 1814	Madison	Deserters	3 proclamations; given full pardon if they surrendered within 4 months
Feb. 6, 1815	Madison	Pirates who fought in War of 1812	Pardoned of all previous acts of piracy for which any suits, indictments or prosecutions were initiated
June 12, 1830	Jackson (War Department)	Deserters	Deserters, with provisions: (1) Those in confinement returned to duty; (2) those at large under sentence of death discharged, never again to be enlisted
Feb. 14, 1862	Lincoln (War Department)	Political prisoners	Paroled
July 17, 1862 (Confiscation Act)	Congress	Rebels	President authorized to extend pardon and amnesty to rebels

²⁷⁶ Amnesties laws enacted between 1795 and 1952 are taken from a list in Gregory Weeks, *Fighting the Enemy Within: Terrorism, the School of the Americas and the Military in Latin America*, 5 HUM. RTS. REV. 12 (2003); see also THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/proclamations.php> (last visited Sept. 9, 2012).

Date	Issued by	Persons Affected	Nature of Action
Mar. 10, 1863	Lincoln	Deserters	Deserters restored to regiments without punishment, except forfeiture of pay during absence
Dec. 8, 1863	Lincoln	Rebels	Full pardon to all implicated in or participating in the "existing rebellion" with exceptions and subject to oath
Feb. 26, 1864	Lincoln (War Department)	Deserters	Deserters' sentences mitigated, some restored to duty
Mar. 26, 1864	Lincoln	Certain rebels	Clarification of Dec. 8, 1863, proclamation
Mar. 3, 1865	Congress	Deserters	Desertion punished by forfeiture of citizenship; President to pardon all who return within 60 days
Mar. 11, 1865	Lincoln	Deserters	Deserters who returned to post in 60 days, as required by Congress
May 29, 1865	Johnson	Certain rebels of Confederate States	Qualified
July 3, 1866	Johnson (War Department)	Deserters	Deserters returned to duty without punishment except forfeiture of pay.
Jan. 21, 1867	Congress		Sec. 13 of Confiscation Act (authority of President to grant pardon and amnesty) repealed
Sept. 7, 1867	Johnson	Rebels	Additional amnesty including all but certain officers of the Confederacy on condition of an oath

Date	Issued by	Persons Affected	Nature of Action
July 4, 1868	Johnson	Rebels	Full pardon to all participants in “the late rebellion” except those indicted for treason or felony
Dec. 25, 1868	Johnson	All rebels of Confederate States	Universal and unconditional
May 23, 1872	Congress	Rebels	General amnesty law re-enfranchised many thousands of former rebels
May 24, 1884	Congress	Rebels	Lifted restrictions on former rebels to allow jury duty and civil office
Jan. 4, 1893	Harrison	Mormons	Liability for polygamy annestied
Sept. 25, 1894	Cleveland	Mormons	Liability for polygamy annestied
Mar. 1896	Congress	Rebels	Lifted restrictions on former rebels to allow appointment to military commissions
June 8, 1898	Congress	Rebels	Universal Amnesty Act removed all disabilities against all former rebels
July 4, 1902	T. Roosevelt	Philippine insurrectionists	Full pardon and amnesty to all who took an oath recognizing “the supreme authority of the United States of America in the Philippine Islands”
June 14, 1917	Wilson		5,000 persons under suspended sentence because of change in law (not war related)
Aug. 21, 1917	Wilson		Clarification of June 14, 1917, proclamation

Date	Issued by	Persons Affected	Nature of Action
Mar. 5, 1919	Wilson	Espionage	Commutation of "unduly harsh" sentences for individuals sentenced for espionage during World War I
Mar. 5, 1924	Coolidge	Deserters	More than 100 deserters - as to loss of citizenship for those deserting since World War I armistice
Dec. 23, 1933	F. Roosevelt	Espionage and deserters	1,500 convicted of having violated espionage or draft laws (World War I) who had completed their sentences
Dec. 24, 1945	Truman		Several thousand ex-convicts who had served in World War II for at least 1 year
Dec. 23, 1947	Truman	Draft evaders	1,523 individual pardons for draft evasion in World War II, based on recommendations of President's Amnesty Board
Dec. 24, 1952	Truman		Ex-convicts who served in Armed Forces not less than 1 year after June 25, 1950
Dec. 24, 1952	Truman	Deserters	All persons convicted for having deserted between Aug. 15, 1945, and June 25, 1950
Sept. 16, 1974	Ford	Deserters	A limited clemency program in 1974 of partial relief for war resisters
Sept. 8, 1974	Ford	President Richard Nixon	Pardon for former President Richard Nixon for "offences against the United States"
Jan. 21, 1977	Carter	Deserters	Unconditional pardon for draft evasion

Date	Issued by	Persons Affected	Nature of Action
Dec. 24, 1992	Bush Sr.	Six Reagan administration members	Pardon for involvement in Iran-Contra Affair
Aug. 11, 1999	Clinton	Insurgents	16 members of Armed Forces of Puerto Rican National Liberation (FLAN) for violent insurgency within the United States

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[T]hrough a curious transposition peculiar to our times—it is innocence that is called upon to justify itself.

Albert Camus¹

INTRODUCTION

The metaphor “intimate enemy” best captures the changing nature of international law vis-à-vis nations. “Intimate enemy” is a useful heuristic device that could be deployed to capture legal concepts of indeterminacy, dialectics, and reformulation within international law. The United Nations Charter of 1945 aims primarily at saving,

succeeding generations from the scourge of war . . . reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.²

Developing countries since then have mostly been backbenchers within the international legal system given their dismal compliance with human rights norms and high protectionism in international trade. Furthermore, since the formation of the United Nations, international organizations have taken form in a myriad of memberships such as the World Trade Organization (WTO), the European Union (EU), the African Union (AU), the Association of South East Asian Nations (ASEAN), African, Caribbean and Pacific Group of States (ACP), Asociación Latinoamericana de Integración, and the South Asian Association for Regional Cooperation. Empirically, the participation of developing and least developed

¹ ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* 4 (Anthony Bower trans., 11th ed. 1978) (1951).

² U.N. Charter preamble.

countries in international legal systems has increased multi-fold. With the rise in the participation of non-Western nations, international law began to change its overall relationship with nations. There is a gradual but unmistakable swap of positions.

This Article calibrates the relationship of international law vis-à-vis developed, developing, and least developed nations by deploying the metaphor of “intimate enemy.” Given the lack of sufficient non-Western academics and institutions in the field of international law, there exists a less than robust view on the relationship of international law with developing and least developed countries. Thus, this Article deploys the metaphor of “intimate enemy” to:

1. Unpack the non-compliance of international law by Western nations
2. To show that there is a growing trend among non-Western nations towards compliance.

International law—so far as it is a set of legal doctrines animated by the spirit of global solidarity, world peace, and Laissez-faire policy—has begun to threaten the old position of developed countries. In a new environment, BRIC (Brazil, Russia, India, China) countries have taken away part of the influence from the developed countries. This fundamentally alters the relationship of countries with international law. This Article seeks to expose the politics of knowledge production and marketing that hides this dynamic in the service of a perception that non-Western countries are the worst violators of international law. The scale of intimate animosity works both ways; it maps the decline in international law’s compliance by Western nations as well as a growth in its compliance by non-Western nations.

Indian Judge Radhabinod Pal’s dissent³ that famously absolved all the Japanese defendants in Tokyo Tribunal of all guilt, according to Kirsten Sellars, was an articulation of a “third-worldist sentiment.”⁴ Indeed it was also the start of an international legal advocacy in postcolonial ink. The first wave of postcolonialism marked the birth of Third World Approaches to International Law (TWAIL). However, having transgressed the limits of conditions and riding the wave of globalization today, many see the Arab Spring and other

³ See generally International Tribunal for the Far East: Dissenting Opinion of Justice Pal (1953).

⁴ Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1085, 1095 (2011).

advancements in developing countries as blowing away postcolonialism.⁵ Nonetheless, the first phase of the discovery of self-worth among developing countries came within a postcolonial vocabulary. In fact, within the legal literature postcolonialism is still alive as a methodology of deconstruction.⁶

Nobel laureate V.S. Naipaul pens about Salim—the hero of his novel, *A Bend in the River*—in postcolonial ink.⁷ Salim’s background is rather international and interesting. His forefathers came from Gujarat—the home province of Gandhi. “My family was Muslim,” declares Salim, and “in our customs and attitudes we were closer to the Hindus of northwestern India. . . . All that I know of our history and the history of the Indian Ocean I have got from books written by Europeans.”⁸

If I say that our Arabs in their time were great adventurers and writers; that our sailors gave the Mediterranean the lateen sail that made the discovery of the Americas possible; that an Indian pilot led Vasco da Gama from East Africa to Calicut; that the very word *cheque* was first used by our Persian merchants—if I say these things it is because I have got them from European⁹ books. [However,] [t]hey formed no part of our knowledge or pride.

And Salim throws the salvo at the politics of knowledge creation rather innocuously: “Without Europeans, I feel, all our past would have been washed away, like the scuff marks of fishermen on the

⁵ See HAMID DABASHI, *THE ARAB SPRING: THE END OF POSTCOLONIALISM* xvii (2012) (“We have now entered the phase of documenting in what particular terms that world is transcending itself, overcoming the mystified consciousness into which it was colonially cast and postcolonially fixated.”). Shashi Tharoor makes similar claims in his book, *PAX INDICA: INDIA AND THE WORLD OF THE TWENTY-FIRST CENTURY* 15 (2012). Post-1991, Tharoor says, “the post-colonial chip has fallen off” India’s shoulder. *Id.*

⁶ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739 (2006) (“The colonial and postcolonial realities of international law have been obscured and misunderstood as a consequence of a persistent and deep seated set of ideas that has structured traditional scholarship on the history and theory of international law. This article seeks to identify these structures, suggesting ways in which they have limited the understanding of the relationship between imperialism and international law.”). Tayyab Mahmud, *Law of Geography and the Geography of Law: A Post-Colonial Mapping*, 3 *WASH. U. JUR. REV.* 64 (2011). James Gathii talks about anti-colonial reconstructions of international legal history. See James Thuo Gathii, *International Law and Eurocentricity*, 9 *EURO. J. INT’L L.* 184, 187 (1998) (“I identify this form of anti-colonial International legal scholarship as strong because of the centrality its analysis places on the claims and role of economic, political, social and cultural superiority/inferiority in the historical relationship of colonized and colonizing countries in the past and the present.”).

⁷ V.S. NAIPAUL, *A BEND IN THE RIVER* 11 (1979).

⁸ *Id.*

⁹ *Id.* at 11–12.

beach outside our town.”¹⁰ Naipaul is very sarcastic in speaking through Salim. At the same time he exposes the problem that international law faces, the problem of the absence of native voices, the enigma of an authentic Other’s worldview. International law today deepens the problem still further; it is about the ability that powerful actors have to co-opt resistance by the Others within international law.¹¹

Unfortunately, it is only through borrowed glasses that one begins to see oneself.¹² The postcolonial international law is one such borrowed glass.¹³ But then this enemy has become intimate; at the base of this intimacy is a live-in relationship between the developing countries and international law after 1945 that—as Bhabha would say—is an offspring of the productivity of colonial power.

In order to understand the productivity of colonial power it is crucial to construct its regime of ‘truth’, not to subject its representations to a normalising judgement. Only then does it become possible to understand the *productive* ambivalence of the object of colonial discourse; that ‘otherness’ which is at once an object of desire and derision, is an articulation of difference contained within the fantasy of origin and identity. What such a reading reveals are the boundaries of colonial discourse and it enables a transgression of these limits from the space of that otherness.¹⁴

Decolonization was succeeded by the birth of a “predominant liberal notion of democracy” that “deals with those excluded, but in a radically different mode: it focuses on their inclusion, as minority voices.”¹⁵ Here all minorities “should be heard, all interests taken into account, the human rights of everyone guaranteed, all ways of life, cultures and practices respected, and so on.”¹⁶ In the process, what

¹⁰ *Id.* at 12.

¹¹ See B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799, 826 (2006) (“Indeed, GAL [Global Administrative Law] can be co-opted by powerful states to their advantage. While this is no reason for neglecting the development of GAL, it is important to understand the limits of this expanding phenomenon. GAL can, in other words, only act as a *very limited tool of resistance and change*. Even for this to happen, certain conditions must be present.”).

¹² See Prabhakar Singh, *The Scandal of Enlightenment and the Birth of Disciplines: Is International Law a Science?*, 12 INT’L CMTY. L. REV. 5 (2010).

¹³ See Frédéric Mégret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’*, in INTERNATIONAL LAW AND ITS OTHERS 265 (Anne Orford ed., 2006).

¹⁴ Homi K. Bhabha, *The Other Question . . . Homi K. Bhabha Considers the Stereotype and Colonial Discourse*, 24 SCREEN 18, 19 (1983).

¹⁵ Slavoj Žižek, *How to Begin from the Beginning*, 57 NEW LEFT REV. 43, 55 (2009).

¹⁶ *Id.*

gets lost is “the position of universality embodied in the excluded. . . . What unites us is that, in contrast to the classic image of proletarians who have ‘nothing to lose but their chains’, we are in danger of losing everything.”¹⁷ While a liberal notion of democracy welcomed decolonization, today neo-colonialism awaits the liberal democratic machine and the demise of postcolonialism. With the new age of the “war on terror” and the rise of nationalism in the Western world, international law is gradually being sidelined in the service of American foreign policy. This rigmarole, this Article emphasizes, could be captured within the epithet of “intimate enemy.” In order to prove this thesis, this Article discusses international humanitarian law, international economic law, and international criminal law. More precisely, this Article will take up “war on terror,” laws of Sovereign Wealth Funds (SWFs), and the law of regional unions such as the EU and the AU to explicate the claims made. Across the board, this Article claims that an intimate animosity is on display.

In what follows, Section I discusses the blatant breach of international law in droning Pakistan. Since the droning is not supported by any UN resolution, it is the United States alone that should offer the legal basis for the exercise. Subsection B, therefore, discusses the role of U.S. courts and scholars vis-à-vis international law. With the background set in this way, Section II discusses the psychological pull of international law, a fact that further stamps the growing affinity of the Third World and international law. Section II focuses on the Third World’s view of international law. Section III discusses the nature of international law vis-à-vis the EU. Section IV discusses the fallacy of the international law of humanitarian intervention using Afghanistan as an example. Western nations are largely interested in the suspension of international law at a time when SWFs are on the rise in non-Western economies. The withdrawal from international law by the Western countries to sabotage SWFs has been brought out in Section V. Section VI discusses the relationship between the AU and international law. Section VII concludes. This Article invites scholars and researchers of international law to use “intimate enemy” as a new hermeneutics to unpack the real relationship of countries and international law.

¹⁷ *Id.*

I

THE HEURISTIC OF “INTIMATE ENEMY”

I borrow the phrase “intimate enemy” from Ashis Nandy.¹⁸ The lens of “intimate enemy” offers an account of the relationship between international law and the Third World as the outcome of what Pahuja and Eslava put as “TWAIL’s characteristic double engagement with the attitudes of both reform and resistance vis-à-vis international law and scholarship.”¹⁹ The aim behind deploying this phrase in this Article is to capture a moment from the international law’s live-in relationship with the Third World. The desire behind importing this new lens of intimate animosity, to borrow Martti Koskenniemi’s words, “is not to write [a] ‘global history’ in which everything is visible—an impossible undertaking—but to diminish the power of blindness,” thereby seeing the future more clearly.²⁰

The evaluation of the Third World’s relationship with international law through the lens of intimate animosity, however, is not a value judgement. It is simply an effort at mapping the shifting realities of our times at a given moment, for instance, in 2012. Essentially a love-hate courtship, the bond between international law and the Third World is in a state of constant flux. This affair is akin to the Stockholm syndrome: after a prolonged exposure to the Western technology of culture, Western education, and Western conceptions of international law, the Third World has begun to sympathize with the erstwhile colonizers. It is this Stockholm syndrome of the Third World that has procreated the enigma of intimate animosity. Arguably, international law was the Third World’s enemy because, to deploy TWAIL’s central argument, it was used to justify colonial violence, slavery, and to acquire native land in all of Asia, Africa, and Latin America.²¹

“It is now time,” Nandy wrote some two decades ago, “to turn to the second form of colonization, the one that at least six generations of the Third World have learnt to view as a prerequisite for their liberation.”²² Here lies the pull for intimate animosity of international

¹⁸ ASHIS NANDY, *THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM* 72 (1983).

¹⁹ Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 *TRADE L. & DEV.* 103, 103 (2011).

²⁰ Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 *RECHTSGESCHICHTE* 152, 176 (2011).

²¹ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT’L L.J.* 5 (1999).

²² NANDY, *supra* note 18, at xi.

law for the Third World. The lens of intimate animosity, when applied to international law, helps us re-imagine the modern West from a “geographical and temporal entity to a psychological category; in structures and minds.”²³

Europeans, Camus once remarked, “have preferred the power that apes greatness . . . whom [European] school history books, in an incomparable vulgarity of soul, teach us to admire.”²⁴ Books are agents of knowledge, and the power that such books wield on the minds of people is all too well known.²⁵ Colonization cemented the presumption that knowledge only flows eastwards. However, through corrupt science and psychopathic technology, the West has purposefully dissipated only information eastward. For instance, during the colonial rule in India, the British introduced a new system of education to create clerical support. It is doubtful that this system even aimed at arming Indians with the knowledge of science and technology to create scientists. By the time of decolonization, international law had successfully seduced the Third World with concepts like sovereignty. About sovereignty and the primacy of international law, Hans Kelsen says that the theoretical dissolution of the dogma of sovereignty is one of the most substantial achievements of his Pure Theory of Law.²⁶

By the 1970s, in the New International Economic Order, oil rich nations furthered their resource nationalism through sovereignty. Notably, however, with its intimate animosity, the Third World also runs the risk of copying the West with all its lacunas. Somehow, international law functions as a software that facilitates this imitation. TWAIL then becomes an exercise in separating knowledge from information and affirming that knowledge could also flow westward. In effect, TWAIL, apart from exposing some of the hypocrisies of international law, calls for a cross-fertilization of knowledge, ideas, and solutions for global problems.

²³ *Id.*

²⁴ Albert Camus, *Helen's Exile*, in LYRICAL AND CRITICAL ESSAYS 148, 150 (Philip Thody ed., Ellen Conroy Kennedy trans., 1967).

²⁵ See Aaron A. Dhir, *The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47 (2009), for a perspective.

²⁶ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 124 (Bonnie Litschewski Paulsen & Stanley L. Paulsen trans., Clarendon Press 2002) (1934).

A. Droning in International Law

In September 2012, Stanford Law School and NYU School of Law came up with a joint report titled *Living Under Drones*.²⁷ The report deals primarily with death, injury, and trauma to civilians from U.S. droning in Pakistan.²⁸ It is the possibility of losing everything—for example, in the war on terror—that begs attention to the nature and effect of international law’s displacement of developing countries such as Pakistan. Droning is a question of *jus ad bellum*, the body of law concerning the recourse of force between two or more nations.²⁹ In any case, civilians must be protected within *jus ad bellum*.³⁰

The legality of droning depends on whether Pakistan has consented to the strikes or whether the United States is lawfully acting in self-defense.³¹ Paradoxically, while the liberal texts and documents of international law, including the UN Charter, seek to work towards the inclusion and protection of minority voices,³² in droning civilians, the United States has been violating those minorities within a foreign state whose consent was not sought.³³ Pakistan’s parliament has long

²⁷ INT’L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW), *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN* (2012) [hereinafter *LIVING UNDER DRONES*].

²⁸ *Id.*

²⁹ See Simon Chesterman, *Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond*, 37 N.Y.U. J. INT’L L. & POL. 281 (2005); Brian L. Job, *Confronting Terrorism: Dilemmas of Principle and Practice Regarding Sovereignty*, in *RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA?* 119, 122 (Trudy Jacobsen, Charles Sampford & Ramesh Thakur eds., 2008).

³⁰ “If the goal of the laws of war is to protect all individuals in armed conflict, can one ever be on the ‘wrong’ side of the laws of war? The answer to that question from many international humanitarian lawyers is an emphatic ‘no.’” Mégret, *supra* note 13, at 265.

³¹ *LIVING UNDER DRONES*, *supra* note 27, at 103, 105, 106; 3A C.J.S. *Aliens* § 1133 (2012) (“Designation of foreign terrorist organization—Judicial review”); 74 Am. Jur. 2d *Terrorism* § 8 (2012).

³² A very seasoned scholar and lawyer, Michael Riesman clearly admits this: “[E]xpectations with respect to the lawfulness of current or projected actions in the contemporary international political system are not necessarily congruent with the stuff with which lawyers ordinarily work, the formal texts of international law.” W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 59, 59–60 (Michael N. Schmitt ed., 2009); see also Yousef T. Jabareen, *Toward Participatory Equality: Protecting Minority Rights Under International Law*, 41 ISR. L. REV. 635 (2008); see generally United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), available at <http://www.un.org/documents/ga/res/47/a47r135.htm>.

³³ Piotr Balcerowicz, *Afghanistan at the Cross-Roads*, 11/12 DIALOGUE & UNIVERSALISM 97, 98 (2001) (“The call to war against world terrorism should not mean

called for the end of droning.³⁴ Clearly there is no state consent then.³⁵ However, droning could still be legal if the United States is found to have acted purely in self-defense as UN Charter 51 stipulates.³⁶ However, a neutral evaluation of pure self-defense is tough to have, given the pro-government bias of U.S. courts as seen in a streak of new cases.³⁷ Also such claims of self-defense are not only arbitrary, but they also constitute an invitation to extraterritorial application of one sovereign's laws over another. No doubt, the war on terror has not only stretched the very idea of self-defense—a justification that

common responsibility of the whole Afghan nation. Would a Parisian during the World War II unhesitatingly approve of American carpet bombing of Paris and Rheims, undertaken in order to expel the Nazis or their Vichy collaborationists under Marshal Pétain? Any civilised European would have shivered with a twinge of resentment at such an action, because the means would have been in stark disproportion to the ends, because the individual lives of civil inhabitants would have been considered too costly, because alternative methods could have been envisaged that would lead to ultimate victory and, lastly, because the cities are considered world cultural heritage.”); *see also* Steven R. Ratner, *Jus Ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905 (2002).

³⁴ Declan Walsh, *Pakistani Parliament Demands End to U.S. Drone Strikes*, N.Y. TIMES, Mar. 21, 2012, at A8.

³⁵ The *Living Under Drones* report says:

Some analysts, citing information released by *Wikileaks* maintain that Pakistan had, at some prior point, tacitly supported drone strikes. It is not known whether Pakistan continues to consent privately to the program today. Repeated public statements by Pakistani officials, which intensified in 2012—declaring that US strikes are illegal, counter-productive, and violate the country’s sovereignty—clearly cast doubt on whether Pakistan consents to ongoing operations.

LIVING UNDER DRONES, *supra* note 27, at 106.

³⁶ *Id.* at 103, 106.

³⁷ *See, e.g., Designation of Foreign Terrorist Organization*, 13A Fed. Proc., L. Ed. § 36:511 (Sept. 2012); Request for Comments on Effects of Foreign Policy-Based Export Controls, 52 Fed. Reg. 42663-01 (proposed Nov. 6 1987). Some of the cases under Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-11, are: *Acree v. Republic of Iraq*, 125 S. Ct. 1928 (2005); *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009); *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009); *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Republic of Sudan v. Rux*, 549 U.S. 1208 (2007); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). The spate of cases after the 9/11 incident, such as *Khalid v. Bush*, have upheld the President’s authority to capture and detain persons outside of Afghanistan.” *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.C. Cir. 2005). Invoking the separation of powers doctrine, the court said that it is impermissible to inquire into conditions of detention under international norms given the President’s authorization from Congress to detain combatants. *Id.* The U.S. Constitution was read as ossifying any cognizable constitutional rights of non-resident aliens captured and detained outside the United States in the war on terror. *Id. U.S. v. Hamdan*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011) (holding that military commissions have subject matter jurisdiction); *see also* *Al-Bihani v. Obama*, 619 F. 3d 1 (D.C. Cir. 2010); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73 (2006); John R. Kennel, *Exceptions to Immunity*, 48 C.J.S. International Law § 45.

exists by virtue of UN Article 51—beyond anyone's imagination, it has also induced a breach of the principles of natural justice.³⁸ The United States not only defines its reasons of self-defense, but also interprets all tacit talks to the military government of Musharraf after 9/11 and current ductile Pakistani government as a form of legal consent within international law.³⁹ The United States thus stands in the grave danger of not only undermining democracy as a concept in Pakistan, it also insults the will of the civilians in a foreign country, who often become victims of droning. Either from outside or from within, it is international law that is put to rest.

Today, it is the innocence, alienation, and ignorance of women, men, and children at the Afghanistan-Pakistan boarder that is often called upon to justify itself in a situation where the international community, through NATO, has ensured a rainfall of bombs.⁴⁰ Very ironically, while the war on terror in Afghanistan, which has subsequently leaped into Pakistan, has identified its most vulnerable victims—women and children—a senior advisor to Obama blogs about the President's release of "the first ever U.S. National Action Plan on Women, Peace, and Security."⁴¹ The White House has not only identified terrorists—a prerequisite of so-called "signature" droning of locations in Pakistan⁴²—in the form of the U.S. National Action Plan on Women, Peace and Security, it dons the garb of a savior of the women and children in these two countries.⁴³ In his

³⁸ Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 42 (2002); LIVING UNDER DRONES, *supra* note 28, at 103.

³⁹ LIVING UNDER DRONES, *supra* note 27, at 106.

⁴⁰ J. Ann Tickner, *Feminist Perspectives on 9/11*, 3 INT'L STUD. PERSP. 333, 333 (2002).

The author "demonstrate[s] how gendered discourses are used in this [Afghan war] and other conflict situations to reinforce mutual hostilities, [and] suggest[s] that men's association with war-fighting and national security serves to reinforce their legitimacy in world politics while it acts to create barriers for women. Using the framework of a post-9/11 world, [the author] offer[s] some alternative models of masculinity and some cultural representations less dependent on the subordination of women.

⁴¹ Valerie Jarrett, *Progress Toward a World Without Violence Against Women and Girls*, WHITE HOUSE BLOG (Aug. 10, 2012, 5:06 PM), <http://www.whitehouse.gov/blog/2012/08/10/progress-toward-world-without-violence-against-women-and-girls>.

⁴² David Zucchino, *Drone Strikes in Pakistan Have Killed Many Civilians, Study Says*, L.A. TIMES (Sept. 24, 2012), <http://articles.latimes.com/2012/sep/24/world/la-fg-drone-study-20120925>.

⁴³ Wazhma Frogh, *Is Afghanistan the Worst Place for Women?*, GUARDIAN (London), Jun. 16 2011, <http://www.guardian.co.uk/lifeandstyle/2011/jun/16/afghanistan-worst-for-women> ("What the world forgets is that Afghanistan has been at war, civil war, conflict

Savages, Victims, and Saviors, Makau Mutua attacks precisely such attitudes and politics of the United States.⁴⁴ Mutua's "savages-victims-saviors" construction enlightens the larger ongoing politics of human rights. For instance, it illuminates the role of the Nobel Peace Prize and what its committee thinks are the victims to not only identify, but also to manufacture and, eventually, award the saviors.

In her Nobel Peace Lecture, Aung San Suu Kyi commented: "When the Nobel Committee awarded the Peace Prize to me they were recognizing that the oppressed and the isolated in Burma were also a part of the world"⁴⁵ Actually, she identifies all three: the savages, the victims, and the savior. It is because of her popularity in the West after her Nobel Prize win that she is being critiqued for her silence on grave human rights violations of Rohingya Muslim minority in Burma.⁴⁶ The Rohingya are a stateless and oppressed people, and the government of Burma thinks they have no place in Myanmar and must leave the country.⁴⁷ As Suu Kyi's National League for Democracy looks ahead to elections in 2015, analysts feel that expressing support for the Muslim minority would be politically

for so many years, almost all my life, and that is what has created chaos for women and shrunk women's rights.").

⁴⁴ Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001). Mutua evaluates the human rights project as a damning three-dimensional metaphor that exposes multiple complexes. The grand narrative of human rights, for him, contains a subtext which depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other. Mutua's savages-victims-saviors construction lays bare some of the hypocrisies of the human rights project questioning the universality and cultural neutrality of the human rights project.

⁴⁵ Her speech was remarkable:

So for me receiving the Nobel Peace Prize means personally extending my concerns for democracy and human rights beyond national borders. The Nobel Peace Prize opened up a door in my heart. . . . We are fortunate to be living in an age when social welfare and humanitarian assistance are recognized not only as desirable but necessary. . . . When the Nobel Committee chose to honour me, the road I had chosen of my own free will became a less lonely path to follow.

Aung San Suu Kyi, Nobel Lecture in Oslo City Hall (June 16, 2012), available at www.nobelprize.org/nobel_prizes/peace/laureates/1991/kyi-lecture_en.html.

⁴⁶ Minorities at Risk Project, *Chronology for Rohingya (Arakanese) in Burma* (2004), <http://www.unhcr.org/refworld/docid/469f3872c.html>; DPA, *About 75,000 Rohingyas in Myanmar Camps: Refugee International*, THE HINDU (Sept. 29, 2012), <http://www.thehindu.com/news/international/about-75000-rohingyas-in-myanmar-camps-refugee-international/article3948606.ece>.

⁴⁷ Thomas Fuller, *Internet Unshackled, Burmese Aim Venom at Ethnic Minority*, N.Y. TIMES, June 15, 2012, at A4.

calamitous.⁴⁸ Ironically, the same Nobel Peace Prize was awarded to Obama soon after he became the U.S. President on the expectations that the Peace Prize would remind him of his duty as the savior.⁴⁹ Just like Suu Kyi’s election in 2015, Obama’s second term in the White House depends upon feeding uncritical nationalism and Islamophobia during the war on terror.⁵⁰

B. American Scholarship and International Law Within U.S. Courts

In the war on terror, the NATO-led assault has chosen the same social and political location to play the savior. It is in this connection that Salim—Naipaul’s mouthpiece in his postcolonial *A Bend in the River*—talks about the civil violence in Africa: “[I]t was extraordinary to me that some of the newspapers could have found good words for the butchery on the coast. . . . But people are like that about places in which they aren’t really interested and where they don’t have to live.”⁵¹ Clearly, Afghanistan is one such place where humanitarian-minded Westerners either don’t live or don’t have to live.⁵² Yet it is this not-so-liked place that has become the goldmine

⁴⁸ Alex Spillius, *Aung San Suu Kyi Facing Backlash for Silence on Abuses*, TELEGRAPH (Eng.) (July 26 2012), http://www.telegraph.co.uk/news/worldnews/asia/burma_myanmar/9430518/Aung-San-Suu-Kyi-facing-backlash-for-silence-on-abuses.html.

⁴⁹ Though in an apologetic manner, Obama’s Nobel Peace Prize Lecture nonetheless talks of war:

Still, we are at war, and I’m responsible for the deployment of thousands of young Americans to battle in a distant land. Some will kill, and some will be killed. . . . Now these questions are not new. War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease—the manner in which tribes and then civilizations sought power and settled their differences.

Barack H. Obama, Nobel Lecture in Oslo City Hall (Dec. 10, 2009), available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama_lecture_en.html.

⁵⁰ Ron Faucheux, *Obama’s Second-Term Blues*, WASH. TIMES, Sept. 20, 2012, <http://www.washingtontimes.com/news/2012/sep/20/obamas-second-term-blues/>.

⁵¹ *Id.*

⁵² Wazhma Frogh, a gender and development specialist and human rights activist from Kabul, says that peace in Afghanistan is only possible through campaigning at the grassroots: “[P]eople have to own it.” But NATO’s policy is not to interfere in matters considered “cultural.” Its failure to acknowledge the rights of women is detrimental to building a stable society in Afghanistan. Pennie Quinton, *Special Report: Why World Peace Needs Women*, CEASEFIRE, Jan. 3, 2012, <http://ceasefiremagazine.co.uk/if-dreams-dont-scare-big-enough/>. For a legal discussion, see John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 79 (Michael N. Schmitt ed., 2009).

of victims to ensure the production of saviors.⁵³ The reality, in the words of Tariq Ali, has been the same all the while:

There is widespread fury among Afghans at the number of civilian casualties, many of them children. There have been numerous incidents of rape and rough treatment of women by ISAF [International Security Assistance Force] soldiers, as well as indiscriminate bombing of villages and house-to-house search-and-arrest missions. The behaviour of the foreign mercenaries backing up the NATO forces is just as bad. Even sympathetic observers admit that ‘their alcohol consumption and patronage of a growing number of brothels in Kabul . . . is arousing public anger and resentment.’ To this could be added the deaths by torture at the US-run Bagram prison and the resuscitation of a Soviet-era security law under which detainees are being sentenced to 20-year jail terms on the basis of summary allegations by US military authorities. All this creates a thirst⁵⁴ for dignity that can only be assuaged by genuine independence.

As a consequence, United States courts have to deal with a flurry of cases within its Alien Torts Statute.⁵⁵ Since the United States Congress “has yet to state clearly whether tort claims alleging torture in U.S. custody should be allowed to proceed,” in *Ali v. Rumsfeld*,⁵⁶ the D.C. Circuit could very well have “arrived at a contrary holding that would have been more likely to elicit congressional input.”⁵⁷ But it did not. The court took a textualist approach. Notably, American constitutional scholarship has recently been wielding its pen to arrest international law.⁵⁸ Reckoning from the cases cited by scholars who favor the United States President’s and Congress’s unchecked powers in trumping international law, and the scholars cited in the judgments of U.S. courts in cases of detainees—usually foreign nationals—

⁵³ My “production of saviors” idea comes from reading Baxi. See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 96–114 (2002); see also Thomas Poole, *Book Review*, 2 *HUM. RTS. L. REV.* 163 (2002) (reviewing Baxi).

⁵⁴ Tariq Ali, *Afghanistan: Mirage of The Good War*, 50 *NEW LEFT REV.* 5, 15 (2008) (footnote omitted).

⁵⁵ 28 U.S.C. § 1350 (2006).

⁵⁶ Recent Case, *D.C. Circuit Holds that U.S. Officials are Immune from Alien Tort Statute Claims*, 125 *HARV. L. REV.* 1080, 1080 (2012) (discussing *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)).

⁵⁷ *Id.*

⁵⁸ See Prabhakar Singh, *Why Wield Constitutions to Arrest International Law*, 2010 *ASIAN Y.B. INT’L L.* 16 (forthcoming 2012), available at <http://ssrn.com/abstract=1719363>.

arrested in relation to the war on terror, there is a strong symbiotic cross feeding to sustain each other.⁵⁹

Not only do the U.S. Congress, the courts, and some academicians today stand together to silence the voice of human rights and trump international law in the war on terror, they have also eliminated the doubts that shrouded the theorization of the world within the "clash of civilizations" epithet.⁶⁰ A better example of a growing uncritical unity between academia, politicians, and courts is tough to find in any other country today.⁶¹ In the United States, even sovereign immunity has a more defined statutory basis under the Foreign Sovereign Immunities Act against a blanket immunity that international law mandates.⁶² *Yousuf v. Samantar*⁶³ epitomizes a gradual but unmistakable unwillingness of the U.S. Supreme Court to engage with or even deliberately ignore international legal rules, materials, and cases, which it would ordinarily have.

⁵⁹ For example, most of the U.S. court judgments on the detention of detainees have cited Bradley, Goldsmith, Posner and the like. *See, e.g.,* Al-Bihani v. Obama, 619 F. 3d 1 (D.C. Cir. 2010); al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). *See also* Curtis A. Bradley, *Enforcing the Avena Decision in U.S. Courts*, 30 HARV. J.L. & PUB. POL'Y 119 (2006).

⁶⁰ *See* the controversial thesis of Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

⁶¹ John Balzano, *A Hidden Compromise: Qualified Immunity in Suits Against Foreign Governmental Officials*, 13 OR. REV. INT'L L. 71, 117 (2011). "The *Samantar* decision [of the U.S. Court] ended the circuit split over the Foreign Sovereign Immunities Act's coverage of individual officials, and has left the determination of foreign official immunity under the common law in a state of doubt. . . . It does not discuss the extensive amounts of U.S. and international cases potentially related to foreign official immunity that the parties cited in their briefs; indeed, it does not mention a single international law decision." *Id.* at 97.

⁶² *See* 28 U.S.C.A. § 1605(a)(7) (repealed 2008); *see also* Balzano, *supra* note 63, at 77. In 1996, Congress amended 28 U.S.C.A. § 1605(a), in part by adding thereto a new subparagraph (7), which created such an exception with respect to certain suits in which money damages are sought by or on behalf of a U.S. national for certain acts of state-sponsored terrorism. In *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 105–06 (D.C. Cir. 2000), this amendment was applied. It dealt with a wrongful death action against Iran and its intelligence service brought by the brother of an Iranian-born U.S. national who was assassinated by the Iranian intelligence service. The court found that the murder of the decedent constituted an "extra-judicial killing" under the statute. *See* Michael A. Rosenhouse, *State-Sponsored Terrorism Exception to Immunity of Foreign States and their Property Under Foreign Sovereign Immunities Act of 1976*, 28 U.S.C.A. § 1605(a)(7), 176 A.L.R. Fed. 1 (2002).

⁶³ *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *rev'd*, 130 S. Ct. 2278 (2010). "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the [District] Court." *Yousuf v. Samantar*, No. 1:04CV1360, 2011 WL 7445583, at *1, *1 (E.D.Va. Feb. 15, 2011).

C. Comparing American and Indian Positions on the War on Terror

The Western collective, this Article argues, is withdrawing from different types of international law (e.g., the UN and the WTO law) gradually. For instance, the United States wants a diplomatic settlement of anti-dumping cases after a series of losses,⁶⁴ and the EU is happy to derogate from Article 103 of the UN Charter if it jeopardizes EU constitutional principles.⁶⁵ In what Ben Chigara calls the short-circuiting of international law, as far as laws of war are concerned, powerful states “breach the foremost rules of international law and then claim that they were merely inaugurating new practice in aid of a new nascent norm of customary international law.”⁶⁶ Chigara analyzes the 2003 U.S.-led invasion of Iraq against the UN’s prohibition on the use of force.⁶⁷ In an attempt to create an exception to the prohibition on the use of force, the United States claimed that they were merely actualizing the new doctrine of pre-emption.⁶⁸ Thus, a custom’s potential to short-circuit international law is actualized “when states breach norms *jus cogens* and then plead new State practice.”⁶⁹ Furthermore, a significant majority of American constitutional scholarship not only declares the project of international law unconstitutional law, but it is also breaking new ground in how to withdraw from treaty and customary international law.⁷⁰

The courts in developing countries, on the contrary, are groping toward international law in piecemeal ways. For instance, in 2010, the Indian Supreme Court held that India does not have any comprehensive legislation to generally define natural resources and a framework for their protection. Basing its opinion on international

⁶⁴ Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL INSIGHTS (May 4, 2006), <http://www.asil.org/insights060504.cfm>.

⁶⁵ Cases C-402/05 P & C-415/05 P, *Kadi v. Council of the Eur. Union*, Judgment of The Court (Grand Chamber) Sept. 3, 2008.

⁶⁶ Ben Chigara, *Short-Circuiting International Law*, 8 OR. REV. INT’L L. 191, 191 (2006) (italics omitted).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1 (2010), for a discussion on this issue. See also Anthea Roberts, *Who Killed Article 38(1)(B)? A Reply to Bradley and Gulati*, 21 DUKE J. COMP. & INT’L L. 173 (2010) (“[T]he withdrawal proposal is premised on an analogy between treaties and custom given the apparent anomaly that withdrawal is sometimes permitted from the former but never from the latter.”).

law in the absence of a specific domestic law, the Indian Supreme Court said, "it rests upon the . . . principle of permanent sovereignty (of peoples and nations) over (their) natural resources."⁷¹ In a loosely worded judgment, the Indian Court confessed the Indian intellectual property law to "be an exact copy of GATT and WTO."⁷² Thus a genre of textual monism is already taking root in some of the fast-growing developing countries.

As compared to the existing robust debate in Europe and America about their less-than-robust respect for international law, one is then tempted to compare the American and European approach to how Indian police captured Kasab, the terrorist who conducted the infamous "26/11" attacks in Mumbai, and chose to try him before district trial court under Indian criminal law for "murder, conspiracy and of waging war against the nation."⁷³ From the time of his capture, there was an irrefutable case under the Indian Constitution for Kasab's right to legal assistance and the Indian state's duty to provide it. Kasab's case is important to distinguish between the Indian state and the Indian judiciary. The Indian State (bureaucracy) is dualist.⁷⁴ However, since the 1980s, the Indian judiciary, which has the power of judicial review, is gradually moving to monism, as exhibited in over a dozen judgments. Overall, India is moving toward monism as far as terrorism and international human rights are concerned, though much more remains to be done. Thus, between Osama Bin Laden, Kadi, and Kasab, three jurisdictions' real respect for the rule of international law is exposed.

Now this might be counterintuitive to some. Nonetheless, this is the background for this Article; there is a kind of intimacy mixed with animosity that animates the lives of third worlders vis-à-vis the regime of international law. This Article invites scholars and researchers of international law to use "intimate enemy" as a new hermeneutics to unpack the real relationship of countries and international law.

⁷¹ Centre for Public Interest Litigation v. Union of India, (2012) 3 S.C.C. 1, at ¶ 64 (India).

⁷² Tata Consultancy Services v. State of Andhra Pradesh, (2005) 1 S.C.C. 308, at ¶ 45 (India).

⁷³ *26/11 Mumbai Attack: Kasab's Trial*, NDTV (India) (May 3, 2010, 3:38 PM), <http://www.ndtv.com/article/india/26-11-mumbai-attack-kasab-s-trial-22806>. The *New York Times* reported: "Even by the standards of terrorism in India, which has suffered a rising number of attacks this year, the assaults were particularly brazen in scale and execution." Somini Sengupta, *At Least 100 Dead in India Terror Attacks*, N.Y. TIMES, Nov. 27, 2008, at A1.

⁷⁴ See Jolly George Verghese v. Bank of Cochin, A.I.R. 1980 S.C. 470 (India).

II

THE WORLD WITHIN AN INTERNATIONAL LEGAL VOCABULARY

Albeit a law of easy virtues, this Article contends that, today, international law has become an “intimate enemy” to the Third World. However, one cannot jump to this conclusion without telling the complete story. Within TWAIL, international law has been perceived as an enemy of the Third World because of, as Anghie observes, international law’s colonial origin.⁷⁵ Therefore, this essay will first discuss the nature of the relationship between developing countries and international law after 1945, the year the UN was established.⁷⁶

A comparison between the attitudes of international law and its officials towards the EU and the AU brings out the inherent bias of international law. International law has indeed been promoted as a civilizing force.⁷⁷ Because of the abundance of resources, funded projects, and first movers’ advantage, European lawyers have been able to defend the EU’s breaches of international law. The United States clearly admits its breaches of international law as an example of exceptionalism.⁷⁸ The American exceptionalism to human rights is also not hidden.⁷⁹ However, Bradford and Posner reject the idea of American exceptionalism:

⁷⁵ See Anghie, *supra* note 6, at 739.

⁷⁶ The name ‘United Nations,’ coined by United States President Franklin D. Roosevelt was first used in the Declaration by United Nations of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers. . . . In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August-October 1944.

See *History of United Nations*, UN, <http://www.un.org/en/aboutun/history/> (last visited Nov. 19, 2012). Representatives of the fifty countries signed the Charter on June 26, 1945.

Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories.

Id.; see also J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 119 (2011).

⁷⁷ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, 130 (2001), for an excellent exposition.

⁷⁸ See Nadine Strossen, *American Exceptionalism, The War on Terror, and the Rule of Law in the Islamic World*, 32 *HARV. J.L. & PUB. POL’Y* 495 (2009).

⁷⁹ “The idea that the United States is uniquely virtuous may be comforting to Americans. Too bad it’s not true.” Stephen M. Walt, *The Myth of American*

A trope of international law scholarship is that the United States is an "exceptionalist" nation, one that takes a distinctive (frequently hostile, unilateralist, or hypocritical) stance toward international law. However, all major powers are similarly "exceptionalist," in the sense that they take distinctive approaches to international law that reflect their values and interests. We illustrate these arguments with discussions of China, the European Union, and the United States. Charges of international-law exceptionalism betray an undefended assumption that one particular view of international law (for scholars, usually the European view) is universally valid.⁸⁰

Prior to expressing such a view, Goldsmith and Posner have said: "But international law as such has no special importance. . . . [A]s in other settings, Americans and Europeans have more in common than meets the eye."⁸¹ One should not forget that post-1945, international law has always existed within the spirit of solidarity, and by flaunting the breaches of international law, first by the United States and the EU, and then by China, Goldsmith, Posner, and Bradford are only self-excusing breaches of international law by the United States. They seem to advocate that eventually all nations live in a self-contained regime and, depending upon the military might and diplomatic skills of the nations, international law is trimmed or allowed to flower. Basically, Posner and Goldsmith interpret international law in a positive fashion, as law between two or more nations, and not as a universal construct.

In the war on terror, foreign detainees have received little sympathy from American constitutionalists (as well as the American courts), even though some claim that "the use of international law in constitutional interpretation [in American Courts], as one factor among others, is highly traditional and eminently proper."⁸² Dennis Jacobs, an American judge, thinks: "International law is not all about

Exceptionalism, FOREIGN POL'Y, Nov. 2011, http://www.foreignpolicy.com/articles/2011/10/11/the_myth_of_american_exceptionalism. See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147 (Michael Ignatieff ed., 2005).

⁸⁰ Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 3 (2011).

⁸¹ Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WALL ST. J. (Nov. 25, 2008), <http://online.wsj.com/article/SB122757164701554711.html>.

⁸² Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177, 177 (2006) ("Some international law is too important to the place of the United States in the world for our constitutional jurisprudence to ignore; some international law provides useful functional or normative insights on which constitutional adjudication can draw."); see also William H. Pryor Jr., *Foreign And International Law Sources in Domestic Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 173 (2006).

human rights, conflict, and the overlaying of international consensus on domestic law.”⁸³

A set of nationalist American lawyers interprets the Presidential war powers as arresting international law unconditionally.⁸⁴ Rabkin, for instance, opines that “American self-defense should not be too distracted by international law.”⁸⁵ Also, the “[United States] Supreme Court has made it clear that both the President and Congress can break free of customary international law by simple decree.”⁸⁶ Rabkin challenges the critics’ underlying premise that “international law has the same sort of claim on [the United States] government as domestic law and that war measures abroad can accordingly be judged in the same terms as police abuses at home.”⁸⁷ A series of United States Supreme Court cases has also supported this position, more so during the war on terror.⁸⁸ United States Presidents have stretched or violated international law at significant moments in American history, and international law has served as a political rallying point against the anti-terrorism policies of the Bush administration regarding the use of force, detention, interrogation, and military trial.⁸⁹

What is worrying in such a development is the dry realism that casts off the ideal kernel of international law, the celebrated value of the equality of mankind trumped by the calibrated approach of the supply and demand and the production and consumption of rules.

A. International Law as a Psychological Pull

The romance between international law and the Third World began with the colonizers’ cultural identification of the non-West as heathen

⁸³ Dennis Jacobs, *What Is An International Rule of Law?*, 30 HARV. J.L. & PUB. POL’Y 3, 3 (2006).

⁸⁴ See Michael S. Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); see also Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL’Y 57 (2009).

⁸⁵ Jeremy Rabkin, *American Self Defense Shouldn’t be Too Distracted by International Law*, HARV. J.L. & PUB. POL’Y 31 (2006).

⁸⁶ Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL’Y 65, 66 (2006); see also Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL’Y 141 (2006).

⁸⁷ Rabkin, *supra* note 85, at 31.

⁸⁸ See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (holding that the commission properly exercised jurisdiction over defendant); see also 78 Am. Jur. 2d War § 32 (2012).

⁸⁹ See Delahunty & Yoo, *supra* note 37.

and barbaric.⁹⁰ According to Nandy, "Colonialism replaced the normal ethnocentric stereotype of the inscrutable Oriental by the pathological stereotype of the strange, primal but predictable Oriental—religious but superstitious, clever but devious, chaotically violent but effeminately cowardly."⁹¹

Writing in 1951, R.D. Kollewijn provides evidence to Nandy's insights. He writes that, among all French and German colonizers the trend was towards non-recognition of the non-Western legal systems.⁹² During the seventeenth century, in the case of *Blankard v. Galdy*, Justice Coke's sentence was mitigated as follows: "Where it is said in Calvin's Case, that the laws of a conquered (non-Christian) country, do immediately cease, that may be true of laws for religion, but it seems otherwise for laws touching the government."⁹³ In *Campbell v. Hall*,⁹⁴ Lord Mansfield expressed his displeasure to the distinction made between "a christian and a heathen kingdom"⁹⁵ that Lord Coke had made earlier in *Calvin's Case*.⁹⁶ "Don't quote this distinction," Lord Mansfield interrupts the plaintiff's counsel in *Campbell v Hall*, "for the honour of my Lord Coke."⁹⁷

In that sense, modern colonialism, the vehicle of international law, "won its great victories not so much through its military and technological prowess as through its ability to create secular hierarchies incompatible with the traditional order."⁹⁸ Thus, international law came to the colonized world, such as India, with a

⁹⁰ See Prabhakar Singh, *From 'Narcissistic' Positive International Law to 'Universal' Natural International Law: The Dialectics of 'Absentee Colonialism'*, 16 AFR. J. INT'L & COMP. L. 56, 62 (2008).

⁹¹ NANDY, *supra* note 18, at 72.

⁹² See R.D. Kollewijn, *Conflicts of Western and Non-Western Law*, 4 INT'L L.Q. 307 (1951), for an early essay on this issue. "Without scrutiny of any sort, the laws of a non-Christian State are estimated to be contrary to Christian principles and subject, therefore, to wholesale condemnation." *Id.* at 310.

A modern example of the conception that non-Western law is no law, is given by German colonial theory. When the imperial German Government, in the wake of private merchants and the trading companies, cast covetous eyes upon African territory, extensive estates were already found there, some simply occupied by the German pioneers, others obtained from African chiefs in exchange for cheap circulating mediums.

Id.

⁹³ *Id.* at 310.

⁹⁴ *Campbell v. Hall*, (1774) 98 ENG. REP. 848 (K.B.).

⁹⁵ *Calvin's Case*, (1608) 77 ENG. REP. 377.

⁹⁶ *Id.*

⁹⁷ *Campbell*, 98 ENG. REP. 848.

⁹⁸ NANDY, *supra* note 18, at ix.

promise of emancipation from the local yolk of caste discriminations and other traditional forms of exploitations.⁹⁹ To a very great extent, certain local social evils were uprooted as the British introduced their legal system in India. This promise of a new order ensnared the Third World though a “psychological pull.”¹⁰⁰

Since then, an internal bifurcation characterizes the lives of Third World states. International law, arguably, was the secular wedge that was put between the Third World and its traditions to allow developmentalism to enter.¹⁰¹ Here the insightful findings of M. Sornarajah are remarkably useful; in a purely legal critique of international law, Sornarajah establishes that international law is often kidnapped by powerful nations, among other things, through academic writings, which sometimes even trump the sovereign will of weaker nations.¹⁰² Talking about the state of international investment law, he says:

A series of arbitral awards, followed by confirmatory writings of the so called “highly qualified publicists”, all of them coming from the so called “civilised legal systems”, held that . . . a contract was akin to a treaty in that responsibility of the state followed the event of the breach of the contract and failure to amend the breach. The use of awards of tribunals and the writings of “highly qualified publicists”, often mercenary participants in the litigation writing up their opinions or briefs as articles in “learned” journals, resulted in the creation of an international law in the area. The practice still continues. The members of the so called “arbitration fraternity” elevate each other in status, cite each other’s views and create law on the basis that they are “highly qualified publicists”.¹⁰³

⁹⁹ INDIA CONST. art. 51, § 4 (“Promotion of international peace and security. The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.”); see also V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN J. INT’L L. 53, 53 (2010) (“For the Indian courts the first substantive encounter with international law emerges in the context of several territorial-related issues. The socio-political context forms the next phase, for the Indian courts to have recourse to diverse international legal norms relating to the environment and human rights and applying them as a persuasive tool. Later, the development context brings a complex array of commercial, environmental, and other related international legal norms into the Indian legal system.”).

¹⁰⁰ NANDY, *supra* note 18, at ix.

¹⁰¹ See Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 47 (1996).

¹⁰² See M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT’L L. 19, 31 (2006).

¹⁰³ *Id.* at 31 (footnotes omitted).

No doubt this psychological pull worked well, and even since decolonization, a belief in the West’s inherent secular developmentalism has catapulted many Third World countries into a prosperous state. However, during this time, the West has unexpectedly suffered from a bout of illness: decline in overall prosperity, economic crises, and the loss of international hegemony with the rise of China. In about a century’s time, between October 1911 (the year of the Chinese revolution) and October 2011 (the year of an ever-deteriorating Eurozone crisis), Europe and China have swapped their positions: from being a keen lender, Europe has become a desperate borrower of capital. Consequently, Sornarajah contemplates, developed states might “dismantle to a significant extent the international law they had created to protect foreign investment and retreat into principles of sovereignty earlier advocated by the developing states.”¹⁰⁴

Thus, today’s cracks seem to have appeared in the secular and developmental wedge itself.¹⁰⁵ Perhaps, therefore, Anghie says, “[t]he role of the Third World or developing country states in relation to the well-being and dignity of their own people is thus a subject that requires ongoing analysis.”¹⁰⁶ Since it is now proven that international law was created to promote European commercial interests, this change in situation warrants an evaluation of the relationship between international law and the Third World and First World. This Article studies this new relationship though the lens of “intimate enemy.”¹⁰⁷

¹⁰⁴ M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, 1 ASIAN J. INT’L L. 267, 267 (2011).

¹⁰⁵ Alastair Ager & Joey Ager, *Faith and the Discourse of Secular Humanitarianism*, 24 J. REFUGEE STUD. 456, 456 (2011). The authors argue:

that functional secularism frames the discourse of contemporary humanitarianism. While in principal ‘neutral’ to religion, in practice this framing serves to marginalize religious language, practice and experience in both the global and local conceptualization of humanitarian action. Illustrated with examples from a range of humanitarian contexts, it is argued that the resulting discourse fosters a humanitarian response that is ill-equipped to engage with dynamics of faith within displaced populations. Humanitarianism needs to acknowledge the advent of post-secularism signalled by many social theorists, and engage with greater awareness of the role of faith—both liberal materialist and religious—in addressing a range of issues of core relevance to the field: the clarification of core humanitarian values, the retention of a human rights framework able to define and protect human dignity, and appropriate means of addressing religious experience and well-being in the course of humanitarian programming.

Id.

¹⁰⁶ Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT’L L. REV. 1315, 1365 (2011).

¹⁰⁷ Prabhakar Singh, *Macbeth’s Three Witches: Capitalism, Common Good and International Law*, 14 OR. REV. INT’L L. 47, 79 (2012).

B. Third World as a Legal System

It is hypocritical that no text on international law adverts to th[e] practice of lawmaking for so many states and peoples by so few in an age in which there is much talk of democratic legitimacy. These trends were kept in check by the vigorous assertion of competing principles by the developing states in General Assembly resolutions. Yet, such alternative sources were dismissed by members of the “arbitration fraternity” as unable to create international law or as expressing *ex ferenda*. It is strange that the collective wishes of the states of the world solemnly expressed through resolutions of international institutions could not create international law but often uncontested arbitral awards and writings of a few “scholars” could create international law.¹⁰⁸

Sornarajah’s above views flag the reasons that led to the alternative view on international law from a non-Western perspective. What is a Third World? Baxi thinks, “Third World emerges through practices of resistance and struggle by the colonially constituted subject peoples, practices which offer the best possible readings of the critique of the European Enlightenment and of the universalising form of capitalism.”¹⁰⁹ Offering an historical understanding, Chaliand notes: “The French demographer Alfred Sauvy coined the expression (‘tiers monde’ in French) in 1952 by analogy with the ‘third estate,’ the commoners of France before and during the French Revolution—as opposed to priests and nobles, comprising the first and second estates respectively.”¹¹⁰ It “therefore implies that the Third World is exploited, much as the third estate was exploited, and that, like the third estate its destiny is a revolutionary one.”¹¹¹

B.S. Chimni, one of the most prominent Third World voices on international law, notes: “It is very often argued that the category ‘third world’ is anachronistic today and without purchase for addressing the concerns of its peoples.”¹¹² However, “too much is often made of numbers, variations, and differences in the presence of structures and processes of global capitalism that *continue to bind and unite*. It is these structures and processes that produced colonialism

¹⁰⁸ Sornarajah, *supra* note 102, at 31 (footnotes omitted).

¹⁰⁹ Upendra Baxi, *What May the ‘Third World’ Expect from International Law?*, 27 *THIRD WORLD Q.* 713, 714 (2006).

¹¹⁰ Gerard Chaliand, *Third World: Definitions and Descriptions*, *THIRD WORLD TRAVELER*, http://www.thirdworldtraveler.com/General/ThirdWorld_def.html (last visited Nov. 19, 2012).

¹¹¹ *Id.*

¹¹² B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *INT’L CMTY. L. REV.* 3, 4 (2006).

and have now spawned neo-colonialism.”¹¹³ Therefore, he proclaims, “once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category ‘third world’ assumes life.”¹¹⁴ Thus, he unpacks the politics of vocabulary through which some actors deliberately try to dissolve the category of Third World.

But there is a need to be alert to the politics of critique of the category “third world”. To misrepresent and undermine the unity of the Other is a crucial element in any strategy of dominance. From which flows the suggestion that the category “third world” is irrelevant to the era of globalization. It represents the old divide and rule strategy with which third world peoples are exceedingly familiar. Such a policy seeks to prevent a global coalition of subaltern States and peoples from emerging through positing divisions of all kinds. Thereby, the transnational elite seeks to subvert collective modes of reflection on common problems and solutions.¹¹⁵

Sornarajah thinks:

China, though not a state created through the processes of self-determination, played a leading role through solidarity with the newly independent states of Africa and Asia in advancing the causes espoused by these states which, together with the developing states of Latin America, collectively came to be described as the Third World.¹¹⁶

To me, the Third World is synonymous with destitution, poverty, and lawlessness in the backyard of civilizations, both Eastern and Western. Third World, to me, points to the state of living, material access to resources, political and social conditions of the subaltern groups, and the sluggish traffic of justice to the victims of faceless global capitalism and dictatorial communism. There are many examples of the Third World: the great continent of Africa and the country of Afghanistan are two.¹¹⁷

¹¹³ *Id.*

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.* at 6.

¹¹⁶ Sornarajah, *supra* note 102, at 19.

¹¹⁷ “Under current [U.S.] law, the legal analysis of targeted killings is straightforward: If we are at war, an American government may target enemy combatants and civilians directly participating in hostilities without running afoul of either domestic or international law.” John Fabian Witt, Op-Ed., *The Legal Fog Between War and Peace*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/opinion/the-legal-fog-between-war-and-peace.html>.

Writing in 1987, two years before the fall of the Berlin Wall, Korean lawyer No-hyoung Park said, “[n]o effort, however, has been made to recognize the Third World’s significant contributions to the development of international law.”¹¹⁸ He argues: “The Third World should be regarded as a single international legal system, separate from the individual laws of Africa, Asia and Latin America.”¹¹⁹ Several reasons justify the consideration of the Third World as a single international legal system.¹²⁰ The universality of international law, according to Park, “should be understood as developing inductively from diverse regional national laws. Thus, considering the international legal system as a three-system group does not undermine the universality of international law.”¹²¹

Regarding the Third World as an international legal system would enhance the development of contemporary international law. Second, considering the global future, it is necessary to identify the Third World as a separate international legal system. The debate on the global future, whose central issue is to establish effective patterns of order, has been affected by the Superpowers’ fight for hegemony. The Third World should participate in this debate because without Third World input, the Superpowers may establish a world order that ignores the needs of many nations.¹²²

What is notable is that soon after the fall of the Berlin Wall, when scholars began to deny the existence of three worlds, Park’s advocacy fell by the side.¹²³ Perhaps Park’s observations about “Jihad” were to

Current international law purports to decide the question of war or peace by evaluating the intensity of the conflict. But in an age of mass destruction, when conflicts can go in an instant from zero intensity to unfathomable terror, the intensity measure seems ill suited to the work at hand.

Id.

¹¹⁸ No-hyoung Park, *The Third World as an International Legal System*, 7 B.C. THIRD WORLD L.J. 37, 38 (1987).

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.* at 38. The author says: “First, both underdeveloped and developed nations have neglected the study of the Third World as an international legal system. In the study of international law, ‘Traditional international law,’ ‘Eurocentric international law’ and ‘Soviet international law’ have been recognized.” *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 40 (footnotes omitted). Park observed: “For example, a ‘Jihad’ or holy war is explained, not only by the cultural interests of territorial expansions but by the Islamic philosophy: unity of God, unity of mankind, and, the unity of religion. Hence, it is incorrect to assume that culture is irrelevant in international law and politics.” *Id.* Unfortunately such an example of “Jihad” follows his superb invocation and analysis the ICJ statute. Despite these observations, cultural values are relevant to international law. First, Article 9 of the Statute of the International Court of Justice designates the Court as a “whole representation of the main forms of civilization and the principal legal systems of

be proved historically wrong, as today the war on terror is effectively the war against "Jihad."¹²⁴ However, one should note what Chimni has to say about the fall of the Berlin Wall and the subsequent end of the cold war: "Unnecessary importance is often attached to the end of the cold war."¹²⁵ The growing north-south divide is sufficient evidence, if any were needed, of the continuing relevance of the category "Third World."¹²⁶ Its lasting expediency "lies in pointing to certain structural constraints that the world economy imposes on one set of countries as opposed to others."¹²⁷

Notably, humanitarian intervention in Third World countries, according to Fassin, "is a biopolitics insofar as it sets up and manages refugee camps, establishes protected corridors in order to gain access to war casualties, develops statistical tools to measure malnutrition, and makes use of communication media to bear witness to injustice in the world."¹²⁸ And all of this happens at a time the United States has

the world." *Id.* Article 9 indicates that cultural values are indeed relevant to international law and the ICJ must consider the diverse cultures of nations. Second, the rules which the Court applies are not always, universal or culturally neutral. Often, "the Court . . . consider[s] whether there [is] a special custom in capital states giving states of the shareholders *locus standi* under the circumstances of the particular case." *Id.* Furthermore, it has been suggested that an established custom among a well-defined group of states is binding on all states in that group, except those states who consistently opposed the custom from its inception. Finally, "the premise that state interests which characterize foreign policy are independent of values or culture disregards the fact that state interests are not necessarily value-free." *Id.* (footnotes omitted). However, lawyers are not clairvoyant pundits and wrong examples might succeed right analysis.

¹²⁴ Notably, a provocative advertisement—"In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad."—that debuted in San Francisco made its way to New York subways in September 2012. *See* Hamid Dabashi, *The War between the Civilised Man and the Savage*, ALJAZEERA (Sept. 24, 2012, 12:19 PM), <http://www.aljazeera.com/indepth/opinion/2012/09/201292464012781613.html>. There cannot be better proof of that fact that the war on terror is seen as the war on Jihad, as the timing of the advertisement points to; a High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels took place at the United Nations Headquarters in New York on September 24, 2012. The advertisement also has support from a U.S. Federal Court. New York's Metropolitan Transportation Authority initially rejected it, but the Authority's decision was overturned when a federal judge ruled that the ad is protected speech under the First Amendment. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., No. 11 Civ. 6774(PAE), 2012 WL 3756270, at *1 (S.D.N.Y. Aug. 29, 2012).

¹²⁵ Chimni, *supra* note 112, at 5.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Didier Fassin, *Humanitarianism as a Politics of Life*, 19 PUB. CULTURE 499, 501 (2007).

been droning parts of Pakistan, which constitutes one of its many breaches of international law.¹²⁹

C. The TWAILing of International Law

This leads us to the question: what is TWAIL? Chimni has written the manifesto of TWAIL that is worth ruminating over and again.¹³⁰ He makes six points that speak to “The Road Ahead,” that constitute “[f]urther thoughts on a TWAIL Research Agenda.”¹³¹ Makau Mutua has offered one of its most provocative and powerful definitions.¹³² The long and the short of his opinion is that though the acronym TWAIL is new, the idea is not. Historically, international law is a “predatory system,” Mutuwa pens, “that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.”¹³³ Thus, TWAIL first resists international law and then converts it into a reformist agenda. Today, TWAIL is on intellectual ascendancy. Using, if you will, a “social conflict” theoretical approach to the study of international law, TWAIL gives fresh ideas and adds new footnotes to the legal scholarship.¹³⁴

In advancing what has been a surprisingly reformist agenda, [TWAIL has] also helped to consolidate and institutionalise [sic] a political avenue that argues for the improvement of international law. Bringing to the forefront of thinking and writing on international law—issues of political economy, the cultural practices of differentiation, the uses of violence or the excessive exploitation of natural resources that have accompanied the expansion of the international legal order—TWAIL has become a virtual site from which scholars and activists can work both to resist, and to transform—or reform—international law.¹³⁵

¹²⁹ See Chris Woods, *CIA Drone Strikes Violate Pakistan's Sovereignty, Says Senior Diplomat*, GUARDIAN (Eng.), Aug. 2, 2012, <http://www.guardian.co.uk/world/2012/aug/03/cia-drone-strikes-violate-pakistan>.

¹³⁰ Chimni, *supra* note 112.

¹³¹ They are: Increasing Transparency and Accountability of International Institutions, Increasing Accountability of Transnational Corporations, Conceptualizing Permanent Sovereignty as Right of Peoples and Not States, Making Effective Use of Language of Rights, Injecting Peoples Interests in Non Territorialised Legal Orders, Protect Monetary Sovereignty Through International Law, Ensuring Sustainable Development With Equity, Promoting the Mobility of Human Bodies. *Id.* at 23–26.

¹³² Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000).

¹³³ *Id.* at 31.

¹³⁴ Moshe Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, 55 U. TORONTO L.J. 891, 906–09 (2005).

¹³⁵ Eslava & Pahuja, *supra* note 19, at 105.

Charged with umpteen counts of such allegations, where does international law stand today vis-à-vis the Third World?

The mainstream international law is about the “state.” A state is assumed to have a sovereign character, meaning it is theoretically free in making its decisions. What does TWAIL have to say about the character of a state? TWAIL begins by asserting quite the opposite: states are inherently promiscuous and not sovereign. Sovereignty, as a concept, was invented within a particular historical environment. For mainstream international law, maintaining the façade of a state’s sovereignty helps to continue the old power structure.

Naturally, then, an alternative conception of state leads to an alternative understanding of international law. Historically speaking, sovereignty was an expression of a political and commercial liberalism of, for, and by the Europeans. But when awarded to the non-Western states, liberalism within sovereignty, as a rule, addresses the individual’s egotistic indifference to other people’s plight. What else does the inherent liberalism of the responsibility to protect mean to the tribal and the rural population that is forced to welcome American drone visits through international law’s mandate?¹³⁶ Unfortunately, it is their innocence and disengagement that is unashamedly invited to defend itself. Therefore, TWAIL has provided us with five powerful observations.

- (1) [T]hat colonial patterns of thinking persist and continue to structure our international law sources and foundational concepts;
- (2) that the “civilizing mission” continues . . .
- (3) that racism and misplaced notions of cultural superiority continue to obliterate the contributions of and concerns expressed by non-Europeans;
- (4) that . . . notions of “class,” remain central to understanding our legal regimes; but that
- (5) contemporary forms of globalization have rendered geographically based notions of “imperialism” or “hegemony” overly facile in understanding the Gramscian forms of collaboration that now characterize the “Third World” itself.¹³⁷

The “intimate enemy” lens could very neatly magnify these five insights further. In his last article, the late R.P. Anand wrote:

¹³⁶ See Judy Dempsey, *Europe Stays Quiet Despite Unease About Drones*, N.Y. TIMES, June 11, 2012, <http://www.nytimes.com/2012/06/12/world/europe/12iht-letter12.html> (“Analysts say this approach is short-sighted. The United States intends to arm Italian surveillance drones in Afghanistan beginning next year. France has plans for military drones for reconnaissance and attack missions. NATO is trying to get member states to finance surveillance drones that eventually may also be armed.”).

¹³⁷ See J.E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIO JURIS (Sept. 28, 2010, 6:13 AM), <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>.

“Although international law is presumed to be applicable among all states, east or west, north or south, big or small, it is only a recent phenomenon, not older than the United Nations itself.”¹³⁸ Likewise, Martti Koskenniemi says: “While the legality of the bombing of Afghanistan was still an object of polite disagreement, the occupation of Iraq is almost unanimously seen as illegal—occasioning the response from across the Atlantic that if so, then so much the worse for law.”¹³⁹ Not surprisingly, globalization has rendered geographically based notions of “imperialism” or “hegemony” overly facile in understanding the alliance that now typifies the Third World itself. It is because of this that this Article uses the “intimate enemy” lens to see international law.

III

THE EU AND INTERNATIONAL LAW

After the Court of Justice of the European Union provincialized international law in the *Mox Plant* case,¹⁴⁰ it again expressed its preference for dualism in the *Kadi* case.¹⁴¹ *Kadi*

¹³⁸ See R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23 LEIDEN J. INT'L L. 5, 5 (2010).

¹³⁹ Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 197 (2004).

¹⁴⁰ See *The MOX Plant Case (Ir. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, INT'L TRIB. L. OF THE SEA, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf; *Arbitral Tribunal, Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K. & N. Ir.)*, Final Award of July 2, 2003; ECJ, Case C-459/03, *Comm'n of the Eur. Cmty. v. Ir.* [2006] ECR I-4635. The conflict between Ireland and the United Kingdom about the building and operation of the MOX Plant at Sellafield, on the Irish Sea, dates back to 1993. The plant is designed to recycle the plutonium produced during the reprocessing of nuclear fuel. Ireland contested this project since the beginning and requested access to information from the UK about the plant in order to protect the marine environment of the Irish Sea. Both states are parties to the two treaties addressing the issue of environmental information: the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). In 2001, Ireland commenced dispute settlement proceedings under these treaties. Furthermore, it also applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures that would restrain the UK from commissioning the plant. In this context, waiting for the final decision of the Arbitral Tribunal constituted under the UNCLOS, the ITLOS prescribed a provisional measure in December 2001, ordering the parties to cooperate and to engage in consultations, including the exchange of information, without further delay. Ireland formally notified the Arbitral Tribunal of the withdrawal of its claim against the United Kingdom on February 15, 2007. See M. Bruce Volbeda, *The MOX Plant Case: The Question of “Supplemental Jurisdiction” for International Environmental Claims Under UNCLOS*, 42 TEX. INT'L L.J. 211, 218 (2007). On June 6, 2008, the Tribunal issued Order No. 6 terminating proceedings. See *Ireland v. United Kingdom (MOX Plant Case)*, THE HAGUE JUSTICE PORTAL (last visited Oct. 20, 2012),

presented a high-profile and path-determining opportunity for the [European Court of Justice (ECJ)] to make its views felt in the current international debate about the extent to which human rights principles should inform the Security Council’s sanctions regime, as well as to develop its jurisprudence on the relationship between the European Community (EC) and the international legal orders in the novel context of the UN.”¹⁴²

“On both counts,” de Búrca says, “the judgment was a significant disappointment. . . . The result undermines the EU’s aspirations to develop a powerful international role premised on its distinctive commitment to international law.”¹⁴³

EU scholars defended the ECJ’s dualism as pluralism, adding to the recognized American constitutional dualism.¹⁴⁴ Thus, even though

<http://www.haguejusticeportal.net/index.php?id=6164>. In Case C-459/03, Comm’n of Eur. Cmty. v. Ireland, Judgment of the Court of Justice (Grand Chamber) of May 30, 2006, 2006 E.C.R. I-4635. Ireland was condemned for bringing the *MOX Plant* dispute before an arbitral tribunal. See Nikolaos Lavranos, *MOX Plant Dispute—Court of Justice of the European Communities*, 2 EUR. CONST. L. REV. 456 (2006). International Court of Justice Judge Bruno Simma sees the *MOX Plant* case as a problem of parallel proceedings. He notes that in the *MOX Plant* case,

the EU Commission initiated proceedings against Ireland in the European Court of Justice for breach of EU law committed through bringing a case against the United Kingdom under the Law of the Sea Convention. Here, it was not only the parties which initiated parallel proceedings (before ITLOS, an arbitral tribunal under the OSPAR Convention as well as an arbitral tribunal under UNCLOS), but also the organ of a regional organization which tried effectively to prevent the states involved from having their dispute settled by an independent arbitral tribunal outside the EU legal system.

Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EURO. J. INT’L L. 265, 285 (2009).

¹⁴¹ Cases C-402/05 P & C-415/05 P, *Kadi v. Council of the Eur. Union*, Judgment of the Court of Justice (Grand Chamber) of Sept. 3, 2008, 2008 E.C.R. I-06351.

¹⁴² Gráinne de Búrca, *The European Courts and the Security Council: Between Dédoublment Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, 20 EUR. J. INT’L L. 853, 862 (2009).

¹⁴³ *Id.*

¹⁴⁴ According to Gráinne de Búrca, *Kadi* is arguably the ECJ’s

most important judgment to date on the subject of the relationship between the European Community (‘EC’) and the international legal order. This high-profile case involved a challenge by an individual to the EC’s implementation of a U.N. Security Council resolution, which had identified him as being involved with terrorism and mandated that his assets be frozen.

Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT’L L.J. 1, 1 (2010). She examines

the response of European courts—and in particular of the European Court of Justice (‘ECJ’)—to the dramatic challenges to the U.N. Security Council’s anti-terrorist sanctions regime recently brought before the courts. The ECJ in *Kadi* annulled the European Community’s implementation of the Security Council’s asset-freezing

both the EU and the United States keep violating international law, there is an expectation of compliance from the African and the Asian states. This expectation is further forced into compliance through the responsibility to protect, seconded by the threat of force. As the war on terror evinces, to recall Albert Camus, “[i]t is . . . with cannon shots that Europe philosophizes.”¹⁴⁵ In the times of shifting realities, there exists a love-hate relationship between the Third World countries and international law, animosity mixed with intimacy. Depending upon the nature of international concern, the intimate animosity grows or declines. This constitutes a gradual shift of positions between the Western and the non-Western countries in relation to international law.

A. Reconciling International Law’s European Experience

[T]he spread of the nation-state norm beyond its European homeland was . . . the result of coercive imposition by hegemonic western powers as an integral part of colonialism and imperialism . . . The European state ideal and its key concept of sovereignty became a cornerstone of the global interstate system after the Second World War. . . . Furthermore, the Charter of the United Nations and its support for the principle of state sovereignty and territorial integrity confirmed the centrality of the European state ideal.¹⁴⁶

The postcolonial constitutions have thus been framed in terms of a monist-dualist doctrine. Fresh from the bout of Stockholm syndrome, immediately after decolonization, the Third World states held on to sovereignty. Understandably, it was typical behavior of the newly decolonized non-Western states; sovereignty befell like a new toy in

resolutions on the ground that they violated ‘EU’ norms of fair procedure and of property protection.

Id. She argues

that the robustly pluralist approach of the ECJ to the relationship between EU law and international law in *Kadi* represents a sharp departure from the traditional embrace of international law by the European Union. Paralleling in certain striking ways the language of the U.S. Supreme Court in *Medellin v. Texas*, the approach of the ECJ in *Kadi* carries risks for the EU and for the international legal order in the message it sends to the courts of other states and organizations contemplating the enforcement of Security Council resolutions. More importantly, the ECJ’s approach risks undermining the image the EU has sought to create for itself as a virtuous international actor maintaining a distinctive commitment to international law and institutions.

Id.

¹⁴⁵ Camus, *supra* note 24, at 151.

¹⁴⁶ Roland Axtmann, *The State of the State: The Model of the Modern State and Its Contemporary Transformation*, 25 INT’L POL. SCI. REV. 259, 262 (2004).

their hands. A sense of nationalism that emerged from their protracted separation from their traditionalism during colonial intervention swept all of Asia and Africa leading to nationalization of foreign properties and investments. By the 1970s, the New International Economic Order led to a further assertion of sovereignty by non-Western oil rich states. Europe also seemingly has come full circle. In the EU today, dualism has become the sole way to look at international law, though scholars are offering a pluralist defense for eschewing monism.¹⁴⁷

In 2006, Anne-Marie Slaughter and William Burke-White observed that "[t]he [f]uture of [i]nternational [l]aw is [d]omestic (or, the European [w]ay of [l]aw)." ¹⁴⁸ And if we believe Camus, who says that Europe philosophizes with cannon shots, how good is this new European way of law? In the last article that professor R.P. Anand wrote, he observed: "Before the Second World War, international law was supposed to be not only a product of the European states and based on their customs and treaties, but applicable only among them—that is, European states or states of European origin."¹⁴⁹ Are Slaughter and Burke-White asking us to go back to this old position? To be sure, Hersch Lauterpacht, who invested all his life injecting domestic-law-type legality into international law, did not have the European way of law in mind.¹⁵⁰

When, in *Kadi*,¹⁵¹ the ECJ claimed to have created a legal order where international law could only enter after the EU's permission,¹⁵² Karl Popper became all the more important for the Third World. Wrapped in parochial nationalism, Europe, like the United States's constitutional version, is offering a pluralist vision of international law that self-excuses both these constituencies for any derogation from international law. International law has thus been reduced to an agent of the West, employed or fired as and when needed.

¹⁴⁷ Búrca, *supra* note 144.

¹⁴⁸ Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 (2006).

¹⁴⁹ Anand, *supra* note 138, at 5.

¹⁵⁰ See Philippe Sands, *My Legal Hero: Hersch Lauterpacht*, GUARDIAN (London), Nov. 10, 2010, <http://www.guardian.co.uk/law/2010/nov/10/my-legal-hero-hersch-lauterpacht>.

¹⁵¹ *Kadi*, 2008 E.C.R. I-06351.

¹⁵² See, e.g., Martti Koskenniemi, *Constitutionalism, Managerialism and the Ethos of Legal Education*, EUR. J. LEGAL STUD. (Apr. 2007), available at <http://www.ejls.eu/1/3UK.pdf>.

B. Monism, Dualism and Pluralism: The Kadi Episode

In its 1988 advisory opinion, the International Court of Justice (ICJ) said, “[i]t would be sufficient to recall the fundamental principle of international law that *international* law prevails over *domestic* law.”¹⁵³ This principle, the World Court said, was endorsed by judicial decision as long ago as the arbitral award of September 14, 1872, in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since—for example, in the case concerning the Greco-Bulgarian Communities.¹⁵⁴

The ICJ strongly affirmed the sole role of states in the *Barcelona Traction* case of 1970.¹⁵⁵ Human rights discourses since then have sought to change that view. In 2011, after the Israeli navy attacked a flotilla of humanitarian aid for Gaza and nine Turkish citizens were killed, Mansfield rightly argued, “[w]here states have failed to comply with international law, private citizens must have the right to instigate transgressors’ arrest.”¹⁵⁶

No doubt, the conservative statist view, as Kelsen identified in his Pure Theory of Law, is fraught with normative contradictions. Powerful states create more duties for individuals under international law as they offer fewer rights—it was clearly seen in the lack of due process in listing procedure that led to *Kadi*. If we want to empower people and cut down powerful states’ ability to justify violence in terms of inflicting punishment, like how it was done through the UN’s resolution freezing the funds of people without due process, then the ECJ’s *Kadi* decision is certainly welcome.¹⁵⁷

¹⁵³ Advisory Opinion Concerning the Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. 12, 34–45 (Apr. 26, 1988).

¹⁵⁴ *Id.*

¹⁵⁵ *Barcelona Traction, Light and Power Co., Ltd., Judgment (Belg. v. Spain)*, 1970 I.C.J. 3, 44.

¹⁵⁶ Michael Mansfield, *Government’s Move to Curb Universal Jurisdiction Sends Wrong Message*, GUARDIAN (Eng.), July 27, 2010, <http://www.guardian.co.uk/law/2010/jul/27/universal-jurisdiction-law>.

¹⁵⁷ Under the terms of General Assembly resolution 65/34 adopted on December 6, 2010, the Ad Hoc Committee met at the United Nations Headquarters from April 11–15, 2011, to continue to elaborate the draft comprehensive convention on international terrorism, and to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. See *Current Mandate*, UNITED NATIONS (Jan. 19, 2012), <http://www.un.org/law/terrorism/index.html>. Also, there is a study commissioned by the United Nations, Office of Legal Affairs; see Bardo Fassbender, *Targeted Sanctions and Due Process*, UNITED NATIONS (Mar. 20, 2006), http://www.un.org/law/counsel/Fassbender_study.pdf.

In *Kadi*, on the one hand, Europe strives to protect the fundamental rights of a Muslim male alleged to have connections with Osama Bin Laden and Al Qaida. On the other hand, it signals to the United States its autonomist aspirations of establishing fair procedures in international law.¹⁵⁸ Europe receives a lot of investment from the nationals of oil rich states, and perhaps in *Kadi* the ECJ sends positive signals to such investors—who have a guaranteed fair trial under the European constitutional scheme—that Security Council resolution 1267 cannot take away.

Under the everyday integrating world, Europe seeks an inversion of Kelsen; it’s the European law that shall guide international law and not the other way around. *Kadi* serves a powerful signal to all three constituencies: (1) to those Europeans who defeated a common Lisbon constitutional treaty, (2) to the Americans that run the show at the Security Council, and (3) to the rest of the world that looks up to Europe on the standards of protecting human and fundamental rights through the powers of a constitution.

C. Provincializing International Law

The ECJ has emerged as the sole generator of EU regional law, as seen in the *Mox Plant* case¹⁵⁹ between Ireland and England.¹⁶⁰ *Mox Plant* has been raised at three different institutions:

1. at the Arbitral Tribunal set up under the United Nations Convention on the Law of the Sea (UNCLOS),
2. another Tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and
3. within the ECJ under the European Community and Euratom Treaties.¹⁶¹

The UNCLOS Arbitral Tribunal held that “according to ‘dictates of mutual respect and comity’ it should defer the treatment of the matter until its implications under EC law had been clarified.”¹⁶² For the first time in the history of international law, a tribunal of higher UN order

¹⁵⁸ See Christopher Michaelsen, *Kadi and Al Barakaat v. Council of the European Union and Commission of The European Communities*, 10 MELB. J. INT’L L. 329 (2009).

¹⁵⁹ The MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, INT’L TRIB. L. OF THE SEA, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf.

¹⁶⁰ Koskenniemi, *supra* note 152.

¹⁶¹ *Id.*

¹⁶² *Id.* (quoting the statement by the President of the Arbitral Tribunal, 13 June 2003).

waited on a regional European court to take orders.¹⁶³ At the ECJ, the Advocate General Maduro found Ireland guilty of having gone to a UN body, and thereby bypassing the European Order. *Mox Plant*, in my view, was a preparation for *Kadi*.¹⁶⁴

Thus, the idea of international law's interpretation is not a value neutral question, as many in West claim it to be. It is the value neutrality of international law that the United States and developing countries in general seek to question in plurality arguments made about the decisions of the ECJ. *Kadi* is therefore problematic, even though it does create some common good of protecting individual rights from the continuing war on terror.

IV THE WAR ON TERROR AS THE TERROR OF WARS

In a fragmented state of international law, Third and First World countries cling to different fragments of the law as the right law. As is well known, Article 1(1) of the UN Charter aims to “take effective collective measures” for the “suppression of acts of aggression or other breaches of the peace.”¹⁶⁵ What is also known is that the Security Council has been busy blueprinting war plans in the “war on terror.” While, on the one hand, NATO, standing true to the United Nations’ spirit of taking “effective collective measures,” assumes the responsibility to protect, on the other hand, in Guantánamo and elsewhere, the United States is outsourcing torture and human rights

¹⁶³ Case C-459/03, *Comm’n of Eur. Cmty. v. Ireland*, Judgment of the Court of Justice (Grand Chamber) of May 30, 2006, 2006 E.C.R. I-4635.

¹⁶⁴ According to a press release: “Hearings in the case took place from 10 June 2003 until 21 June 2003, after which the Tribunal issued, on 24 June 2003, *Order No. 3—Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures*. On 14 November 2003, the Tribunal issued *Order No. 4—Further Suspension of Proceedings on Jurisdiction and Merits*, under which the arbitral proceedings were suspended until the European Court of Justice had given judgment in a related case concerning European Community law issues, or until the Tribunal otherwise determines. The European Court of Justice delivered its judgment on 30 May 2006. The arbitral proceedings remained suspended, with the Parties submitting periodic reports to the Tribunal, in accordance with *Orders No. 3 & 4*. The Tribunal issued *Order No. 5—Suspending Periodic Reports by the Parties* on 21 February 2007. This Order formalised the suspension until further notice of the requirement that the Parties submit periodic reports and information on the provisional measure (prescribed by ITLOS in its Order of 3 December 2001) and the requirement that Ireland submit periodic reports on developments in the proceedings before the European Court of Justice.” See Press Release, Permanent Court of Arbitration, *MOX Plant Arbitral Tribunal Issues Order No. 6 Terminating Proceedings* (June 6, 2008), <http://www.haguejusticeportal.net/index.php?id=6164>.

¹⁶⁵ U.N. Charter art. 1, para. 1.

abuses to dodge legal volley and public protests that such an act would cause if done on the American soil.¹⁶⁶

The American courts have also moved from their position in 1980, expressed in *Fernandez v. Wilkinson*, that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law."¹⁶⁷ Perhaps the most anti-international law judgment from a U.S. court came in the *Citizens Living in Nicaragua* case where, *inter alia*, the court said judgments of the ICJ "do not fall within the definition of *jus cogens* or peremptory norms of international law."¹⁶⁸

The spate of cases after the 9/11 incidents, such as *Khalid v. Bush*, led the court to hold that the "[U.S.] President's authority was not confined to capture and detention of persons on or near battlefields of Afghanistan."¹⁶⁹ Invoking the separation of powers doctrine, the court said that "it [is] impermissible to inquire into conditions of detention under international norms given President's authorization from Congress to detain combatants."¹⁷⁰ The United States Constitution was read as ossifying any cognizable constitutional rights of "non-resident aliens captured and detained outside" the United States in the war on terror.¹⁷¹

It is this duality of international law that Kelsen attacked in his Pure Theory of Law. He penned: "International law is forced to undergo a complete denaturing in the notion that it is incorporated into the legal system of one's own state."¹⁷² Within the confines of a state legal system, "international law can no longer perform its

¹⁶⁶ Slavoj Žižek, *Iraq's False Promises*, FOREIGN POL'Y (Jan. 1, 2004), http://www.foreignpolicy.com/articles/2004/01/01/iraqs_false_promises.

¹⁶⁷ Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan.1980).

¹⁶⁸ Comm. U.S. Citizens Living Nicar. v. Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988). The court also held that "despite claim that the Contras had begun targeting Americans living in Nicaragua, the funding of the Contras did not constitute a due process violation"; that a statute inconsistent with customary international law modifies or supersedes that law to the extent of inconsistency; and that an article of the U.N. Charter as to respecting judgments of the International Court of Justice does not confer rights on private individuals.

¹⁶⁹ Khalid v. Bush, 355 F. Supp. 2d 311, 311 (D.C. Cir. 2005).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; see also U.S. v. Hamdan, 801 F. Supp. 2d 1247 (U.S.C.M.R. 2011) (holding that military commission have subject matter jurisdiction); Al-Bihani v. Obama, 619 F. 3d 1 (D.C. Cir. 2010).

¹⁷² KELSEN, *supra* note 26, at 116.

essential function.”¹⁷³ This is precisely what we see in the “war on terror.”

American constitutionalists invert Kelsen at this precise point to ensure the continuance of American hegemony and shirking responsibility for the civilian casualties in Iraq, Afghanistan, and Pakistan in the war on terror.¹⁷⁴ It then becomes clear that the critique of international law’s hypocrisy in its useful deployment by the West cannot be done in a legal vocabulary. Only through the lens of political science, sociology, and other disciplines can this injustice be magnified for all to see. TWAIL is a step in that direction.

A. The Afghanistan Example

Post 1989, the world stood witness to the horrors of terrorism, which many argue was the aftermath of the United States’s Cold War policies. This is true to a great extent. In order to avenge the former USSR for the Vietnam defeat, the United States armed the Afghans and bankrolled Pakistan’s military to fight the invasion of the communist USSR. After Russia’s defeat in Afghanistan, a political lull attracted Islamist guerrilla fighters to the struggle for power. America’s modernist intervention in Afghanistan enthroned the medieval ideology of the Taliban in Kabul. Installed indirectly through American liberalism, the Taliban organized a large scale lynching of women, televised evangelization of the administering of death in public places like football fields, banning of media and entertainment, annihilation of secular culture, and other unimaginable illiberalisms.¹⁷⁵ The Taliban later offered hospitality to Osama bin Laden and company, with Pakistan recognizing the Taliban rule. It later became bin Laden’s laboratory and the cause for 9/11.

The problem with today’s United States is not that it is a new global empire, but that, while pretending to be an empire, it continues to act as a nation-state, ruthlessly pursuing its interests.¹⁷⁶ Something analogous to the outsourcing of jobs to Third World countries is taking place with the interrogation of terror suspects. Torture is being “outsourced” to Third World allies (those same countries criticized in

¹⁷³ *Id.* at 117.

¹⁷⁴ Paulsen, *supra* note 84, at 1774.

¹⁷⁵ Tariq Ali says, “[t]o portray the invasion as a ‘war of self-defence’ for NATO makes a mockery of international law, which was perverted to twist a flukishly successful attack by a tiny, terrorist Arab groupuscule into an excuse for an open-ended American military thrust into the Middle East and Central Eurasia.” Ali, *supra* note 54, at 19.

¹⁷⁶ Žižek, *supra* note 166.

the U.S. State Department’s annual Country Reports on Human Rights Practices) who can coerce confessions without worrying about legal problems or public protests.¹⁷⁷

During this growth and nutrition of *Talibani* medievalism through modernist Western intervention, India received its own set of guests, trained on American money and weapons, Pakistan’s army establishment sent *mujahids* to fight for Kashmir.¹⁷⁸ This led to the 1999 Kargil War between India and Pakistan.¹⁷⁹ Soon after Pakistan’s defeat and its isolation within the international community due to the efforts of Indian diplomacy, Pakistan saw a military coup and the loss of a democratic government. In terrorism, therefore, it can conclusively be said that the United States is fighting the spectres of its cold-war diplomacy; it is a case of the U.S. history run amok.¹⁸⁰ After the September 11, 2001, attacks, the United States declared the war on terrorism without caring much about its legality.¹⁸¹ India had high hopes from the United States-led campaign against global terrorists that emerged in the wake of the September 11 attacks.¹⁸² From the arming of the Afghans against the former USSR to the efforts at disarming the Afghans in the war on terror, international law stood as a helpless bystander. Iraq need not even be mentioned. Yet many states sought international law’s indulgence manifesting an intimate animosity.

Rarely has there been such an enthusiastic display of international unity as that which greeted the invasion of Afghanistan in 2001. Support for the war was universal in the chanceries of the West, even before its aims and parameters had been declared. NATO governments rushed to assert themselves ‘all for one’. Blair jetted round the world, proselytizing the ‘doctrine of the international

¹⁷⁷ *Id.*

¹⁷⁸ Jessica Stern, *Pakistan’s Jihad Culture*, 79 FOREIGN AFF. 115, 115 (2000).

¹⁷⁹ K. Shankar Bajpai, *Untangling India and Pakistan*, 82 FOREIGN AFF. 112, 124 (2003).

¹⁸⁰ Doug Stokes, *Why the End of the Cold War Doesn’t Matter: The US War of Terror in Colombia*, 29 REV. INT’L STUD. 569, 569–70 (2003).

¹⁸¹ Ali, *supra* note 54, at 17.

The current occupation of Afghanistan naturally recalls colonial operations in the region, not just to Afghans but to some Western myth-makers—usually British, but with a few Subcontinental mimics—who try to draw lessons from the older model; the implication being that the British were ‘good imperialists’ who have a great deal to teach the brutish, impatient Americans.

Id.; see also Christian Tomuschat, (*On the Application of Al-Jedda*) v *Secretary of State for Defence: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists*, 9 MELBOURNE J. INT’L L. 391 (2008).

¹⁸² Bajpai, *supra* note 179, at 112.

community' and the opportunities for peace-keeping and nation-building in the Hindu Kush. Putin welcomed the extension of American bases along Russia's southern borders. Every mainstream Western party endorsed the war; every media network—with BBC World and CNN in the lead—became its megaphone. For the German Greens, as for Laura Bush and Cherie Blair, it was a war for the liberation of the women of Afghanistan. For the White House, a fight for civilization. For Iran, the impending defeat of the Wahhabi enemy.¹⁸³

The end of the twentieth century has not put wars between nations out of fashion.¹⁸⁴ Wars are businesses of profit and post-war reconstruction attracts investors with profit motives. The United States's rise after Europe's destruction in World War II is a relevant example. A decade into the twenty-first century, with the increase in the number of new sovereign states, the number of wars has only increased. Wars exemplify the symptoms of power with an understanding that every power structure is necessarily split. This crack is constitutive of the power dynamics; wars, as bottle-openers of the power structure, allow the aggressor to consolidate sympathy and thus more power though international solidarity.

Meanwhile, the number of Afghan civilians killed has exceeded many tens of times over the 2,746 who died in Manhattan. Unemployment is around 60 per cent and maternal, infant and child mortality levels are now among the highest in the world. Opium harvests have soared, and the 'Neo-Taliban' is growing stronger year by year. By common consent, Karzai's government does not even control its own capital, let alone provide an example of 'good governance'. Reconstruction funds vanish into cronies' pockets or go to pay short-contract Western consultants. Police are predators rather than protectors. The social crisis is deepening. Increasingly, Western commentators have evoked the spectre of failure—usually in order to spur *encore un effort*.¹⁸⁵

Such wars are conducted on rules entailed as international humanitarian laws, and they expose nations' intimate animosity with

¹⁸³ Ali, *supra* note 54, at 5.

¹⁸⁴ They are far too many in number to register them all here. Some of them are: the Kosovo-Yugoslavia conflict, which the NATO countries promoted as the first humanitarian war; America's continued war in Afghanistan against Al Qaida; Kenya's occupation of Southern Somalia for Al-Qaida-linked Al-Shabab militants; the African Union's holding of Mogadishu since 2007; NATO's bombing of Libya and killing of colonel Muammar el-Qaddafi; Thailand's occasional exchange of fire with Cambodia for the Preah Vihear temple; Israel's attack on a ship carrying aid to Gaza, killing nine Turkish nationals; continued battles between India-Pakistan in relation to Kashmir; the Israel-Syrian Conflict; the Sri Lankan Civil War; and the Thai-Myanmar (Burma) border conflict.

¹⁸⁵ Ali, *supra* note 54, at 6.

international law. Unfortunately new graveyards continue to spring up around the world, filled with millions of men, women, and children of all nations. We, the people of the world, have not moved away from wars; wars have simply chosen to dig new graveyards to lay to rest people of different ethnicities, races, and nationalities. In their responsibility to protect—while humanitarian wars put an end to life with bullets, bombs, or air strikes—sepulchral trade wars, embargos, and the discontinuation of relief and aid administer gradual death to kids, women, and men.¹⁸⁶

B. Humanitarian Interventions as a Consoling Myth

When Roscoe Pound came to deliver the Tagore lecture at the Calcutta University in 1948, perhaps it was with a sense of future that he remarked that international law “has conspicuously failed.”¹⁸⁷ Those were the last days of formal colonialism. Oduntan usefully reminds us that the bulk of African states’ interest in the International Court of Justice arose only as a result of the Democratic Republic of Congo crises—which accounted for six new cases between 1999 and 2004 alone—involving five African states that have never appeared before the court.¹⁸⁸

All these new states had based their political and social order on constitutions embodying a variety of rights and duties for both states and citizens taken from the so-called international standards. The relationship of these new states with international law, as Paulsen vehemently advocates in respect to the United States, also became a constitutional matter.¹⁸⁹ Decolonization was the historical moment where international law underwent a cosmetic surgery. All along the two Hague Conferences and in the formation of the League of Nations, the primacy of international law over state law was promoted.

Soon after the non-Western states joined the bandwagon of international solidarity, constitutional law’s priority over international law became the new argument. However, we will do well to recall Karl Popper, who exposed Hegel’s double face on his idea of a

¹⁸⁶ Parvin Huda, *Destined For Terror: Coping With the Most Restrictive of U.S. Export Controls Embargoes, Terrorist-Supporting Countries, Designated Terrorists, and Sanctioned Persons*, in *COPING WITH U.S. EXPORT CONTROLS*, 2011, at 313 (2011).

¹⁸⁷ ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 54 (Liberty Fund 2002) (1958).

¹⁸⁸ See Gbenga Oduntan, *How International Courts Underdeveloped International Law: Political, Economic and Structural Failings of International Adjudication in Relation to Developing States*, 13 *AFR. J. INT’L & COMP. L.* 262, 265 (2005).

¹⁸⁹ Paulsen, *supra* note 84, at 1774.

constitution quite unmercifully.¹⁹⁰ Ironically, under his Prussian patronage, Hegel transformed the demand for a constitution into one for an absolute monarchy.¹⁹¹ Some American scholars, such as Paulsen, seek to repeat the same feat by trumping international law using a constitutional vocabulary.

Today, while the Third World shows a growing affinity for international law, the First World has reduced international law to a consoling myth. While speaking about the responsibility to protect, the new avatar of international humanitarian law, Žižek confirms this. According to him, the public message of the responsibility to protect—to provide international security and to save the planet—is supplemented by the obscene message of the unconditional exercise of power: “Laws do not really bind me, I can do to you whatever I want, I can treat you as guilty if I decide to do so, I can destroy you on a whim.”¹⁹² “This obscene excess,” he thinks, “is a necessary constituent of the notion of sovereignty.”¹⁹³

There is also a latent structural asymmetry that the five permanent members of the Security Council seek to promote: “[T]he law can only sustain its authority if subjects hear in it the echo of the obscene, unconditional self-assertion of power.”¹⁹⁴ Sustained by an eminently political choice, America’s less-than-robust affection for international law lies in its enigma of the very presentation of international crises “as ‘humanitarian,’ the very recasting of the political-military conflict into the humanitarian terms.”¹⁹⁵

Examples abound. As Žižek asks, although all the media were full of pictures and reports, why did the UN forces, NATO, or the United States not accomplish just a small act of breaking the siege of Sarajevo, of imposing a corridor through which people and provisions could circulate freely? “It would have cost nothing,” Žižek says, “with a little bit of serious pressure on the Serb forces, the prolonged spectacle of encircled Sarajevo exposed to ridiculous terror would have been over.”¹⁹⁶

¹⁹⁰ See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: VOL. 2 THE HIGH TIDE OF PROPHECY* 48 (Harper Torchbooks 1962) (1945).

¹⁹¹ *Id.* at 47.

¹⁹² Slavoj Žižek, *Against Human Rights*, 34 *NEW LEFT REV.* 115, 123 (2005).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Slavoj Žižek, *The Obscenity of Human Rights: Violence as Symptom*, LACAN.COM (2005), <http://www.lacan.com/zizviol.htm>.

¹⁹⁶ *Id.*

The situation was deliberately allowed to perpetuate a condition of humanitarian intervention. There is nothing human about such humanitarian interventions, then. Arguably then, TWAIL must interrogate the possible inconsistencies and splitting under the body of international law that "allow[s] the edifice of Order to maintain itself" in the guise of humanitarianism.¹⁹⁷

V

THIRD WORLD'S INTIMATE ANIMOSITY AND THE FIRST WORLD'S SUSPENDED ANIMATION

Today many non-Western countries, many of them Arabian, have been trying to invest in Western countries. Given the call for free markets and foreign investments, it is only natural that such investments are allowed. That is how many SWFs have come up. But there is an increased opposition to non-Western investment in the Western world. Most recently, a decision by "the French government to allow Qatar to invest millions of euros in France's depressed and neglected suburbs has prompted concerns across the political spectrum about the motives of the wealthy Arab emirate."¹⁹⁸

The outcry from the anti-immigrant far right was predictably loud. Marine Le Pen, head of the National Front, in a communique headlined "Islamic Trojan horse," said Qatar's decision was clearly linked to the fact that the majority of the population of the banlieues was Muslim.¹⁹⁹

Islamophobia, for now, puts international law on the backburner.²⁰⁰ Even the political left in France is not comfortable with this. Demorand, from the left-leaning *Libération*, suggested the Qatari investment was the latest exercise in "soft power" and far from philanthropic.²⁰¹ A similar fever had gripped the United States when a Dubai port wanted to invest in an American port, but it bowed to pressure from the U.S. Congress to sell it another American

¹⁹⁷ SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 3 (2nd ed. 2007).

¹⁹⁸ Harvey Morris, *Qatar's Latest Investment Stirs the French*, INT'L HERALD TRIB., Sept. 25, 2012, <http://rendezvous.blogs.nytimes.com/2012/09/25/qatars-latest-investment-stirs-the-french/>.

¹⁹⁹ *Id.*

²⁰⁰ See Alexander Lemarié, *Du FN au Front de gauche, le fonds du Qatar suscite le scepticisme*, LE MONDE, Sept. 27, 2012, http://www.lemonde.fr/proche-orient/article/2012/09/27/de-le-pen-a-melenchon-le-fonds-du-qatar-attire-les-critiques_1766842_3218.html.

²⁰¹ Morris, *supra* note 198.

company.²⁰² In India, on the contrary, the government has announced a bold move to welcome foreign direct investment (FDI)—the FDI in the broadcasting sector is as high as seventy-four percent.²⁰³ The Indian Prime Minister, Man Mohan Singh, has urged Indians not to fear FDI.²⁰⁴ Quite understandably, due to a protracted fear of terrorism emerging from the Arab world and the feeling in the West about a soft takeover of their economy by Arab countries goes against the very freedom of trade, commerce, and investment that the West has been promoting since 1945.

A. *The Curious Case of SWFs*

In light of these developments in two important jurisdictions—the EU and the United States—this Article contends that at the start of the twenty-first century’s second decade, international law, to borrow Nandy’s apt idiom, has become an “intimate enemy” to the Third World in particular.²⁰⁵ The Third World, somehow, appears more inclined in obeying international law. Both the West and the non-West do not fully comply with international law. Even so, while the West is gradually moving away, the non-West is slowly holding on to international law. This counterintuitive psychological evaluation informs a complete role reversal between the West and the non-West vis-à-vis international law today.

The rise of concerns against SWFs is a case in point, as it exhibits the intimate animosity of international investment law vis-à-vis non-Western states.²⁰⁶ Yvonne Lee argues that the reversal of capital flow from non-Western countries like “China, Russia, Singapore and

²⁰² Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, WASH. POST, Mar. 10, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030901124.html>.

²⁰³ *Global Players Can Get Majority Stake in DTH, Cable, Mobile TV*, THE HINDU (Sept. 14, 2012), <http://www.thehindu.com/business/Industry/article3897354.ece>.

²⁰⁴ Smita Gupta, *Don’t Fear FDI: PM*, THE HINDU (Sept. 21, 2012), <http://www.thehindu.com/news/national/dont-fear-fdi-pm/article3922186.ece>.

²⁰⁵ See NANDY, *supra* note 18.

²⁰⁶ The Sovereign Wealth Funds Institute says: “A Sovereign Wealth Fund (SWF) is a state-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, government transfer payments, fiscal surpluses, and/or receipts resulting from resource exports.” *What is a SWF?*, SWF INST. (Dec. 9, 2011), <http://www.swfinstitute.org/what-is-a-swf/>.

United Arab Emirates” to Western economies such as America and France, “have raised the spectre of SWFs as smoking guns.”²⁰⁷

International law, that has promoted free markets and an undeterred flow of capital as a harbinger of universal common good, has been shifting to statist policies to keep Arabian and other non-Western capital out of their markets. No doubt, there are genuine fears of security and terrorism. What this proves, however, is that primacy of self-interest over such values as freedom of trade and commerce and free flow of capital have long animated international law’s universalism and liberalism.

In this new reversal characterized as intimate animosity, while the capital-exporting, non-Western countries like China, Singapore, and United Arab Emirates are keener on keeping the freedom of international investment law alive, capital importing Western nations now seek to defeat their old arguments of protection of investments, universality of international law, and free trade as a universal value for the common good of mankind.

Žižek urges us to drop the common cliché today about Western cultural imperialism suppressing the globe’s cultural differences.²⁰⁸ Actually, it is quite the opposite; in the twenty-first century, Western cultural imperialism accentuates the difference since the West lives by promoting cultural relativity.²⁰⁹ Perhaps this explains why international law has now become intimate to the Third World.

The “intimate enemy” lens also helps us evaluate Third World countries’ love-hate relationship with international law. For example, it explains India’s incoherent reaction to international law’s different regimes: the UN-led security regime, the law of the seas, the WTO-led trade regime, the human rights regime, the climate change regime, etc. Today, not only does India see international law differently, but it is conscious of how it is “perceived by the world compared with 1996, the last time it contested and lost to Japan” for the non-permanent seat in the Security Council.²¹⁰

²⁰⁷ Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 197 (2010).

²⁰⁸ ŽIŽEK, *supra* note 197, at 217.

²⁰⁹ *Id.*

²¹⁰ Editorial, *India in the Security Council*, THE HINDU (Oct. 13, 2010), <http://www.thehindu.com/opinion/editorial/article828742.ece>.

B. The Suspension of International Law

In this section, the essay contends that a club of global capitalists are interested in the suspension of international law.²¹¹ In the sections before, it was contended that the European and the American scholars' demand that national law control the international law—a position Kelsen vehemently opposed. Be that as it may, within a state, irrespective of the ruling ideology, there is an inherent urge on the part of the Left, Right, or Center to suspend the law.²¹² Since the national policies control the international arguments, naturally the urge to suspend the internal law translates into an urge to suspend the international law. Such ideological spaces thrive on the way the governments of various states connect with the international law regime. *Arguendo*, an evaluation of the role of such ideologies in maintaining the rule of law is a worthy exercise.

Subsequently, importing Žižek to international law becomes necessary. He opines that “the ‘Right’ finds it difficult to conceal its fascination with the myth of a ‘primordial’ act of violence supposed to ground the legal order; the ‘Centre’ counts on innate human egotism . . . ; the ‘Left’, as has long been discerned by perspicacious conservative critics from Nietzsche onwards, manipulates with *ressentiment* and the promise of revenge.”²¹³ The global Left points to a third domain that belongs “neither to global market-society nor to the new forms of ethnic fundamentalism: the domain of the *political*, the public space of civil society, of active, responsible citizenship—the fight for human rights, ecology and so forth.”²¹⁴ However, as TWAIL has often identified the problem, “this very form of political space is more and more threatened by the onslaught of globalization.”²¹⁵

Against the liberal center, “which presents itself as neutral and post-ideological, relying on the rule of the Law, one should reassert the old leftist motif of the necessity to suspend the neutral space of Law.”²¹⁶ This means that irrespective of the prevailing ideology—

²¹¹ See B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

²¹² See Slavoj Žižek, *Plea for Ethical Violence*, YOUTUBE (Feb. 20, 2008), <http://www.youtube.com/watch?v=1gyEjEh7jIE>. For instance, the Left in both India and France are against FDI.

²¹³ ŽIŽEK, *supra* note 197, at 3 (italics in original).

²¹⁴ SLAVOJ ŽIŽEK, *THE UNIVERSAL EXCEPTION* 176 (2006) (italics in original).

²¹⁵ *Id.*

²¹⁶ Slavoj Žižek, *Multiculturalism, Or, the Cultural Logic of Multinational Capitalism*, 225 NEW LEFT REV. 28, 49 (1997).

Left, Center or Right—a new group of Third World capitalists would join the club of the global capitalist class.²¹⁷ No wonder Žižek finds “multiculturalism” as the new cultural logic of multinational capitalism.²¹⁸

In the legal vocabulary, “multiculturalism” could be replaced by “pluralism.” Thus, scholarly debate around *Kadi* can also be explained as the effort on the part of the EU to avoid its self-destruction and invite capital to financially sustain the EU constitutional project.²¹⁹ Even so, most of the transnational capitalists are interested in getting around laws, or even putting them under suspended animation.

VI

THE AFRICAN UNION AND INTERNATIONAL LAW: THE CONTINUED PSYCHOLOGICAL PULL

The forces of neocolonialism have constantly underdeveloped the African continent as a whole to ensure its continued Third World status. Ibrahim Gassama quips about the destruction of the post-decolonized African continent in great detail.²²⁰ “It is time for African communities,” he writes, “to reject the perspectives and programs of the past . . . [and] transcend limitations of the past.”²²¹ It is an apparent call to transcend post-colonialism. Since international law remains the sole way to organize the postcolonial lives of nation-states, we need a lens that first calibrates the very nature of this relationship. The lens of intimate animosity helps us calibrate the precise state of the relationship at a particular moment.

On July 8, 2011, South Sudan became the world’s newest nation, the climax of a process made possible by the 2005 peace deal that ended a long and bloody civil war. On August 27, 2010, North Sudan’s president, Omar Al-Bashir, visited Kenya to attend

²¹⁷ See Chimni, *supra* note 211, at 1; see also B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT’L L. 499 (2007); B.S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT’L L. REV. 199 (2007).

²¹⁸ See Žižek, *supra* note 216.

²¹⁹ For example, Gráinne de Búrca’s piece describes *Kadi*’s dualism as pluralism or soft-constitutionalism. See Búrca, *supra* note 144, at 28.

²²⁰ See Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and Its Consequences*, 10 OR. REV. INT’L L. 327 (2008).

²²¹ *Id.* at 360.

celebrations to promulgate a new constitution.²²² He is facing two arrest warrants by the International Criminal Court (ICC).²²³ His visit extenuated international condemnation. As an ICC signatory, Kenya had an obligation to arrest Al-Bashir.

A. *Al-Bashir's ICC Arrest Warrant and the ICC*

Kenya's failure to do so drew criticism from both the Court and European governments.²²⁴ However, the Commonwealth Secretariat supported Kenya. Kamlesh Sharma, the Secretary General, said that the ICC must "understand Kenya's multiple international obligations."²²⁵ The Kenyan government argued that arresting the Sudanese president could have an adverse effect on the Sudanese peace process.²²⁶ Officials also said Kenya had a duty to the African Union, which instructed its members to defy the ICC and not apprehend Sudan's president.²²⁷

Responding to Commonwealth Secretariat, Christian Wenaweser, the President of the ICC assembly of states' parties to the Rome Statute of the ICC, wrote a letter reminding the Commonwealth secretary of the standing of (1) *an ICC arrest warrant in international law*, (2) *backed by treaty* and (3) *a UN Security Council resolution*. Apparently baffled, Wenaweser remarked: "What was alarming to me was that [Sharma's] comments seemed to indicate he agreed with the view expressed by the Kenyan officials that the obligation to the

²²² Julian Borger, *Commonwealth Chief Admonished by ICC Over 'War Crimes' Remarks*, GUARDIAN (Eng.), Oct. 27, 2010, www.guardian.co.uk/world/2010/oct/27/commonwealth-international-criminal-court-bashir/print.

²²³ Two arrest warrants have been issued against him by the Chamber I of the ICC. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); Prosecutor v. Omar Hassan Ahmed Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (July 12, 2010). The warrants list ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including: five counts of crimes against humanity: murder—article 7(1)(a); extermination—article 7(1)(b); forcible transfer—article 7(1)(d); torture—article 7(1)(f); and rape—article 7(1)(g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities—article 8(2)(e)(i); and pillaging—article 8(2)(e)(v). The three counts of genocide included: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b), and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).

²²⁴ Borger, *supra* note 222.

²²⁵ Walter Menya, *Club Boss Says Kenya in Order Over al-Bashir*, DAILY NATION (Kenya) (Sept. 14, 2010), <http://www.nation.co.ke/News/politics/Club+boss+says+Kenya+in+order+over+al+Bashir+/-/1064/1011186/-/rswse8/-/index.html>.

²²⁶ Borger, *supra* note 222.

²²⁷ *Id.*

African Union overrides the obligation to fully co-operate with the ICC.”²²⁸ The Security Council, Alvarez says is not much of a deterrent for the Sudanese head of state because “[t]he Security Council has, to date, ducked all pleas by the ICC Prosecutor to assist the Court in enforcing its indictments, even though the Council could easily do so under UN Chapter VII authority, including its existing sanctions regime for Sudan under Security Council Resolution 1591 (2005).”²²⁹ Here Alvarez is egging on the Council to intervene in the AU at the cost of undermining an international legal process as enshrined in article 16 of the ICC.²³⁰ This flies in the face of the understanding of some AU members states that the ICC’s Article 16 be used “sparingly and only when a specific threat to international peace and security could be identified under chapter VII of the UN Charter and when action against such a specific threat would be exacerbated by proceedings pending before or contemplated by the ICC.”²³¹

B. ICC Article 16, Security Council and Sudan: The Politics of International Law

Wenaweser nonetheless needs to consult some of the judgments from the ECJ and the U.S. Supreme Court; many of them discussed the derogation of international law by the EU and the United States before. The question is: what alarms him? Is it the disobedience of international law *per se* or disobedience by an African state? As such, the AU is frustrated over the Security Council’s failure to consider its deferral request.²³² “Less than two weeks after the Rome Statute entered into force on 1 July 2002, . . . article 16 of the Rome Statute was controversially invoked at the behest of the United States”²³³ The United States threatened in early June 2002 to veto the renewal of the mandate of the UN mission in Bosnia and Herzegovina, as well as all other future peacekeeping operations, if rticle 16 of the ICC was not amended to its liking.²³⁴

²²⁸ *Id.*

²²⁹ Alvarez, *supra* note 137.

²³⁰ *Id.*

²³¹ DAPO AKANDE, MAX DU PLESSIS & CHARLES CHERNOR JALLOH, INST. FOR SEC. STUDIES, AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC 10 (2010).

²³² *Id.* at 8.

²³³ *Id.*

²³⁴ *Id.*

Usually states party to the ICC self-refer the cases. In the case of Sudan—not a party to ICC, only to the UN—the Security Council, acting under its chapter VII authority, submitted the situation to the ICC prosecutor.²³⁵ As such, as Dapo Akande *et al* argue, “in a treaty-based consensual international judicial institution like the ICC, the Sudanese referral constitutes a coercive and exceptional measure.”²³⁶ Such a measure is justifiable only from the perspective of international treaty law if “it is a measure aimed at the maintenance or restoration of international peace and security under article 39 of the UN Charter.”²³⁷ The Security Council’s invocation at the behest of—and under threat by—the United States points to the highly politicized “nature of article 16” of the ICC.²³⁸ Although article 16 of the ICC allows the Security Council “a limited power of intervention in the workings of the ICC, it was not intended as a means” which the Council might use to undermine the ICC.²³⁹ Such a situation, as Akande reports, has prodded the Assembly of the AU, and the African Commission, “to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of state officials under international law.”²⁴⁰

Larger questions emerge. If the EU, as well as the United States, could trump international law, as discussed above, why can’t the African Union rethink its relationship with international law? This is not to justify any kind of genocide by any state machinery, including the State head. The question is about the political nature of conviction within international law.

²³⁵ *Id.* at 7.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 8.

²³⁹ *Id.* at 10.

²⁴⁰ Dapo Akande, *The African Union’s Response to the ICC’s Decisions on Bashir’s Immunity: Will the ICJ Get Another Immunity Case?* EJIL: TALK! (Feb 8, 2012), <http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/>.

As has been the pattern over the past three or four years, the AU Assembly has, at its biannual meetings, adopted a number of decisions regarding cases at the [ICC]. In the latest meeting, the AU Assembly reiterated its request that the UN Security Council defer the proceedings against Sudanese President Bashir in accordance with Article 16 of the Rome Statute.

Id.

After all, whether or not the Kenyan “obligation to the African Union overrides the obligation to fully co-operate with the ICC”²⁴¹ is a matter of debate, just as it is within the EU as seen in *Mox Plant* case. As it is, the Sudan-Kenya part of the AU is an extremely fragile zone. When the larger prospect of peace is in deferring the arrest of Al-Bashir, which would be temporary, the Security Council should give peace a chance rather than just call unequivocally for Al-Bashir’s arrest. The exercise in international norm creation, such as the one done through the creation of the ICC, has been the single most important political result of international law’s project, which continues to misread the Third World states’ local needs. If the AU Assembly reiterates its request that the Security Council defer the proceedings against Sudanese President in accordance with article 16 of the Rome Statute, it should draw the attention of international lawyers to a political turmoil that the arrest might unleash in the region. In any case, the United States, which controls the Security Council for all practical purposes, must not act to jeopardize the legal process for political mileage. The AU is doing its best to honor international law; it is the political production of convicts by the Security Council that wrongly portrays the AU as not complying with international law. International law’s intimate animosity continues.

CONCLUSION

Since the terrorist attacks of September 11, the United States has decided to go it alone. Others are welcome to join in if they wish, and there may be advantages, but very little law, down that road. The Guantanamo base was deliberately chosen to hold al-Qaida suspects in a legal vacuum and has become a symbol of the US opposition to everything that might check its liberty of action—from human rights treaty bodies to the International Criminal Court, multilateral disarmament to the Kyoto Protocol.²⁴²

International law was never a Third World child. It was thrust upon the Third World through the process of colonization. Sovereignty is central to the understanding of international law. But as Anghie thinks, “sovereignty is, perhaps somehow inherently imperial.”²⁴³ It always seeks to expand its reach and power, whether internally or externally.²⁴⁴ Thus the “work of TWAIL scholars is indispensable to

²⁴¹ Borger, *supra* note 222 (quoting President of the ICC Assembly of State Parties Christian Wenaweser).

²⁴² Koskenniemi, *supra* note 139, at 197.

²⁴³ Anghie, *supra* note 106, at 1367.

²⁴⁴ *Id.*

addressing and comprehending these evolving complexities and shifting realities.”²⁴⁵ The lens of intimate animosity seeks to capture this shifting reality within the schema of international law.

Today, the Third World has begun to accept the idea of international law. This creates a rather unprecedented situation when the Third World looks more interested in saving the project of international law than the Western collective. Much to the displeasure of Kelsen, both the EU and the United States have something dearer to defend. For the EU it is their yet-to-be-born constitution, and for the United States, it is their Constitution. Putting all speculations about the role of power in international law’s operation to rest, Paulsen reminds us that for the United States, its “Constitution is always supreme over international law.”²⁴⁶ He maintains: “To the extent that the regime of international law yields determinate commands in conflict with the Constitution’s commands or assignments of power, international law is, precisely to that extent, *unconstitutional*.”²⁴⁷

Unfortunately, international lawyers “exist in a tenuous twilight zone between academic homelessness and practical professional insecurity.”²⁴⁸ While practicing international law, due in part to the discursive nature of law, lawyers do not want to transcend legal thinking. Sovereignty as a concept is also undergoing an unprecedented and severe change. Alas! Under the Western assault, international law is bleeding out its ability to see welfare as a common good at a time when NATO is handing down the responsibility to protect as a new humanitarian aid. If not more, at least in the responsibility to protect, we see the West philosophizing through force.

Referring to Europe fresh from World War II, Albert Camus once wrote: “But the Europe we know, eager for the conquest of totality, is the daughter of excess.”²⁴⁹ It is no longer with hammer blows, he cautioned “but with cannon shots that Europe philosophizes.”²⁵⁰ Thus it is important that the norm-creating hypothesis of the international legal system “be reformulated so that support of a nascent norm of

²⁴⁵ *Id.* at 1366.

²⁴⁶ Paulsen, *supra* note 84, at 1762.

²⁴⁷ *Id.* (italics in original).

²⁴⁸ Peter Goodrich, *On the Relational Aesthetics of International Law: Philosophy of International Law*, *Anthony Carty*, 10 J. HIST. INT’L L. 321, 322 (2008).

²⁴⁹ Camus, *supra* note 24, at 149.

²⁵⁰ *Id.* at 151.

customary international law could never be adduced alone as sufficient justification for breach of the system's foremost norm."²⁵¹ In other words, international law is waiting to be seen through an "intimate enemy" lens to capture its actual dynamics vis-à-vis developing and developed worlds.

²⁵¹ Chigara, *supra* note 66, at 196.

KATE E. BLOCH*

Representation for the Accused: Haiti's Thirst and a Role for Clinical Legal Education

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Appendix A 471

INTRODUCTION

In 2011, the United States Supreme Court ruled that conditions in California’s prisons constituted cruel and unusual punishment and violated the inmates’ rights under the Eighth Amendment of the U.S. Constitution.¹ The Supreme Court perceived the situation as so grave that it upheld the district court’s order mandating that California further reduce its prison population by approximately 37,000 prisoners.² The Supreme Court’s ruling stemmed from a plethora of

¹ *Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011) (“This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years. They remain uncorrected.”).

² *Id.* at 1923 (“Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternate remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order’s impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent.”). California passed legislation in 2011 that the California Department of Corrections and Rehabilitation describes as “the cornerstone of California’s solution for reducing the number of inmates in the state’s 33 prison[s] to 137.5 percent of design capacity by June 27, 2013, as ordered by the Three-Judge Court and affirmed by the U.S. Supreme Court.” *The Cornerstone of California’s Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEP’T OF

evidence documenting egregiously problematic conditions in the prisons. This evidence begins with the sheer number of inmates in relation to the space. The Court noted that the prison population was “nearly double the number that California’s prisons were designed to hold.”³ The district court had described the severe overcrowding as “forc[ing] prisons to house inmates in non-traditional settings, such as triple-bunks in gyms and dayrooms not designed for housing.”⁴ The Supreme Court noted that two to three correctional officers may supervise as many as 200 inmates in a gymnasium, a space not designed to house prisoners, and that “[a]s many as 54 prisoners may share a single toilet.”⁵

The conditions in California’s prisons as delineated in *Plata* are abysmal.⁶ As disturbing as these conditions are, I wonder what the Court might have ordered had the conditions in California’s prisons been as they have in Haiti’s. In reporting on conditions in Haiti, the U.S. Department of State’s 2009, 2010, and most recent 2011 Human Rights Reports concluded in similar, and sometimes identical, language in each year’s report that:

[p]risons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept in shifts due to lack of space. Some prisons had no beds for detainees, and some cells had no access to sunlight. Many prison facilities lacked basic services such as toilets, medical services, potable water, electricity, and medical isolation units for contagious patients Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, poor quality health care, and illness caused by lack of access to

CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/> (last visited Aug. 19, 2012). The legislation, known as Realignment legislation (found in AB 109 and 117), became effective on October 1, 2011. *Id.* Generally, the legislation focuses on counties keeping and supervising individuals who have committed less serious offenses at the local level, rather than sending them to state prison. *Id.*

³ *Plata*, 131 S. Ct. at 1923.

⁴ *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 U.S. Dist. LEXIS 67943, at 142 (E.D. Cal. Aug. 4, 2009). In *Plata*, the Supreme Court described in graphic detail the disturbing results of California’s failure to remedy overcrowding and consequent failure to provide necessary medical and mental health care to the inmates of its prisons. Among other consequences, the Court pointed out that a 2007 “analysis of deaths in California’s prisons found 68 preventable or possibly preventable deaths.” *Plata*, 131 S. Ct. at 1925 n.4.

⁵ *Plata*, 131 S. Ct. at 1924.

⁶ I have had occasion to visit one of California’s prisons, San Quentin Prison in San Quentin, California, and did observe some of the effects of overcrowding there.

clean water. Some prisons did not allow prisoners out of their cells for exercise.⁷

With respect specifically to overcrowding, the 2011 State Department Report explains that “[a]ccording to local standards, available prison facilities were at 300 percent of their capacity, but by international standards, the prisons were above 500 percent of capacity.”⁸

In March of 2012, a law school group from the University of California, Hastings College of the Law, visited the prison in Jérémie, Haiti, and observed that there was no triple bunking in gymnasiums and dayrooms because there were no gymnasiums or dayrooms.⁹ In

⁷ U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: HAITI 5 (2011) [hereinafter 2011 HUMAN RIGHTS REPORT: HAITI]. The relevant passage from the 2009 Report reads:

Prisons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept and stood in shifts due to lack of space. Some prisons had no beds for detainees; some cells had no[] access to sunlight. Many prison facilities lacked basic services such as medical services, electricity, and medical isolation units for contagious patients. Many prisons also periodically lacked water. Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, and poor quality health care and illness caused by the presence of rodents. Some prisons did not allow prisoners out of their cells for exercise.

U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: HAITI, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136116.htm> [hereinafter 2009 HUMAN RIGHTS REPORT: HAITI]. The relevant passage from the 2010 Report reads:

Prisons and detention centers throughout the country remained overcrowded, poorly maintained, and unsanitary. Overcrowding was severe; in some prisons detainees slept in shifts due to lack of space. The earthquake, which damaged several prisons, intensified the existing problems. The earthquake damage compromised the holding capacity at facilities in Carrefour, Delmas, Jacmel, and the National Penitentiary in Port-au-Prince. Over 5,000 detainees escaped in the wake of the earthquake, including all 4,215 persons held at the National Penitentiary. Some prisons had no beds for detainees; some cells had no access to sunlight. Many prison facilities lacked basic services such as medical services, water, electricity, and medical isolation units for contagious patients. Many prisoners and detainees suffered from a lack of basic hygiene, malnutrition, poor quality health care, and illness caused by the presence of rodents. Some prisons did not allow prisoners out of their cells for exercise.

U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: HAITI, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154509.htm> [hereinafter 2010 HUMAN RIGHTS REPORT].

⁸ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 5.

⁹ Escorted by Georges-Gabrielle Paul, an ESCDROJ graduate, I visited the Jérémie Prison with four other members of the 2012 Hastings-to-Haiti Partnership (HHP) on March 6, 2012. Our visit was brief. The Seton Hall Law School delegation also visited the prison the same week and conducted interviews with personnel associated with the prison and then prepared a fact-finding memorandum on the conditions there. *See* Seton Hall Law School Fact-Finding Memorandum from Rachel Lopez, Concerning Prison Conditions in

fact, there were no bunks or beds for adult male inmates at all.¹⁰ In general, these inmates slept in shifts on the concrete floor because there was not enough floor space for all the inmates to lie down at one time.¹¹ Adult male inmates primarily stood, sat, or squatted side-by-side with, in at least one cell, over fifty men packed into the cell with an official capacity of approximately ten men.¹² We learned that the adult male population of the Jérémie Prison had only limited access to toilets, which were located in the yard. According to a 2012 fact-finding memorandum on the Jérémie Prison from a Seton Hall School of Law delegation, “[t]ypically, prisoners have two to three breaks from their overcrowded cells per day, during which they have approximately 25 minutes to shower, use the toilet, and get whatever little exercise they can. When a prisoner needs to use the toilet and it is not break time, he must relieve himself into a communal bucket in the cell, which is collected and dumped each morning.”¹³

Jérémie and Recommendations for Reform (Apr. 18, 2012) (on file with the Review and with the author).

¹⁰ During the March 6, 2012, visit to the Jérémie Prison, I observed the intensely crowded conditions in adult male inmates’ cells, the absence of gymnasiums and dayrooms, and the lack of bunks and beds in cells with adult male inmates.

¹¹ The Seton Hall Memorandum notes, with respect to sleeping conditions in the prison, that the

prison warden explained that he cannot furnish the men’s cells with beds or mattresses because the roofs are made of aluminum and the prisoners could easily escape by using the mattresses to push up the roof. As a result, the prisoners must sleep on the floor. Sometimes the prison guards will place cardboard on the ground so the inmates do not have to sleep directly on the cold concrete floor.

Lopez, *supra* note 9, at 2.

¹² Lopez, *supra* note 9, at 1–2. When the HHP group visited the prison in March, we noticed the number fifty-seven chalked on a cell door, one that housed adult male inmates. This number was apparently intended to represent the count of inmates in the cell. We were, however, informed that the actual count of inmates in the cell was fifty-eight. Inmates in this cell stood, squatted, or sat almost on top of one another, occupying what appeared to be nearly every available square foot of floor space of the small dark room.

¹³ Lopez, *supra* note 9, at 2 (“The facility only has seven toilets and seven showers, which are located outside of the cells . . . The prison allows the prisoners two visits from their family members each week, but on those days they lose their regular break time.”). The HHP group did learn that, in at least some ways, the conditions in the Jérémie Prison had improved in recent years. For example, inmates now had regular access to water, which was apparently treated with chlorine or other disinfecting agents. *Id.* at 2–3. This access to water apparently resulted from funding by Seton Hall Law School and coordination with Dr. Eustache to have a well dug for the prison. *Id.* The cholera epidemic in Haiti, which began in October of 2010, has produced outbreaks in Haitian prisons, *see* 2011 HUMAN RIGHTS REPORT HAITI, *supra* note 7, at 6, and rendered the issue of the adequacy of medical care facilities in Haitian prisons especially urgent. In a July 18, 2012, website posting, the Center for Economic and Policy Research notes that the outbreak of

The observations of the March 2012 UC Hastings College of the Law group who visited the prison and the description in the Seton Hall 2012 fact-finding memorandum mirror many of the concerns about overcrowding and prison conditions articulated in the most recent 2011 U.S. State Department's Human Rights Report on Haiti.¹⁴ Similarly, the Health and Human Rights in Prisons Project in Haiti (HHRPP) opined in 2009 that "Haiti's prisons are among the worst detention facilities in the Americas."¹⁵

cholera in Haiti had caused 7,418 deaths and infected 579,014 people. *104 Members of Congress Call for the UN to Take Responsibility for Cholera*, CTR. FOR ECON. & POLICY RESEARCH (July 18, 2012), <http://www.cepr.net/index.php/blogs/relief-and-reconstruction-watch/104-members-of-congress-call-for-the-un-to-take-responsibility-for-cholera>; see *Health Cluster Bulletin: Cholera & Post-Earthquake Response in Haiti*, PAN AM. HEALTH ORG. (Dec. 21, 2011), available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3209.pdf ("As of 30 November 2011, the cumulative number of reported cholera cases was 515,699, of which 279,077 (54%) were hospitalized and 6,942 persons had died."). When I visited the Jérémie Prison in 2012, there was a pool of what appeared to be bleach just outside the entrance to the prison into which we dipped the soles of our shoes to avoid spreading (cholera) germs. On March 6, 2012, at least one and perhaps two inmates seemed to be in the process of being treated for apparent cholera symptoms. One was walking about the yard in what appeared to be a disposable hospital gown and the other lay under a canopy on a cot in the otherwise open prison yard and appeared to be attached to a one-to-two gallon-sized jug of intravenous solution. The Seton Hall group, who visited the following day, reported that even though the well water was being treated in the Jérémie Prison, "four prisoners have had cholera and two have died since the outbreak of cholera in October 2010. Additionally, the week that the Seton Hall delegation visited, one of the prisoners was identified as possibly having cholera." Lopez, *supra* note 9, at 3.

¹⁴ As indicated in note 13, *supra*, some of the conditions in the Jérémie Prison (for example, access to water) may have been better than those in the prisons generally in Haiti as described in the 2009, 2010, and 2011 U.S. State Department Reports. The U.S. State Department Reports do note improvements in some of the conditions in Haitian prisons. See, e.g., 2010 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 6 ("Authorities took some measures to improve prison conditions. In response to the prison killings in Les Cayes, Minister of Justice Paul Denis began a series of unannounced prison visits, beginning with the Women's prison in Petionville followed by the National Penitentiary. In addition, the government started releasing defendants who had been held in preventive detention for unacceptably long periods, pending formal charges and trial. Officials implemented a pilot project at the Petionville Women's Prison, establishing a special correctional tribunal to deal with the 257 detainees awaiting formal charges. Between June 8 and 14, the tribunal heard 15 cases, including three involving juveniles; 14 defendants were released, including an inmate who had served her sentence but remained incarcerated. The Ministry of Justice held hearings in August and September to reduce the pretrial detention backlog in the National Penitentiary, and the court committee released 30 inmates as a result. Still, since most of the 1,570 detainees awaiting trial in the Penitentiary were held for serious crimes that warranted a jury trial, they were effectively denied the right to a prompt trial. An estimated 15 percent of detainees in the National Penitentiary had been convicted by year's end.").

¹⁵ HEALTH AND HUMAN RIGHTS IN PRISONS PROJECT (HHRPP), INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI 3 (Dec. 2009), available at <http://ijdh.org/archives/5007>

Not only are the prison conditions deeply troubling, but they are accompanied by frequent failures to meet the Haitian legal requirement that suspects be brought before a judge within 48 hours following arrest.¹⁶ The 2009, 2010, and 2011 U.S. State Department Reports all explain, in similar language, that arrestees are often held in the jails and prisons for “extended periods—in some cases up to five years—without the opportunity to appear before a judge.”¹⁷ The

[hereinafter HHRPP]. Additional sources that describe the prison conditions in Haiti include the decision of the Inter-American Court in the *Yvon Neptune v. Haiti* case, where the court explained:

The Court also finds that it has been proved and not disputed that, during the time Yvon Neptune was detained in the National Penitentiary and subsequently in the Annex, there was a general context of serious shortcomings in prison conditions in Haiti, as well as a lack of security in almost all the country's detention centers; this was pointed out by several international organizations and agencies. There was extreme overcrowding, lack of beds, badly ventilated and unhygienic cells, few sanitary installations, poor food, a scarcity of drinking water, lack of medical attention and serious problems of hygiene, illnesses and bacterial diseases. The State did not dispute the Commission's allegations, according to which: “[t]he extreme overcrowding, unhygienic and unsanitary conditions and poor inmate diet at the National Penitentiary did not even approximate the standards set in the United Nations *Standard Minimum Rules for the Treatment of Prisoners*”; and “[d]espite repeated outbreaks of violence in the National Penitentiary, the State kept its inadequate structure intact.”

See *Yvon Neptune v. Haiti*, Merits Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 137 (May 6, 2008) (footnotes and citations omitted), available at www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.pdf, and a submission to the United Nations Human Rights Council entitled REPUBLIC OF HAITI CRIMINAL JUSTICE—SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW, available at <http://ijdh.org/word/press/wp-content/uploads/2011/03/UPR-Prisons-SR-English-Final.pdf>. Some sources report current or impending improvements in prison conditions in Haiti. See, e.g., Trenton Daniel, *Haitian Prisons Get Overhaul as Rest of Reconstruction Lags*, ASSOCIATED PRESS (July 21, 2011), <http://ijdh.org/archives/20289>.

¹⁶ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 7–8, 10 (noting specifically that “[t]he law prohibits arbitrary arrest and detention, and the constitution stipulates that a person may be arrested only if apprehended during the commission of a crime or on the basis of a warrant by a legally competent official such as a justice of the peace or magistrate. Authorities must bring the detainee before a judge within 48 hours of arrest. Officials frequently did not comply with these provisions in practice The government frequently did not observe the constitutional requirement to present detainees before a judge within 48 hours, and prolonged pretrial detention remained a serious problem. Authorities held many detainees in pretrial detention for extended periods—in some cases up to five years—without the opportunity to appear before a judge.”).

¹⁷ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 7–8; 2010 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 8 (“The government frequently did not observe the legal requirement to present detainees before a judge within 48 hours, and prolonged pretrial detention remained a serious problem. Many detainees were held in pretrial detention for extended periods—in some cases up to five years—without being informed of charges against them.”); see also HHRPP, *supra* note 15, at 6. The HHRPP report describes results

most recent 2011 Report indicates that “most of the 4,808 pretrial detainees had never been before a judge, seen a lawyer, or even had access to documentation regarding the charges against them.”¹⁸ According to the Seton Hall memo, in Jérémie, there appear to be significant efforts underway to get pre-trial detainees before the court.¹⁹ Nonetheless, the memo indicates that, of the 243 adult male inmates in the prison on March 7, 2012, only seventy-five had been sentenced.²⁰ The remaining 168 still awaited trial, meaning more than two-thirds of the adult male inmates in the prison were pre-trial detainees who had not been convicted of the crime for which they sat, squatted, or stood in prison.²¹

These reports underscore the need for representation. Seeing a judge or being heard in the Haitian justice system may require the intervention of an attorney.²² For example, the 2012 Seton Hall fact-finding memorandum opines that “[a]fter 48 hours has passed, someone who has been arrested and not been before a judge may file a petition for habeas corpus, but that person needs a lawyer to represent him.”²³ An international human rights attorney familiar with prisons and legal services in Haiti explains, however, that: “[a]ccess to legal services is particularly problematic. Eighty percent of the population is desperately poor and cannot afford to pay [for] legal services. Despite the great need, Haiti lacks a tradition of organized public assistance lawyering.”²⁴ Similarly, the 2011 State Department

from its survey of prisoners on the length of detention as follows: “the average wait for trial for detainees in the HHRPP survey was 16 months, with one prisoner still waiting after nine years.” *Id.*

¹⁸ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 11.

¹⁹ Lopez, *supra* note 9, at 1, 4.

²⁰ *Id.* at 3.

²¹ *Id.* There were approximately five women inmates during the March 2012 visit. The women inmates did have bunks and mattresses in the women’s cell, and so they were able to lie down without having to sleep in shifts. *Id.* at 2. Moreover, women were not confined to their cell during the day in the same way that the male adult inmates were confined. *Id.* Instead, the women seemed to have substantial access to the prison yard during the day.

²² *Id.* at 5.

²³ *Id.* (footnotes omitted).

²⁴ Blaine Bookey, *Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY L. REV. 255, 274 (2011). Similarly, the 2011 State Department Report explains that “[m]any detainees could not afford the services of an attorney, and the government routinely did not provide free counsel.” 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 10. As described by a knowledgeable observer, most “Haitian law school graduates never become lawyers, because they fail to complete the required *memoire* (thesis) and *stage* (apprenticeship) required for admission to the bar. Students of modest means, those most likely to work on behalf of the poor, find

Report notes, "Many detainees could not afford the services of an attorney. The local bar association in some departments formed legal assistance groups to provide pro bono counsel to indigents who could

it particularly difficult to overcome these hurdles." Bookey, *supra* at 274. Similarly, Brian Concannon notes:

After finishing law school, graduates must present a memoire, or thesis. Technical support, access to materials, and advice for this process are not integrated into the curriculum, so students must find a lawyer willing to help them with their proposed topic, for a price. After successfully defending their memoire, candidates must complete a two-year stage or internship. Although some internships may be done in the public sector (in a courthouse, for example), the vast majority of candidates must find a senior lawyer in private practice who is willing to supervise them. As a result, although many students are enrolled in Haiti's six law schools, some motivated by the possibility of using the law for social change, [Mr. Concannon estimates that] fewer than twenty lawyers per year are admitted to practice . . . Haiti's legal education system is changing, but haltingly.

Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 212 n.45 (2000). In addition, the Seton Hall fact-finding memo also opines that

[i]n Haiti, free legal assistance is nearly non-existent and . . . opportunities for pro se representation are extremely restricted." Lopez, *supra* note 9, at 7. On the topic of the availability of legal representation, Dr. Eustache explains: "In Haiti . . . [t]he scarcity of free legal services for lower income groups contributes greatly to the lack of legal knowledge. While the right to counsel is afforded to all citizens, court appointed counsel is generally only provided after the pretrial investigation is completed. In short, defendants are denied the right to legal advice during the most critical period of the proceedings.

Dr. Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement of the Judiciary System in Haiti*, 32 HASTINGS INT'L & COMP. L. REV. 601, 609 (2009).

A significant development in providing free legal representation to prisoners has begun in a pilot project in prisons in Hinche, Mirebalais, and St. Marc, Haiti, under the auspices of the Health and Human Rights Project in Prisons. See HHRPP, *supra* note 15, at 7. A report on their work explains that "[t]he legal team represents prisoners at no charge to secure a dismissal of unjustified charges, and pre-trial release or a speedy trial where appropriate." *Id.* at 3. The HHRPP report notes that "[t]here is no effective system of legal aid in Haiti." *Id.* at 6. Moreover, the report contends, "Haiti's prisons are at the center of a nationwide bribery racket within the justice system." *Id.* at 6. Similar concerns about official corruption more generally also appear in the 2011 U.S. Department of State Human Rights Report, which maintains that "[t]he law provides criminal penalties for official corruption. However, the government did not implement the law effectively, and officials often engaged in corrupt practices with impunity. Corruption remained widespread in all branches and at all levels of government." 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 20.

Haiti is the poorest country in the Western Hemisphere. *The World Factbook, Haiti: Economy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (last visited Oct. 13, 2012). The most basic human needs, for adequate food, potable water, and safe shelter, especially post-earthquake, are often not met. Many organizations and individuals are working to try to meet these and other threshold needs.

not afford an attorney, but there was no nationwide government provision of free legal representation.”²⁵ This need for representation produces an imperative to train and encourage attorneys to represent detainees in Haitian prisons.²⁶

At least one law school in Haiti aims to meet this imperative. ESCDROJ (*L'École Supérieure Catholique de Droit de Jérémie*, the Catholic Law School of Jérémie) focuses on “help[ing] build a society where the rule of law can be enforced”²⁷ and preparing law students “to become servants of law and justice.”²⁸ Approximately 130 students are enrolled in the four-year law school curriculum.²⁹ A law school dedicated to supporting the rule of law and to justice furnishes an excellent forum for encouraging students to undertake representation of prison detainees.

In U.S. legal education, especially in the decades since the 1992 MacCrate Report,³⁰ a law school would likely rely on a clinical

²⁵ 2011 HUMAN RIGHTS REPORT: HAITI, *supra* note 7, at 10; 2009 HUMAN RIGHTS REPORT: HAITI, *supra* note 7 (explaining that “[w]ith the support of the national government and the local legal community, international groups provided funds to indigent defendants for professional legal representation”).

²⁶ Training and encouragement of attorneys to represent detainees are crucial steps in providing legal counsel for inmates. While some attorneys may be able to donate their time to handle some of these cases pro bono, additional funding to support attorneys representing indigent detainees will almost certainly be required to provide sufficient access to representation. In the pilot project of the HHRPP, described briefly in *supra* note 24, the Institute for Justice and Democracy in Haiti (*Bureau des Avocats Internationaux*) reports that it “hired on-site lawyers at two of the three prisons” involved in the project. HHRPP, *supra* note 15, at 3. Of course, representation is only one of a number of reforms that are likely to be necessary to address the issues surrounding detention of individuals in Haiti’s prisons. HHRPP, which involves a partnership among legal and health organizations, more generally aims to address “prolonged pretrial detention and horrific prison conditions by systematizing the delivery of health and legal services to individual prisoners and advocating for broader, systemic reforms.” *Overview, Health and Human Rights in Prisons Project*, INSTITUTE FOR JUSTICE AND DEMOCRACY IN HAITI, <http://ijdh.org/projects/prisoners-rights#hrpp-prisons> (last visited Oct. 13, 2012).

²⁷ *About ESCDROJ*, L'ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/About.html> (last visited Oct. 13, 2012) (“ESCDROJ was created to help build a society where the rule of law can be enforced, where justice may flourish, and where peace may be enjoyed. We envisioned our law school as a place for those who want to become servants of law and justice, regardless of religion, gender, social, economic or political backgrounds.”).

²⁸ *Id.*

²⁹ In addition to the successful completion of classes, to practice as an attorney in Haiti, generally students must complete both a “memoire,” which resembles a thesis, and a “stage” or apprenticeship in a court or law office. The “stage” appears to differ from a typical U.S. law school externship experience in that it occurs following law school and without academic supervision. *See supra* note 24.

³⁰ *See generally* AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUC. AND PROF’L DEV.: AN EDUC. CONTINUUM (July 1992); *see also* N.

program to provide the theoretical, doctrinal, and practical training to help students embark on criminal representation of the underserved jail population. The law school might employ a live-client clinic, in particular, to enable students to experience such representation.³¹ But, as succinctly explained by Dr. Jomanas Eustache, Dean of ESCDROJ, “these kinds of clinical training opportunities do not currently exist in Haiti.”³²

Pioneers at ESCDROJ aim to change that. To do so, Dr. Eustache and members of the ESCDROJ community have engaged in a variety of efforts to enhance the focus on practical experiential legal education in Haiti. Among these efforts, they have sought to import some of the information and experience from U.S. clinical programs. For example, they have reached out to encourage U.S. law schools that partner with ESCDROJ to share U.S. clinical teaching approaches with aspiring lawyers-to-be in Haiti. As part of these efforts, members of the Hastings-to-Haiti Partnership (HHP)—a long-standing partnership between the University of California, Hastings College of the Law, and ESCDROJ—have participated in creating and teaching sample clinical criminal simulation modules.³³ More directly, ESCDROJ is in the midst of attempting to create its own

William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, THE ASS'N OF AM. LAW SCH., http://www.aals.org/services_newsletter_presNov05.php (last visited Oct. 13, 2012) (“The recent ABA report on curriculum changes between 1992 and 2002 notes that one pronounced trend has been the growth in opportunities for students to gain practical experiences in representing clients within supervised clinical settings and the proliferation of courses emphasizing discrete professional skills, such as factual investigation, interviewing, counseling, negotiation, mediation, and litigation—the core agenda of the McCrate Report.”).

³¹ An extensive body of scholarship exists on clinical andragogy/pedagogy in legal education. See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

³² Eustache, *supra* note 24, at 607; see also Brian Concannon, Jr., *The Bureau des Avocats Internationaux, a Victim-Centered Approach*, in EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS 239 (Barnhizer ed., 2001) (“Law School in Haiti is theoretical, with no practice classes or clinics.”).

³³ As one of several partnerships between ESCDROJ and U.S. law schools, HHP’s work is just one of a number of U.S. law school collaborations with legal educators in Jérémie. At least three U.S. law schools, in addition to UC Hastings College of the Law, enjoy educational partnerships with ESCDROJ, including Catholic University of America, Columbus School of Law, Florida International University College of Law, and Seton Hall University School of Law. See *Partners & Projects*, L’ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/partners&projects.html> (last visited Oct. 14, 2012).

criminal justice clinic in Jérémie.³⁴ The hope and expectation is that “[o]nce fully operational, the Clinic will help to reduce significantly the overcrowding of the jail in Jérémie.”³⁵

This Article explores and reflects on the experience of the Hastings-to-Haiti Partnership in designing and teaching two criminal justice simulation modules, one in 2009 and one in 2011, with the collaborative and invaluable engagement, advice, and support of our ESCDROJ colleagues. This simulation project aims to contribute to the larger endeavor of fueling practical legal training in Haiti’s law school curriculum, as well as furnishing more immediate education about practical legal skills for students who might represent detainees in the Haitian prison system in Jérémie through the hoped-for criminal justice clinic and in their future practices.

It is important to note, before proceeding to a discussion and evaluation of this aspect of the UC Hastings and ESCDROJ exchange, that, although the members of the UC Hastings contingent were the primary presenters of material for these clinical modules, the exchange is a bi-directional one. The partnership engages students,

³⁴ Eustache, *supra* note 24, at 606–07 (“In the near future, ESCDROJ hopes to start a law clinic in order to provide both clinical training for our students and assistance to those in our community and who need representation. Currently, after passing a pre-memoir at the completion of their second year, students may represent individuals before the local court. However, by having a clinic, we could more effectively train our students in a manner that combines advocacy with a strong commitment to serve those who cannot afford justice. Students would then have the necessary tools to sharpen their legal advocacy skills. The need is great because these kinds of clinical training opportunities do not currently exist in Haiti.” (footnotes omitted)); *see also Partners & Projects*, *supra* note 33 (“ESCDROJ is currently working to establish Groupe de Recherche, d’Analyse et d’Assistance Légale, the first law school affiliated Criminal Justice Clinic to serve the Grand’Anse region of Haiti. The clinic will increase access to quality legal representation for indigent defendants, provide for private mediation to resolve disputes before they ripen into criminal charges, inform the citizenry about their rights and responsibilities under the rule of law, and train and deploy a new class of lawyers dedicated to social justice. It will also serve as a model that can be replicated in other law schools of Haiti to increase high quality legal representation for those charged with crimes who currently are unrepresented, and often forgotten, in Haiti’s criminal justice system.”); *Law and Social Justice Initiatives*, THE CATHOLIC UNIVERSITY OF AMERICA (June 20, 2012), <http://lsji.law.edu/cuahaiti.cfm>. As part of the effort to initiate a criminal justice clinic, clinicians in the United States at Catholic University of America, Columbus School of Law hosted and worked with Roxane Dimanche, a pioneer in the efforts to found the Jérémie clinic, to provide information about U.S. clinical legal education. In January 2012, UC Hastings hosted Georges-Gabrielle Paul, a graduate of ESCDROJ, to support her efforts to help launch the Criminal Justice Clinic at ESCDROJ. Ms. Paul joined UC Hastings law students in attending an intensive accelerated class focused on preparing the U.S. law students for their externship experiences in local California prosecutors’ or public defenders’ offices.

³⁵ *Law and Social Justice Initiatives*, *supra* note 34.

alumni, and faculty from both institutions in presenting and sharing legal research, analysis, and information with each other. Moreover, the guidance, counsel, and practical support of our ESCDROJ colleagues were critical to the design and implementation of these two simulations.

Part I provides an overview of the creation and implementation of the first module. Part II surfaces and reflects upon some of the lessons from this foray into clinical legal educational modules in Haiti. In identifying these implications, Part II articulates several potential guideposts for international academics and practitioners providing curricular support for clinical legal education in Haiti and, perhaps, in other international contexts. Part III briefly addresses the second module and how we tried to follow those guideposts and apply those lessons.

Through this Article, I aim to provide a firsthand account and consequent analysis of one approach to developing and teaching criminal justice clinical legal educational modules in a Haitian law school. We hope that these simulation modules play at least a small part in helping to prepare and/or encouraging students to engage in criminal practice, and thus ultimately in addressing the urgent need for legal representation for detainees in Haitian prisons.³⁶ Research in the scholarly legal literature suggests that this is the first Article to furnish such an account and analysis as applied to Haiti.³⁷

³⁶ I use the term “we” often in this Article with the intent to credit my many wonderful colleagues involved in these simulations for the work and insights they contributed. But they may not share precisely my views, perspectives, or evaluative opinions. Consequently, please interpret the “we” as sharing credit, but not burdening my colleagues with my opinions.

³⁷ This research was conducted in a variety of scholarly legal literature sources available in English. This Article strives to supplement the existing collection of scholarly literature on global clinical legal education efforts. *See, e.g.*, THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (Frank S. Bloch ed., 2011) (describing and reflecting upon facets of clinical legal education endeavors in a variety of countries around the world); BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUE THE PRESIDENT AND WON (2005) (describing the work of Yale Lowenstein Clinic Law School students, Michael Ratner and Professor Harold Koh, among others, in representing Haitian detainees at Guantanamo Bay); Stacy Caplow, “*Deport All the Students*”: *Lessons Learned in an X-Treme Clinic*, 13 CLINICAL L. REV. 633 (2006) (reviewing STORMING THE COURT); Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT’L L. & FOREIGN AFF. 1, 38–39 (2008) (“In an effort to formalize global information exchange among progressive academics, the Global Alliance for Justice Education was founded in the late 1990s to facilitate the network of clinical and practice-oriented law school professors from around the world interested in promoting social justice pedagogy.”); Lawrence M. Grosberg, *Clinical Education in Russia: “Da and Nyet,”* 7 CLINICAL L. REV. 469 (2001); Steven E. Hendrix,

I

CREATING AND IMPLEMENTING OUR FIRST SIMULATION MODULE

A. Developing the Module

In the fall of 2008, Dean Eustache gave a symposium presentation at UC Hastings in which he conveyed his hope that ESCDROJ would create its own criminal justice clinic.³⁸ Several months later, in the spring semester of 2009, as discussions got underway about what presentations might be of interest to our partners during the upcoming

Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America?, 54 J. LEGAL EDUC. 597 (2004) (discussing law school reform, including reform of law school clinics in Guatemala); Grady Jessup, *Symbiotic Relations: Clinical Methodology—Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377 (2002); Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417 (2006); Peggy Maisel, *Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa*, 30 FORDHAM INT'L L.J. 374 (2007) (reviewing obstacles faced by law school clinics and vehicles employed by clinicians for addressing them in South Africa); Peggy Maisel, *The Role of U.S. Law Faculty in Developing Countries: Striving for Effective Cross-Cultural Collaboration*, 14 CLINICAL L. REV. 465, 466 (2008) (offering a critique to “provide ideas to U.S. law faculty who undertake future visits abroad to insure that their efforts amount to effective cross-cultural collaborations as opposed to one-sided attempts to transfer American expertise.”); Melissa Gibson Swain & JoNel Newman, *Helping Haiti in the Wake of Disaster: Law Students as First Responders*, 6 INTERCULTURAL HUM. RTS. L. REV. 133 (2011) (discussing the efforts and aid provided by U.S. law school clinicians and their students in helping Haitians secure Temporary Protected Status in the wake of the January 2010 earthquake as part of the work of a law school clinic at the University of Miami School of Law); J.P. Ogilvy, *Compilation of Clinical Law Teachers with International Teaching or Consulting Experience*, 24–25 (Feb. 27, 2012), available at [http://www.law.edu/res/docs/INTERNATIONAL_TEACHING_Survey_rev02-27-12\(5\).pdf](http://www.law.edu/res/docs/INTERNATIONAL_TEACHING_Survey_rev02-27-12(5).pdf) (including two references to faculty who have taught or consulted in Haiti—the compiler, Professor Ogilvy, and Professor Jean Larosiliere of Northern Illinois); Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL L. REV. 615 (2006). Although Professor Larosiliere’s entry from a 1994–95 visit notes providing “training in investigative theory and technique, ethics, comparative law and criminal law,” neither entry reports teaching clinical simulations in a law school; Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraq Law Schools*, 23 BERKELEY J. INT’L L. 112, 115 (2005) (recommending “introduction of clinical education methodologies” at Iraqi law schools but counseling against introduction of live client clinics at that time); see Rodney J. Uphoff, *Clinical Essay: Why In-House Live Client Clinics Won’t Work in Romania: Confessions of a Clinician Educator*, 6 CLINICAL L. REV. 315 (1999) (contending that “[g]iven the existing structure of Romanian education, the nature of the Romanian system, and the limited resources available to Romanian law schools, pedagogically sound in-house live client clinics are not feasible”); Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT’L L. REV. 421, 422 (2004) (providing an “overview of the development of clinical legal education outside of the [United States]”).

³⁸ Eustache, *supra* note 24, at 606–07.

annual voyage to Jérémie, ESCDROJ's interest in clinical legal education came to the fore.³⁹ And so, we began designing an experiential module to provide a window into some of the practical training emphasized in clinical approaches in the United States.

Clinical legal education may be defined in a variety of ways. But, in reviewing clinical education globally, one experienced clinician and scholar explains that “three elements stand out as constituting the most important commonly conceived notions of clinical legal education around the world: professional skills training, experiential learning, and instilling professional values of public responsibility and social justice.”⁴⁰ This clinical educator describes “[c]linical legal education [as] bring[ing] a more realistic, from-the-ground-up perspective on law practice to students through the use of actual or simulated experiences as the primary teaching tool.”⁴¹ Fortunately, the 2009 contingent of the HHP included several clinicians as well as students willing and eager to participate in a simulation demonstration. As the group was largely self-selected, it was a serendipitous coincidence that ours had substantial clinical leanings. Two faculty members, including the author, and two of the students assumed primary responsibility for creating and translating the first module.

1. On Which Skills Should the Module Focus?

As we began imagining an experiential module for export, we tried to ascertain what types of legal training might be of use in Haiti. We aimed, within resource constraints, to develop a criminal law module from the ground up that correlated to the reality that law students might experience defending a client on a criminal charge in Haiti. We received information from an ESCDROJ colleague that attorneys in

³⁹ In the spring semester of 2009, as is commonly the procedure, UC Hastings faculty members who planned to participate in the spring voyage to ESCDROJ were asked about topics on which they would feel comfortable presenting in Haiti. From among the variety of topics proposed, Roxane Dimanche selected several, including one about clinical legal education and one about criminal law practice. With the encouragement of Karen Musalo and Richard Boswell, and the advice and practical support of Roxane Dimanche and Jomanas Eustache, these evolved into the clinical criminal practice simulation of that March.

⁴⁰ Frank S. Bloch, *New Directions in Clinical Legal Education: Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL'Y 111, 121 (2008) (“These three elements interact, with varying degrees of emphasis, to form the core of a global conception of clinical legal education.”).

⁴¹ *Id.* at 122.

Haiti can interview their clients and that they can chose whether to interview witnesses. From among the range of possible legal skills to include in our simulation, client and witness interviewing could be germane to Haitian criminal defense practice. Moreover, representation for prison detainees was urgently needed. For effective criminal legal representation in the United States, we perceived client interviewing as a prerequisite, as well as being a skill crucial to the early phases of criminal defense.⁴² In addition, client interviewing also represents a common, if not the most common, experiential preparation that live-client clinics offer at U.S. law schools.⁴³

Still, although client interviewing is available as part of the criminal defense attorney's role in Haiti, the Haitian legal system rests on a civil law, not a common law, approach.⁴⁴ A clinical colleague involved in international clinical legal education, particularly in civil law systems in Europe, opines that "the attorney-client relationship appears to be less important in the civil law system than in the common law system."⁴⁵ He maintains therefore that "a sophisticated understanding of interviewing and counseling techniques may actually be much less important in such a system."⁴⁶ This colleague cautions that "if U.S. clinical teachers, in our international collaborations, are not mindful of the crucial differences between the legal cultures of civil and common law societies, we risk promoting clinical program models that will not work in civil law systems."⁴⁷ This critique about recognizing differences between civil and common law systems generally is a significant one.

⁴² Having an attorney at an early stage of criminal proceedings has not, as Dr. Eustache indicates, been the practice in Haiti. See Eustache, *supra* note 24, at 609. But, early intervention may be possible with the anticipated clinic.

⁴³ Client interviewing also apparently appears as a staple in clinical legal education globally. See Bloch, *supra* note 40, at 122–23 ("Increasingly around the world one sees a common set of clinical courses on interviewing, negotiation, counseling, trial and appellate advocacy, and so on.").

⁴⁴ Eustache, *supra* note 24, at 602 ("Having not known another model of legal system and deprived of the necessary human resources to construct its own legal and judicial systems, Haiti's founding fathers inevitably adopted the French model of law commonly referred to as 'The Napoleonic Code.'").

⁴⁵ Professor Genty argues that, in civil law systems, "[t]he lawyer's duty to the court system trumps the duty to the client, and the lawyer is seen as presenting the client's case, without necessarily vouching for the client. Moreover, the client plays a limited role—if any—in the court proceedings, where written submissions predominate over live testimony." Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 150 (2008).

⁴⁶ *Id.*

⁴⁷ *Id.* at 149.

In Haiti, however, perhaps especially in contexts where human rights are at issue (which is arguably the situation for many detainees in Haitian prisons), there appears to be significant interest directed toward training lawyers in case preparation techniques and in an investment in the attorney-client relationship.⁴⁸ For example, the Bureau des Avocats Internationaux (BAI) in Port-au-Prince, which “is a group of lawyers [initially] funded by the Haitian government that assists the judiciary with human rights cases,”⁴⁹ emphasizes its “close collaboration”⁵⁰ with its clients, the victims of alleged human rights violations, whose civil cases often companion the criminal prosecution of the alleged perpetrator.⁵¹ This attorney-client collaboration, within the Haitian civil law system, includes meeting with, interviewing, and working extensively with clients.⁵² Brian Concannon, Jr., one of the attorneys who came to BAI early in its history,⁵³ explains that BAI “involves [their clients] as much as possible in strategic decisions, and work[s] with them to analyze the different obstacles to their case.”⁵⁴ In addition to representing victims in civil cases that companion criminal prosecutions, among other human rights representation, BAI is now also significantly involved in efforts to represent detainees in Haitian prisons.⁵⁵

⁴⁸ Mr. Concannon explains that the “BAI is helping train a new generation of human rights lawyers through its programs for Haitian law graduates and U.S. law students.” Concannon, *supra* note 32, at 239. He opines that “[i]n our experience, the lack of trained lawyers willing and able to do high quality human rights or public interest work is the largest single problem with the justice system.” *Id.* Mr. Concannon maintains that “the main cause of this human resources problem is a training system that: a) does not train lawyers to prepare a quality, fact-based case, and b) perpetuates a legal culture that reinforces existing injustices.” *Id.*; *see also infra* notes 50–56 and accompanying text.

⁴⁹ Concannon, *supra* note 32, at 233. According to BAI’s website, “since February 2004, it has received most of its support from the Institute for Justice & Democracy in Haiti (IJDH), and no support from any government or political organization.” *The Bureau des Avocats Internationaux*, INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI, http://ijdh.org/articles/article_bureau_internationaux.php (last visited Nov. 16, 2012).

⁵⁰ Concannon, *supra* note 32, at 237.

⁵¹ As explained by Mr. Concannon, “[u]nder the French system used in Haiti, a claim for civil damages can piggy-back on a criminal prosecution. . . . The lawyer [for the victim] can introduce evidence and examine witnesses and parties at trial.” *Id.* at 235.

⁵² *Id.*

⁵³ Mario Joseph is the attorney who currently manages BAI. *See Bureau des Avocats Internationaux*, *supra* note 49.

⁵⁴ Concannon, *supra* note 32, at 235. In the concluding lines of the chapter on BAI’s victim-centered approach, he writes “[i]f the office can add three to six well trained public interest lawyers to the bar every year, it will change legal training and the way lawyers relate to their clients forever.” *Id.* at 241.

⁵⁵ *See supra* notes 24 and 26, and accompanying text.

Relatedly, we have come to understand from an ESCDROJ colleague that sharing approaches that have not commonly been taught in the traditional law school curriculum (about, for example, fact investigation) is of interest in our presentations at ESCDROJ.⁵⁶ An interest in information about such approaches to legal training may stem at least in part from the widespread and substantial concerns that have been expressed about the judicial system in Haiti and the powerful desire for reform of that system.⁵⁷

Whether or how ESCDROJ faculty will encourage students to conduct client interviews or engage in fact investigation within their criminal justice clinic or more generally how students will perform such tasks when they practice within the Haitian civil law environment are decisions for the ESCDROJ faculty and students. What has become apparent is that our colleagues in Haiti are interested in having aspiring attorneys learn about approaches to engaging in a variety of lawyering skills, like the approaches commonly taught in U.S. clinical legal education. We thus could provide at least a window for comparison on what we believed were some options for best practices in U.S. representation, including attorney-client (and witness) interviewing. We began, then, to focus on client interviewing skills as the heart of our exportable module.

2. Assumptions About Client Interviewing: But, Does It Work That Way in the Haitian Criminal Justice System?

For this client-interviewing module, we concentrated initially on the need to establish rapport between the attorney and client. In our

⁵⁶ HHP notes of our planning discussion for the second simulation, for example, reflect our ESCDROJ colleague's expressed preference that we present approaches to lawyering skills that were not commonly covered. For example, our colleague emphasized the value of attorneys learning to engage in fact investigation, rather than deferring to the court report. Similarly, the notes indicate that our colleague explained that client and witness interviewing were not generally taught.

⁵⁷ For examples of that expressed concern, see, e.g., Eustache, *supra* note 24, at 607 ("[p]eople often witness cases where the justice system has failed to hold individuals accountable for their actions or where the protection of rights depended solely on an individual's ability to pay."); Concannon *supra* note 32, at 234 ("Justice in Haiti is often described with the word 'exclusion[]' the exclusion of the poor from the formal justice system, and the use of the system to exclude the poor from the country's economic, political and social spheres. . . . Lawyers were not adept at preparing cases for trial."); 2011 HUMAN RTS. REPORT: HAITI, *supra* note 7 ("Corruption and a lack of judicial oversight also severely hampered the functioning of the justice system. Many judicial officials charged varying 'fees' to initiate criminal prosecutions based on their perceptions of what a service should cost, and those who could not afford to pay often did not receive any services from prosecutorial or judicial authorities."). With respect to reform efforts specifically, see, e.g., *supra* notes 34, 48, and 54.

minds, the confidential nature of the relationship was key to building rapport. We considered how to explain various aspects of client interviewing approaches used in the United States. We imagined what types of information a lawyer might find useful in criminal proceedings in Haiti, and how an attorney might effectively elicit and respond to a client's needs and goals.

The modules we had created over the years for our own clinics relied upon our understanding of U.S. federal and state practices. In developing the interviewing module for Haiti, we assumed that attorneys in Haiti enjoyed a privilege of confidentiality in conversations with their clients. We also assumed, or perhaps did not even consider whether, there would be a place in the local prison where such a confidential interview could take place. With some frequency, and sometimes not until we arrived in Haiti, we found ourselves confronting these and other assumptions we had unwittingly made in our framework—assumptions that threatened to undermine the usefulness of the module we were creating.

Establishing rapport might, after all, look very different in a legal framework in which there is no attorney-client confidentiality. Without reassurances about confidentiality, why should a client confide personal, embarrassing, or potentially incriminating information in a complete stranger?⁵⁸ Client confidentiality is so much a part of the fabric of our living and breathing as lawyers and legal educators in the United States that we posited its existence at the center of our module, though we did not actually know if attorney-client confidentiality existed in Haiti. Fortunately, on this count, our assumption proved correct, as we learned from Roxane Dimanche and Dr. Eustache that Haitian clients do indeed enjoy confidentiality largely similar to the confidentiality that U.S. clients enjoy.⁵⁹ We were relieved, first because we value confidentiality in the lawyer-client relationship, and second, because the simulation we were about to deploy depended on it.

With respect to interview space, as you can perhaps infer from the description given earlier of the space constraints in the prison, our

⁵⁸ There are, of course, rationales for providing information to one's counsel even absent confidentiality, but confidentiality may be a prerequisite for some clients when the information is embarrassing, incriminating, or otherwise secret.

⁵⁹ See also *Le Code de Déontologie des Avocats: Règle IV*, LE JURISTE HAITIEN 2 (although this code is apparently a draft code, Dr. Eustache has emphasized to us that attorney-client confidentiality is viewed in Haiti as a crucial ingredient of the attorney-client relationship).

assumption proved incorrect. A private room allocated for client interviewing was not apparent in the prison plan. This practical reality left us to guess that attorneys and clients might confer in whispers in the open prison yard in an attempt to effectuate a confidential communication.

3. Resources

Creating experiential educational modules depends upon people and informational resources. When we create modules for our own clinics here in the United States, we have access to a wealth of resources written in English on virtually every aspect of criminal practice. Equivalent resources on the subject of day-to-day Haitian criminal practice, however, turned out to be somewhat scarce.⁶⁰ When we arrived, we found, for example, that the one-room law school library itself possessed only two softbound copies of the Haitian Penal Code.⁶¹ Internet access there was also limited and often unreliable. We had, however, previously located a version of the Haitian Penal Code available online in French, a great asset in a code-based system.⁶² As French remains the language in Haiti in which formal court proceedings generally transpire and legal education proceeds, we were lucky that our UC Hastings group also included several strong French speakers.⁶³ What our UC Hastings group often lacked was a clear understanding of the reality of practice, of cultural expectations and norms, of criminal procedure, and of evidentiary limitations as practiced in Haitian courts.

Thus, in order to develop a workable module, we needed to rely upon our colleagues at ESCDROJ—academics and law school graduates who were professionally familiar with Haitian criminal

⁶⁰ There are, however, some very useful reports and descriptions in English by various organizations that do furnish insight into the criminal justice system. *See, e.g.*, 2009, 2010 & 2011 HUMAN RIGHTS REPORTS: HAITI, *supra* note 7; HHRPP, *supra* note 15.

⁶¹ The library contained other books as well, but I recall seeing only two copies of the Haitian Penal Code.

⁶² *See* Código Penal de Haiti [Penal Code of Haiti], available at http://www.wipo.int/wipolex/en/text.jsp?file_id=200018&tab=2 (last visited Oct. 13, 2012).

⁶³ While French is the language taught at school and used by many government officials, Haitian Kreyol (Creole) is the language spoken daily by the vast majority of the population. Estimates vary on the percentage of Haitians who speak French fluently, with five to twenty percent being the common range. *See, e.g.*, Cordelia Hebblethwaite, *Should Creole Replace French in Haiti's Schools?*, BBC NEWS (Aug. 23, 2011), <http://www.bbc.co.uk/news/world-latin-america-14534703> (estimating that five percent of Haitians speak fluent French).

legal practice.⁶⁴ The UC Hastings contingent came in with lots of enthusiasm, substantial cumulative clinical legal teaching experience, and a firm grasp of various aspects of U.S. law; but also, no doubt, some naiveté about local practice and conditions. We were saved from countless errors by the partnership and counsel of our colleagues at ESCDROJ. But even with their help, a workable module depended upon our recognizing the topics about which we needed to make inquiry, such as our blind assumptions about confidentiality and a private space for a client interview. And, some of the process also depended on a bit of good luck.

4. Trying to Respect Cultural Norms and Create a Simulation with Verisimilitude and Andragogical Integrity

Having decided on client interviewing, at least U.S.-style interviewing, and a collection of related skills that we sought to present, we then needed to create a mock criminal case as the setting for the attorney-client interactions. Although our goal was to share approaches to U.S.-style interviewing, we sought to place those skills and ethical precepts in a context that approximated a criminal case that students might see in Haiti. What crimes were prosecuted in Haiti? After all, simply looking at the codebook itself does not tell one how often, or even whether, a particular crime is or will actually be prosecuted. It also does not effectively answer the question of which crime would provide a culturally appropriate base for our simulation. Input from our hosts would be crucial to enhance the verisimilitude of the simulation and hopefully prevent us from committing cultural faux pas, or generally embarrassing ourselves with our ignorance of the Haitian justice system.

To help us prepare, Roxane Dimanche, a highly respected law school graduate who is playing a central role in the efforts to launch the new clinic,⁶⁵ kindly located and e-mailed us a copy of the court papers for a criminal case of alleged arson in the Jérémie courts.⁶⁶

⁶⁴ Julie A. Davies, *Methods of Experiential Education: Context, Transferability and Resources*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 21, 22–23 (2009) (“Experiences with exporting U.S. legal education methods to the rest of the world have shown, time and again, the importance of understanding the context in which those methods will be used.”).

⁶⁵ See *2010–2011 Course Catalogue*, L'ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, <http://escdroj.org/faculty.html> (last visited Oct. 13, 2012). Roxane Dimanche is listed as the Legal Clinic Director.

⁶⁶ Roxane Dimanche e-mailed us the court papers from two different cases, one of which served as the inspiration for the simulation.

They were in French and often hand-written in cursive script—a challenge to decipher through sometimes fuzzy scans and translation of unfamiliar terms.⁶⁷ But the papers furnished highly useful insights into the reality of criminal charging and police fact-finding in Haiti in at least this one criminal arson case. We then researched the elements of arson in the Haitian Penal Code and accordingly framed our simulation based on an arson charge.

With the offense in mind, we considered more carefully our pedagogical⁶⁸ goals for the client interview. We contemplated what the fundamental skills associated with successful interviewing in the United States were, and what made some client interviews challenging. We brainstormed and consulted resource materials that opined on client interviewing.⁶⁹ This led us to the view that it would be valuable to have our mock-case client lie, at least in the initial interview. Successfully interviewing a truthful trusting client who is accurate and forthcoming in his account is rarely a challenge to an interviewer. But a client who has something to hide, a client who is not forthcoming—that person is a client for whose interview we might provide some useful strategies.

Thus, we began to construct the scenario. It would involve an arson and a client who lied during the initial interview. It would be an arson of a farmhouse inherited by the accused and his sister. We supplied a motive for the client to have caused the fire and consequent destruction of the farmhouse. The motive lay in a disagreement between the sister and the client about the appropriate use of the land. The sister wanted to farm the land. The client wanted to sell it and split the proceeds. The accused was allegedly heard to say: “I’d rather see the place burn to the ground than have you continue living there and waste the money it’s worth.” We invented an eyewitness and set the event for dusk. We gave the accused a lie—a false alibi. He was to say that he had spent the evening with his wife, when, in fact, he had not.

Then we wanted to give him information that he could reluctantly reveal to his attorney in a second interview, if the attorney followed

⁶⁷ Roxane Dimanche also graciously sent us some word-processed materials on the case that she had prepared for the court. These materials were entirely legible.

⁶⁸ Although the technically correct term for teaching adults is andragogy, pedagogy also seems to be used with great frequency. I use the two terms interchangeably in this Article.

⁶⁹ See, e.g., ANTHONY G. AMSTERDAM, AM. LAW INST., TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988); CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE (Continuing Education of the Bar, 2008).

the principles that we believed were important in effective interviewing. We sought to invent something of a private nature, a relationship about which the accused might not feel comfortable telling a stranger. We proposed an affair with a woman who worked in the same town. When we consulted those familiar with cultural mores in Haiti, however, we were informed that the extramarital relations might not necessarily provoke hesitation in disclosure. We suggested instead the possibility of an extramarital gay liaison for the client, in lieu of a heterosexual extramarital affair. We thought perhaps our client, as a man married to a woman, might be more reticent about a same-sex extramarital affair. With this, we discovered we had crossed into the realm of the taboo. Views on homosexuality were so charged that we were strongly advised to steer clear of the issue entirely.

This advice and some of the responses we were told to expect if we made reference to homosexuality were disconcerting. We considered whether we should defer to the advice. A number of us were inclined to incorporate the gay affair into the module and engage with the issues raised. But we ultimately concluded that, as invited guests, our just-over three evenings of class supplied too constrained a forum to take on this subject in an effective way with over 100 students, in French, and with translation required for a fair contingent of our delegation. It was also true that members of a delegation some years earlier had given a presentation on gay marriage, and their presentation had met with a number of highly negative responses. Thus, out of respect to our hosts and our other advisors, and because we believed that including a gay extramarital affair could become the focus of the exercise rather than an explanation of the accused's initial falsehood, we returned to the existence of a heterosexual affair as the motivation for the lie and invented specific (and hopefully persuasive) reasons why the accused's wife would be especially disturbed by this affair and, consequently, why the accused would fail to reveal its existence at the initial interview.

B. Logistics and Implementation: Would the Ceiling Fall?

The scenario we created was born with the crime alleged in the court papers that Roxane Dimanche had sent us. But, as most clinicians recognize, when developing materials to meet specific pedagogical goals, substantial modification of real cases is often necessary. Thus, we relied on the crime alleged, but designed the simulation to enable students to acquire and practice skills that, at

least in the United States, we believed were crucial to effective client interviews.

We built the module to incorporate a triad approach to learning. The three pivotal learning elements for this paradigm are: (1) an anchor or framing presentation; (2) experiential components, hands-on participatory opportunities to apply the principles furnished in the anchor presentation; and (3) a demonstration of the principles applied as an example, perhaps a model, for students. In an ideal environment, each of the three elements also incorporates opportunities for students to inquire, respond, and reflect on the learning. Of these, often the most important reflective opportunity arrives at the conclusion, depending on the extent of earlier opportunities to reflect, with an end-of-exercise debriefing to elicit students' understanding of the learning and their processing of the exercise.

And so, one March evening, just before dusk and the time when the mosquitoes descended in force on our exposed skin, we began. It would be inaccurate to call the space at the law school in which we taught a room, in the sense of a space having four walls. We were conducting class in a hallway, entirely open to the outdoors at one end. We were there in the hallway because the ceiling of the school's large outdoor classroom space was poised to collapse, even in pre-earthquake 2009. None of the Haitian students seemed fazed by this. Attentive, engaged, but accustomed to lecture, these students were about to embark on a foray into a U.S.-style clinical client interviewing learning adventure.

In our application of the triad approach, the frame or anchor presentation came first. We presented it in the form of a straightforward discussion on general principles about client interviewing in the United States. It focused on several primary tenets. Perhaps foremost among these was, of course, the importance of—and corresponding potential techniques for—establishing rapport. After all, rapport increases the likelihood of achieving other aims, like obtaining relevant facts, ascertaining the client's goals, etcetera.

Within the essential principle of rapport, we spoke, for example, of reassuring the client of confidentiality and inquiring what the attorney might do to help the client. We learned that what an inmate in Jérémie might need, in addition to some of the legal services that we might be accustomed to attorneys performing in the United States, involved much more basic needs. Apparently, for example, inmates sometimes

lacked access to adequate food.⁷⁰ We could imagine an attorney working to arrange with a client's family to provide such necessities.

Among other principles, we also discussed the significance of ascertaining the client's goals and helping the client understand the attorney's role and the process, to the extent the process was predictable, and, of course, providing the attorney with information about the case.

We tried to include at least a brief opportunity for questions and to respond and reflect at various phases of the learning exercise. We felt it was of particular importance to include responsive opportunities as we understood that our simulation stood in stark contrast to the traditional teaching formats used at the law school. In a world in which lecture and formal presentations were *de rigueur*, we were about to ask students to learn by doing, to brainstorm in small groups, and to conduct client interviews.

I should perhaps add that we had been alerted by one of our very knowledgeable hosts that lawyers in Haiti sometimes entertain a certain determined skepticism about the likely truthfulness of their clients' narratives in criminal cases. In our simulation, the client was supposed to lie in the initial interview, consistent with this skepticism, but was factually innocent of the crime charged. Thus, we hoped that our simulation would challenge the students to reach beyond the initial lie and their potential skepticism to attain a level of rapport to get to the truthful evidence supporting innocence.

Following the anchor presentation, we hustled students off to brainstorm about how they might apply the general principles and to prepare to actually conduct the initial client interview. We had produced a preliminary narrative police report that supplied basic information about the case and translated it into French (an English copy of which appears in Appendix A). The ten-plus small groups buzzed with intense discussion and preparations for the interview.⁷¹

⁷⁰ HHRPP, *supra* note 15, at 6 (“[T]he lack of adequate food in prisons forces families to spend precious time and money delivering their own food to the imprisoned.”); Lopez, *supra* note 9, at 2 (“Sometimes there are delays with government funding and the prison [in Jérémie] is unable to buy food. During those times, the warden says that he does whatever he can to make sure the prisoners have enough to eat. This has occurred three or four times in the last two years.”).

⁷¹ We had confronted a choice in terms of pedagogical approaches. In the triad model, often the anchor and the demonstration precede the student's hands-on component. But here, due to logistical constraints on timing and the specific dynamics of having the client lie about his wife as the alibi in the first interview, we chose to plan for the students to have their first of the hands-on experiences after we explained the general principles, but

For the hundred-plus students, the entire law school student population, to have a small-group experience conducting the interviews, almost every member of our UC Hastings contingent was needed to play the role of the client. We sent French speaking members in on their own and matched non-French speakers with translators. The ESCDROJ students and alumni were very generous in their willingness to translate. In sum, we were able to staff about twelve small groups. This resulted in approximately ten to fifteen ESCDROJ students per small group—larger than would be ideal—but far better than one group of a hundred-plus. After fifteen to twenty minute student-as-lawyer brainstorming sessions by the Haitian students without the client, the client arrived in each small group. This type of client interviewing role-playing exercise serves as the bread and butter of clinical and simulation modules in the United States. We looked forward to and anticipated hearing, as one might expect in the United States, a variety of outcomes from this initial effort to apply the principles we had outlined for effective U.S. client interviewing.

Once the clients were ensconced in each space or room with their attorneys, I circulated to check the pulse of the interactions, aiming to help with logistical and/or translation issues. The exchanges were animated; voices were raised. The energy levels were running high on this sweltering evening in coastal Haiti. Students were engaged. I passed quickly from one group to the next with limited opportunity to garner a sense of whether rapport developed. I was pleased, though, to see genuine and energetic engagement in our clinical pedagogy.

Some twenty or thirty minutes after they had initially joined their attorneys, the members of our delegation emerged. They looked discomfited. When they shared their experiences as clients, we were crestfallen. Rapport had generally not developed. With perhaps one or two exceptions, our delegation members reported that, although varying by small group, collectively: (1) they had been accused by their attorneys of committing the arson, (2) they had been treated like hostile witnesses, (3) they had been encouraged to lie, and/or (4) they had been told that they were guilty and that therefore the students would not represent them. In addition, in some of the groups, students had made extravagant guarantees that they would get their clients released.⁷² Although the buckling concrete hadn't moved from its

before we offered any demonstration of the principles applied or of interviewing more generally.

⁷² With allegations of judicial corruption common in Haiti, *see supra* note 57, perhaps

precarious perch above the outdoor classroom, in a figurative sense, the ceiling had fallen.

Had I failed to effectively convey or persuade students of the importance or methods of establishing rapport in the anchor talk? Did our module design, in which no matter the excellence of the rapport, the client was going to lie and be evasive in the first interview, condemn the interviews to failure? Were we simply expecting too much after only a single anchor discussion of client interviewing with students who had never interviewed a client before?⁷³ How could we repair, recover, and translate this unexpected result into a useful learning opportunity? Somehow we had arrived hoping to create teachable moments for our Haitian students. Instead, they had created a powerful teachable moment for us.

We stepped back and reflected, albeit briefly, during a hurried “break,” on how and whether we might or should convey the failure to establish rapport, the risk of extravagant promises, and the importance and role of representing the guilty (even though, if they succeeded in their subsequent interviewing efforts, this client was factually and legally innocent). After some brief chaos and then some intense rapid-fire brainstorming on the delegation’s part, we determined to supply feedback directly from the clients to the reconvened student body, in hopes that this would be an effective platform for processing the initial interview and helping students revise their interview approaches. Thus, the clients stood in front of the now reassembled student body of over 100 students and each client shared his or her impressions as the client in a two-minute or so summary. Typically, each client began with positive comments, but then generally moved to how he or she had not perceived an empathetic environment in the interview, and to specifically enumerate the types of remarks and approaches that had resulted in the perception that perhaps the clients had just undergone an adversarial style cross-examination by the prosecutor, rather than having been engaged in an initial rapport-building interview with their own defense counsel.

We realized that this approach held risks. Would students reject what we had to offer because our constructive criticism was so direct?

some students anticipated that sufficient funds might indeed result in their client’s release.

⁷³ Perhaps, different roles of attorneys in civil and common law systems and the possible implications of those differences on client interviewing also contributed to the result we experienced. *See Genty, supra* note 45, at 150.

Would students find our approach just inapposite to interviewing clients in Haiti? Would students just stop being willing to play? After all, simulations rely on the good will of the participants. If participants feel that their time is being wasted, they are not learning, or they are not being appropriately valued, then the simulation is generally doomed.

After furnishing this direct feedback, we asked what steps they, as the attorneys for the accused, would take next in the case. We had set the problem up so that the accused would present his wife as alibi (the lie) in that first interview. This was designed to provoke students into doing some additional fact gathering by seeking to interview the client's wife. Fortunately, students did express the desire to interview the accused's wife.

In response, we then engaged in a demonstration witness interview, conducted by an experienced clinician as the interviewer, in front of the assembled student body. Following the demonstration, we processed with the students what they felt they had learned from this interview of the accused's wife. Of course, an interview of a witness differs from an interview of a client. In particular, it lacks the protection of attorney-client privilege. But, many of the other vehicles for establishing rapport are analogous. Substantively, the students astutely discerned from the interview of the client's wife that there were notable discrepancies between their client's and their client's wife's account of the events on the night of the arson. Students then suspected (or, for some of them, undoubtedly concluded) that indeed their client had lied to them in the initial interview.

This produced an interesting dynamic, especially in view of the largely antagonistic initial client interviews. Students who had perceived the client as evasive and a liar had their suspicions confirmed. Could they effectively establish rapport with a client they had alienated and/or who had alienated them, and whom they believed to be a liar? Despite the obstacles, students made clear their inclination to re-interview their client. Our class focus then became how to conduct this second interview with a client, who probably or certainly had lied to them and who probably or certainly felt alienated. What emerged was a discussion of the value of addressing the lie, but in the context of renewed attempts to establish rapport. We brainstormed ways to raise the issue while assuring the client we were on his side. We reaffirmed in particular the importance of discussing confidentiality. Then we once again hurried the students off to their small-group interviews.

The interviews commenced, and I anxiously swept from group to group to ascertain how the second interviews were proceeding. Was there less hostility toward the client and were fewer confrontational voices raised? Once the interviews concluded and our delegation members had had a chance to reconvene and recount the second interview dynamics, we discovered that the Haitian law students had managed an almost absolute about face. From accusatory and hostile to conciliatory and reassuring (especially about confidentiality), student groups had succeeded, almost without exception, in creating an environment in which the clients apparently felt comfortable revealing the true alibi, the mistress Lisette. The students now vociferously requested an interview of Lisette. They were, at least most of them, apparently willing to move beyond the client's initial lie to a place of enough trust to believe that the client had now revealed a truth that bore on his innocence and to insist upon an interview of this new alibi witness.

As we were approaching the final moments of our class time with the students of ESCDROJ, we conducted a speedy demonstration interview of Lisette, who was played by a faculty colleague on the delegation. Much to the delight of—and punctuated by many outbursts of laughter by—the students, Lisette confirmed the accused's true alibi. We engaged in a final and all-too-brief processing about take-aways from the exercise. And, to our delight (and, we hope, theirs), the students' genuine understanding of the principles we had discussed earlier in the week emerged. We celebrated their success.

Despite a very rocky start, and several bumps along the way, together as learners we had navigated our clinical legal education model and seen students acquire new, sometimes hard-won, understandings about lawyering skills of potential importance in both (as we learned) the United States and Haiti. A bright orange full moon had risen just beyond the edge of the chalkboard in our makeshift outdoor hallway of a classroom, a moon that we might be hard pressed to see as clearly from inside through the panes of glass in the classrooms at home.

II
WHAT WE LEARNED THAT MIGHT TRANSLATE TO OTHER
INTERNATIONAL LEGAL CLINICAL ENDEAVORS: ROUGHLY HEWN
GUIDEPOSTS

This section strives to provide some reflections on our first criminal practice simulation experience at ESCDROJ. Those of you who have exported or imported clinical educational modules internationally may find, as suggested in the literature on global clinical legal education,⁷⁴ that some of the lessons we take away resonate with your own experiences. For those who have yet to undertake a similar endeavor, we aim to suggest some guideposts drawn from our experience that might be useful.

A. Relying on Legal Academics/Practitioners On-Site and in Advance

For us, there was no substitute for the legal, cultural, and practical acumen brought to bear by Dr. Jomanas Eustache and Roxane Dimanche, the ESCDROJ Dean and the well-respected graduate who is helping to launch the criminal justice clinic, among others. In fact, the more the project grows from the ground up, from its sources in the goals, knowledge, and values of the host institution and legal culture, the more successful the experience is likely to be.⁷⁵ And, on the most

⁷⁴ The expanding scholarly literature on supporting clinical legal education abroad includes a number of discussions of “take-aways” or lessons learned. *See, e.g.*, Davies, *supra* note 64 (describing the importance of resources, context, and transferability in supporting and/or developing clinical legal education opportunities abroad); Wortham, *supra* note 37 (offering insights on the development of clinical programs abroad); *infra* notes 75 and 76.

⁷⁵ *See* Maisel, *The Role of U.S. Law Faculty*, *supra* note 37, at 490 (“The experiences described above [in her article] and the opinions expressed all indicate that the chances of successful international cross-cultural collaboration increase if U.S. scholars consulting overseas follow the lead of their hosts in establishing or modifying the goals and agenda for the project.”). Similarly, Professor Maisel argues that, among other considerations, “preparation” and a willingness and ability to adapt course materials to the local context, as well as a willingness to disclose a lack of knowledge about local practice, are important in successful clinical teaching abroad. *Id.* at 492–503; *see also* Jessup, *supra* note 37, at 380 (“Although the American experience is informative and may provide guidance to an African law school contemplating a clinical program, it is imperative that any attempt to incorporate a clinical experience into a current African law school curriculum take into account a cognizance of the political structure of governmental organizations and customary norms.” (footnotes omitted)); Pamela Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 *YALE H.R. & DEV. L.J.* 117, 140 (“In adapting the American clinical model to China’s needs, it is crucial to recognize that China is a civil law society in which judges regard themselves as civil servants.” (footnote omitted)).

basic level, HHP's collaborative efforts to develop and share U.S. clinical educational approaches with ESCDROJ emerged as a response to ESCDROJ's interest in information on such approaches.⁷⁶ Learning that there was attorney-client confidentiality proved fundamental to the simulation module we created. Being advised of the risks of making a homosexual liaison the reason for a client's lie enabled us to make informed choices.

If your existing clinical team does not include a local expert, communicating with and relying on local experts who can provide guidance on the myriad of issues crucial to a successful clinical simulation exercise stands as guidepost number one for us in exporting clinical legal education from the United States to Haiti and, I imagine, to many other locations around the world. Relying on a local expert supplements, of course, the basic research and preparation that one pursues through other avenues. Pursuing these other avenues may be especially important in order to limit the imposition on your local experts, especially in a locale where electricity and internet access are unreliable.

B. Unearthing Assumptions

What I would like to propose as the second guidepost is, of course, to recognize the assumptions underlying the materials created and the approaches planned. But, of course, the challenge is the difficulty in perceiving these assumptions. Nonetheless, questioning everything and having many eyes and ears focused on searching for bias and assumptions can be helpful. The ability to pool and contrast observations commonly increases the likelihood of revealing hidden and unwarranted assumptions and bias and getting a better grasp of both the details and how they fit into the bigger picture.

C. Acknowledging the Context-Specific Nature of Our Advice

We tried hard to do our pre-simulation research and gather intelligence about the Haitian system to create a simulation that law

⁷⁶ See Maisel, *The Role of U.S. Law Faculty*, *supra* note 37, at 471 ("A comparison of these efforts provides considerable guidance about how to initiate and plan a successful project, mainly the need to do so collaboratively with academics in the host country."); Genty, *supra* note 45, at 136 ("[T]he history of the Law and Development and subsequent movements, and the analysis of the ways in which legal systems are transplanted, indicate that successful international collaboration in legal education involves at least two elements: a subjective attention to issues of cultural sensitivity in transmitting ideas, and a practical attention to the utility of these ideas to the receiving 'host' country.").

students in Haiti would find relevant and coherent. But, we recognize that our efforts were far from perfect. For this reason and others, we presented our project to the Haitian students as being limited to portraying common approaches to U.S. interviewing.⁷⁷ Although we tried to contrast and address similarities and differences in U.S. and Haitian approaches when we felt reasonably confident that we understood them, we expressly attempted to confine our suggestions and educational pronouncements to practices in the United States.

I don't know that we entirely succeeded. It may be unrealistic to expect that a multi-hour investment by students in this simulation module as their first exposure to client interviewing, especially hands-on interviewing, was likely to remain confined to an interesting "oh, that's how attorneys do this in the U.S." If you have created a meaningful learning experience, students are likely to internalize, transpose, and apply what you bring to their future lawyering. Consequently, despite our disclaimers about the simulation's scope on site, it is helpful to work towards making as much of the simulation as possible consistent with the lived or anticipated experience of local lawyers.

Both in the immediate context of the module's U.S.-based approach to client interviewing and in the larger context of bringing a U.S. approach to clinical legal education to Haiti, we were cognizant of the risks of being or being perceived as imperialistic or

⁷⁷ Genty, *supra* note 45, at 148–49 (discussing the importance of recognizing differences between civil and common law systems in bringing clinical legal education models from common law to civil law systems). For a discussion of client interviewing in the context of differences between civil law and common law systems, see *supra* note 45 and accompanying text. Distinctions between civil and common law systems represent one of the important considerations in international clinical endeavors. Another, perhaps related, consideration stems from a possible preference for familiar clinical vehicles and approaches. For a discussion of potential risks associated with such a preference, see Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 *FORDHAM INT'L L.J.* 56, 56–57 (2000) ("But globalization can also inhibit access to justice and can do so in unexpected ways. This Essay uses the experiences of international efforts to promote clinical legal aid in China to explore one such unexpected consequence of globalization: international assistance's understandable focus on more familiar kinds of legal aid institutions and activities can unintentionally impede the development of indigenous legal aid practices and institutions that might ultimately be better suited for the particular domestic environment. In order to avoid this dynamic, international development projects need to shift their focus from one of simply replicating successful foreign models (what we will call a reductive strategy) to one of promoting discovery of the indigenous developmental implications and possibilities inherent in the domestic environment (what we will call a pragmatic strategy).").

ethnocentric.⁷⁸ We worked to avoid succumbing to these risks. To begin, our efforts to share the clinical legal educational world that we knew responded to our partner law school's, ESCDROJ's, interest in learning about clinical legal education. As part of the endeavor to support their previously announced goal of creating and staffing their own criminal justice clinic, our ESCDROJ colleagues have been seeking to learn about U.S. clinical educational approaches. Second, guidance from our hosts about local legal culture and practice played a significant role in the design of various facets of the simulation module. Third, although we did try to bring some of what we viewed as best practices in the United States, we hope that these approaches serve not as an end, but as a starting point for inquiry, critique, and exploration in the Haitian students' development of their own approaches to client interviewing and criminal practice, and that the experience encourages Haitian legal educators to design clinical curricula and teach the skills and related ethical precepts that they perceive as relevant to aspiring attorneys in the legal culture of Haiti.

D. Anticipating Pitfalls

Figure out the things on which you can certainly depend. Then, as in many adventures, assume that something will interfere with your calculations, and make back-up plans. I recall that, on at least one evening during the 2011 teaching adventure, the power failed. We waited in this huge open space in the dark. Luckily, either the general power returned or perhaps a generator kicked in and we continued. Fortunately, the back-up required here turned out to be just a bit of patience.

On a related front of planning to prevent pitfalls, making multiple copies was not pragmatic in a place with the extremely limited resources of ESCDROJ. If we wanted each student to have the opportunity and time to process the mock police report, we needed to

⁷⁸ For perspectives on legal imperialism in the context of exporting U.S. approaches to law and legal education, see, e.g., Francis G. Snyder, *The Failure of 'Law and Development,'* 1982 WIS. L. REV. 373 (1982) (reviewing James A. Gardner's book *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA*); Peggy Maisel, *The Role of U.S. Law Faculty,* *supra* note 37, at 473 (2008); Genty, *supra* note 45, at 135–36 (“[M]any of the efforts [of the Law and Development Movement] themselves, according to the critics, grew out of a form of legal ethnocentrism, i.e. a belief that desired social change would result from making the legal institutions in developing countries resemble those in the United States. This ethnocentrism was based on assumptions made without learning about the local context and without meaningful consultation with legal scholars in the host country.” (footnotes omitted)).

arrange to have it translated into French and copied for each student before we left the United States.

Even more than simply having the copies, we learned to carry them in the small bags we took as carry-on luggage. The flight from Port-au-Prince to Jérémie involves a very small plane with room for between perhaps sixteen and nineteen passengers. In 2009, with every seat occupied, those who make such decisions decided that most of our luggage would add too much weight for the plane to fly safely. So, they left much of our luggage behind at the domestic airport in Port-au-Prince. On our outbound flight from Port-au-Prince to Jérémie, we were there, flying above the Caribbean, clasping a few items like a change of clothes, our mosquito netting, and medications close to our persons, along with the requisite number of copies of the simulation.⁷⁹

E. Allowing a Bit of Chaos to Unfold, and, if Translation Is Necessary, Leaving Plenty of Time for That

It can prove propitious to allow a bit of chaos to unfold. Careful planning is essential. But sometimes creativity and genuine learning occur most effectively in spontaneous and unplanned ways as students experiment with role. It can help if you are willing to improvise and modify on the fly. This may be especially true if your teaching environment involves live on-the-spot translation as translation appeared to approximately double the time it took to engage with everything.

We had not adequately anticipated the students' struggle with the issue of rapport in the first interview. We are under the impression that our improvised response with direct feedback before the large group from each client was pivotal in turning around what boded to be a frustrating and potentially unsuccessful learning experience. But it required a quick rethinking of our carefully structured plan. And, it required taking a risk that students would not reject what we had to offer if we supplied a direct critique.

Upon reflection, we should not have been surprised or disappointed with the outcome of the initial client interviews. After all, it is supposed to be the experiential grappling with applying theory to practice that is at the heart of clinical education and student learning. This grappling is what we had observed in our students' learning back

⁷⁹ Fortunately, the remainder of our luggage did arrive in Jérémie about twenty-four hours later.

home. The process of trial and error, failure and mastery, is what clinicians invest countless hours helping our students in the United States access in a variety of clinical skills contexts. Somehow, here, with our condensed time frame and efforts at cross-cultural exchange, we had overlooked this wisdom underlying clinical legal education. In Haiti, as often elsewhere, the chance to fail and modify and retry was critical to genuine student learning. That was what happened here, and we are grateful that the Haitian students reminded us about how clinical legal education is supposed to work.

F. Trying to Decipher Cultural Taboos

As our experience with the possibility of including a gay affair demonstrated, it can be helpful to ask or otherwise try to decipher the local cultural boundaries. Then you can decide consciously if you want to challenge them and if so, how. Deciphering taboos is not always possible, of course, but it is certainly worth trying.

G. Garnering Good Will; Believing In, Supporting, and Celebrating the Students' Successes

Experiential learning exercises commonly depend, heavily, on the good will of the participants. Garnering that good will was a high priority in the implementation of our simulation. How to garner it—that was the question. The answer, of course, is as varied as the people making the attempt. We found that humor, clarity, and a belief that students can and will succeed in the exercise—along with an explicit request for, and explanation of, the importance of good will—worked well.

Humor across language and culture can sometimes be a bit risky. But, like in other contexts, often a modicum of self-deprecating humor can leap past cultural and language fences. For example, knowing how I struggle with my somewhat rusty French, it is safe for me to mention my anticipated grammatical errors, as it is extraordinary likely that any sustained effort by me to teach in French will produce some errors. It helps too, sometimes, to acknowledge the challenge of the undertaking for the students. We asked them to do something new, to engage in law school learning in a way that they may not have been expected to before. That they know that *we* know this is challenging can help, too.⁸⁰

⁸⁰ I am not sure that we did enough acknowledging of the challenge.

We also articulated and celebrated the students' successes. If they were mastering or progressing on some facets of interviewing, we praised them for the learning progress we perceived. As you know, when, in our view, they had failed to successfully implement aspects of effective interviewing practice, we had also been direct and (hopefully, gently) candid in our critique. Through this, we believe the students could discern that our praise was genuine.

H. Flexibility, the Silver Lining; Faith in the Value of the Clinical Education Process

Almost everything about the simulation took more time than we had expected. Being flexible helped keep us functional. It was disappointing to have to chop processing time by something like half. It is disappointing if, for instance, students who have to work in the outside-of-law-school world arrive late and miss part of the instructions or the anchor presentation. It is disappointing when you realize that even your careful and best-laid plans have indeed gone awry. But time and again, I see how lucky we were to be there in Haiti, introducing clinical legal education modules to students interested in public service—students who could make meaningful use of this knowledge, not by adopting it wholesale or even piecemeal, but by evaluating it and developing their own approaches to supporting the rule of law. Even if we could not orchestrate a flawless simulation, these students culled valuable information about their role as lawyers from our imperfect attempts to teach.

In the end, the simulation strengthened my faith in the clinical legal education model. Our application was rushed, our execution somewhat flawed and, at moments, a bit chaotic, but the triad model provided structure and nudged students toward an understanding of fundamentals of the attorney-client relationship in both cultures. It nudged us, too, toward a meaningful exchange about the role of the lawyer in Haiti and in the United States, about skills fundamental to interviewing an often frightened individual accused of crime, about the shared, international enterprise of upholding the rule of law in different cultures.

III

**RETURNING AND TRYING TO APPLY THE GUIDEPOSTS: THE 2011
MODULE**

This Article seems incomplete without at least an acknowledgement of the experience of our 2011 visit and our second

module. For this module, when we consulted Roxane Dimanche early in the planning process, she expressed a preference for a simulation based on fact investigation skills.⁸¹ We focused then on these and related client interviewing skills for the just-over two class sessions available during our visit.⁸²

We tried to implement the lessons we had learned in developing the first module. With respect to the first guidepost, we relied more extensively than before on our colleagues at ESCDROJ. In fact, Dr. Eustache visited Hastings in the month before we ventured to Haiti. We worked with him at length, reviewing much of the proposed second simulation line by line and revising our draft. We conferred and inquired and checked on legal limits and issues that attorneys in Haiti might raise. Similarly, we focused on deciphering taboos. We changed the alleged crime, but kept the reasons for a lie essentially unchanged. The accused still had a heterosexual love affair to hide.

We still failed to ask important things. Our simulation rested in part on an incorrect eyewitness identification. Apparently, it turns out that in Haiti, if the police report in the case is wrong, officials stop the trial of the accused and have a new trial on the validity of the police report. We learned this on the second of the three nights of conducting the simulation exercise in Jérémie. Because our simulation remained in the investigatory rather than trial phase, we managed to skirt this issue. If we had been pressed, we might have extemporized that it was the eyewitness, not the police, who had been mistaken. So, the report was not wrong, just the eyewitness's perception. We are not sure if that would have been adequate to solve the problem.

We had to be flexible and allow a bit of chaos to prevail. In this second module, we decided to engage in on-the-spot fact gathering. We waited until we were at the law school to select the location from which the eyewitness would claim to have seen the accused exit the crime scene. This means we could not finalize the eyewitness's

⁸¹ Criminal defense attorney fact finding in the civil law system in Haiti may depend upon many factors, including available resources, perspectives on and expectations of role, and at what point in the process counsel becomes involved in the case. Consider Dr. Eustache's concern about delayed representation. *See* Eustache, *supra* note 24, at 609 ("While the right to counsel is afforded to all citizens, court appointed counsel is generally only provided after the pretrial investigation is completed. In short, defendants are denied the right to legal advice during the most critical period of the proceedings.").

⁸² For a discussion of important considerations involved in designing clinical opportunities for civil law systems and the need to understand the differences between common law and civil law legal cultures, see Genty, *supra* note 45, at 134.

account until we were at the law school on the afternoon of the first day of the simulation, just a few hours before class. This was cutting it a bit close for my taste. But waiting to locate the eyewitness's vantage point meant we could actually invite students to walk the fifty or so feet to the law school gate and view the scene from pretty close to the eyewitness's alleged vantage point. The eyewitness had been adamant that the person hurrying from the scene of the crime ducked behind a tree. But, because we were able to select the location while standing at the proposed location in Jérémie, we could select a place that was visible from the law school and a place, as it turns out, where there are no trees in the area where the eyewitness claimed that the accused disappeared. For our simulation, this meant that the dozen or so student representatives who walked to the gate during the simulation exercise that evening could report that the eyewitness had to have been wrong. With the eyewitness wrong on this issue, the likelihood of the client's innocence increased.

We explicitly acknowledged the U.S. context-specific nature of our advice, but sought to make the case otherwise relatively realistic. As indicated above regarding incorrect information in the police report itself, we were not entirely successful.

Interestingly, in terms of the skills of client interviewing (and perhaps unrelated to our teaching), the students by and large conducted very well executed initial U.S.-style client interviews in the 2011 module. Somehow, unlike following the 2009 anchor presentation, following this anchor presentation (also given by me and largely dependent on the same basic set of notes as the original anchor), students connected to the principles we lauded for client interviewing. I wonder if the fact gathering about the eyewitness's error, which preceded the initial interview, gave students more confidence in the potential innocence of their client in this year's scenario. (Although, in 2011, the case involved the theft of a cell phone, and the phone is found by the police in the defendant's home under his bed.) In most of the small groups, students applied the principles beautifully. They used effective techniques and established rapport; they reassured the client of confidentiality; and they inquired astutely about alibi and factual assertions in the police report.⁸³

Apart from the speculation that the initial on-the-spot fact gathering about the eyewitness's story may have enhanced the client's

⁸³ With less trial and error on the part of the students, and much more initial success, as a clinician, I cannot help but wonder if this clinical experience was somehow less effective than the one in 2009.

credibility, I do not know why this group of students acclimated so quickly to the interview norms we articulated for client interviewing simulation exercises in the United States. I would like to speculate that the students who had participated in our simulation of two years earlier had recalled these norms and they surfaced in this similar exercise and guided the seven to nine student small group interviews. All right, so maybe that's just wishful thinking.

In evaluating our experience from the 2011 trip, I might add another guidepost, the ninth for the list: develop meaningful ways for your host students to provide a critique of the approach you bring. I imagine it might have felt impolite to our hosts to furnish on-the-spot criticism of the methods we presented. But, apart from feedback there and later from Dr. Eustache and Roxane Dimanche, and very gracious on-the-spot feedback from our host students, we did not create a vehicle designed to provide significant critical feedback on the usefulness and pitfalls of our teaching from the intended recipients of our efforts.

Overall, the principles of the guideposts proved useful in our second simulation experience in Jérémie. As the partnership evolves, it will be valuable to find ways of soliciting meaningful critique from our host students about this new clinical facet of our shared international partnership. And I welcome your feedback so that we can improve our approach and identify additional guideposts for clinicians exporting and importing legal education with educational partners around the world.

CONCLUSION

This analysis of our efforts aims to add to the database of evaluations of clinical simulations shared internationally, as well as to encourage others to share and continue to share their clinical learning and teaching in legal environments around the globe.⁸⁴ I hope especially that legal educators at educational institutions for whom clinical legal education is novel will (continue to) engage in the conversation, both by providing critical feedback about the

⁸⁴ In her 2006 article on supporting clinical legal education abroad, Professor Wortham concludes with a "hope[] to inspire those who work in clinics . . . to find the time to report their experience." Wortham, *supra* note 37, at 681. This Article concludes by reaffirming and extending her call for the continued and additional sharing of reflections about global clinical legal education efforts, encouraging reflections on the development of clinics globally, as well as more generally on shared efforts in the development of clinical legal education curricula globally.

experiments of imported modules in their law schools and about their own endeavors in creating homegrown clinical educational curricula.⁸⁵ I also hope that the very modest efforts of the HHP in the context of clinical legal education described and evaluated here will encourage students in Haiti to undertake representation of individuals in Haitian jails to vindicate detainees' human rights, whether through the anticipated criminal justice clinic, or more generally when they graduate and become lawyers. I am grateful to have had the chance to learn so much from our Haitian partners about life, law, and legal education in Haiti and, often unwittingly, about myself.

⁸⁵ For a discussion of the growth and impact of clinical legal education in China and relationships with U.S. law schools and colleagues in those developments from the viewpoint of a Chinese legal educator, see Yanmin Cai, *Global Clinical Legal Education and International Partnerships: A Chinese Legal Educator's Perspective*, 26 MD. J. INT'L L. 159 (2011).

APPENDIX A**MOCK POLICE REPORT**

Hastings to Haiti
Criminal Law Simulation File
March 2, 2009

Preliminary Report

One year ago, Jean and his sister Marie inherited a farmhouse and some land located on the outskirts of Jabricot. The land and home had belonged to their grandparents, who had passed away. Neighbors understood there was some argument about the property. Marie wanted to live in the home and farm on the land, keeping the traditional uses of the property. On the other hand, Jean, whose wife was desperately unhappy in Jabricot, wanted to sell the entire inheritance and split the proceeds with Marie. Neighbors think Jean wants to immigrate to Miami, Florida with his wife so they can start a new life. He needs money to do all the paperwork.

One week ago, when Jean, Marie, and Jean's wife (Claudine) were eating in Chez Matou restaurant, a heated argument ensued between Jean and Marie about their inheritance. Jean was heard to say, "I'd rather see the place burn to the ground than have you continue living there and waste the money it's worth."

Two days ago, just after dark, the farmhouse burned to the ground and some of the crops were also destroyed. Marie was not injured. Coincidentally, the fire was set during the time that Marie was at the regular church service she attends.

In their investigation, the police found burned wood and rags soaked in kerosene around the perimeter of the farmhouse.

One person (Guillaume Dupres), who had been walking by the farmhouse claimed to have seen someone on the property just before it had been torched. Although the sun was setting, Mr. Dupres described the person he saw as about 170 cm tall, of slight build, and wearing work boots. Mr. Dupres did not get a good look at the person's face.

Yesterday, the police arrested Jean Mars and charged him with the crime of arson of the farmhouse.

Student Instructions for Class

Accused: Jean Mars
Offense Charged: Arson
Defense Counsel: Jérémie Law Students

This morning, you were given the above preliminary report and assigned to represent Jean Mars through the Criminal Justice Clinic at the Law School. You will have an opportunity to interview your client sometime in the next week.

To prepare, you should research the elements of the crime of arson. Please write down the elements and bring these to our first case meeting (in class).

Please also think about what you'd like to ask Jean Mars when you have the chance to meet him.

NOTE

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We're Here, We're Queer, Get Used to It: Freedom of Assembly and Gay Pride in *Alekseyev v. Russia*

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INTRODUCTION

In 2011, the European Court of Human Rights (the Court) issued its first judgment on a gay rights case from the Russian Federation. *Alekseyev v. Russia* resulted in a finding that the Russian government had violated Articles 11, 13, and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) when the city of Moscow banned the plaintiff, Nikolai Alekseyev, and other gay rights activists from holding a public demonstration in support of lesbian, gay, bisexual, and transgender (LGBT) rights in 2006, 2007, and 2008, specifically gay pride marches, rallies, and pickets. This ruling follows a recent trend in both the European Union and the United Nations of bold statements in favor of gay rights, and makes a strong case for LGBT rights of assembly.¹

I

UNSANCTIONED PRIDE, SANCTIONED HATE

In 2006, gay activists in Russia organized what they hoped would be the first gay pride parade in the Russian Federation. Organizers, including Nikolai Alekseyev (the plaintiff in this case) and his LGBT rights group, Gay Russia, chose May 27, 2006, as the date for a march and rally to support and promote the rights of Russia's LGBT community.² Beginning in February of that year, the local government

¹ The U.N. released its first ever report on LGBT human rights in December 2011. The report detailed the global battles facing sexual minorities, noting that "LGBT people are often targets of organized abuse from religious extremists, paramilitary groups, neo-Nazis, extreme nationalists and others, as well as family and community violence, with lesbians and transgender women at particular risk." *UN Issues First Report on Human Rights of Gay and Lesbian People*, UN NEWS CENTRE (Dec. 15, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40743>. U.N. Secretary-General Ban Ki Moon followed this up in March 2012 with a call to world leaders to protect gay rights during the U.N.'s first hearing on LGBT discrimination and violence. Michelle Garcia, *U.N. Secretary-Gen. Urges Global Gay Rights*, ADVOCATE.COM (Mar. 7, 2012, 5:17 PM), http://www.advocate.com/News/Daily_News/2012/03/07/UN_Secretary_Gen_Urges_Global_Gay_Rights/.

² May 27 was chosen specifically because it is the anniversary of the decriminalization of homosexuality in Russia. See *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, ¶ 6 (2010). Boris Yeltsin signed a bill repealing Article 121.1 of the Russian Criminal Code, which criminalized consensual sex acts between men, on April 29, 1993.

of Moscow began an informal campaign to prevent the parade and spread the idea that gay activists were provoking societal confrontations by promoting homosexuality. On February 16, the mayor's press secretary published a statement that the Moscow government would "not even consider allowing the gay parade to be held."³ Less than a week later, on February 22, the mayor himself, Yuri Luzhkov, was quoted by the news agency Interfax as saying he personally considered homosexuality to be "unnatural," and that he would impose a ban on gay pride parades and rallies to avoid "stir[ring] up society."⁴

On March 17, deputy mayor Liudmila Shvetsova, wrote to Mayor Luzhkov about the plans to hold the gay pride parade in Moscow.⁵ She informed him that the parade was, in her opinion, a threat to the health and morals of the people of Moscow, and cited a number of petitioners who protested open expressions of support of homosexuality.⁶ However, Shvetsova acknowledged that under Russian law—specifically the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing (the Assemblies Act)—it was not possible to ban the event.⁷ She suggested that authorities ask to change the time or venue of the planned event, or use the possibility of the event becoming a public threat to stop it, and requested that the

LAURIE ESSIG, *QUEER IN RUSSIA* 13 (2009). Lesbian sex was not criminalized in the old criminal code; the new code only mentions homosexuality in relation to gay/lesbian rape, and the penalties are the same for "gay" rape as for "straight" rape. Immigration and Refugee Board of Canada, *Russia: Update to RUS13194 of 16 Feb. 1993 on the Treatment of Homosexuals* (Feb. 29, 2000), available at <http://www.unhcr.org/refworld/docid/3ae6ad788c.html>.

³ *Alekseyev* ¶ 7. The press secretary went on to say that Moscow's government "will not allow a gay parade to be held in any form, whether openly or disguised [as a human rights demonstration], and any attempt to hold any unauthorised action will be severely repressed." *Id.*

⁴ *Id.* ¶ 8.

⁵ HUMAN RIGHTS WATCH, *PRIDE AND VIOLENCE: A CHRONICLE OF THE EVENTS OF MAY 27, 2006 IN MOSCOW* 3 (2006) [hereinafter *PRIDE AND VIOLENCE*].

⁶ *Alekseyev* ¶ 9. Shvetsova stated in the memorandum that the planned event was "direct propaganda for immorality, insulting the honor and dignity of the overwhelming majority of Muscovites and inhabitants of Russia . . . [and] undermining the moral principles of the society." *PRIDE AND VIOLENCE*, *supra* note 5, at 3.

⁷ *Alekseyev* ¶ 9. In spite of her acknowledgement that the Assemblies Act could not prevent the rally as planned, and that homosexuality was in fact no longer a crime in the Russian Federation, Shvetsova stated that "propaganda in favor of [homosexuality and lesbianism], in particular by means of holding gay festivals and gay parades, can be considered propaganda for immorality, which may be forbidden by legislation in [the] future." *PRIDE AND VIOLENCE*, *supra* note 5, at 3.

mayor agree to develop an action plan to prevent any public or private actions towards organizing, promoting, or holding a gay pride event.⁸

Following this letter, the mayor issued instructions to local officials and prefects to “take concrete measures to prevent holding public and mass gay events in the capital,” including organizing a media campaign that would draw on objections from local citizens, religious leaders, and public organizations.⁹ In spite of the Moscow government’s machinations, Alekseyev and Gay Russia pushed forward with their plans to hold the rally. On May 15, the organizers submitted notice of the march, including the proposed date, time, and route, to the mayor.¹⁰ Despite the work of the organizers to ensure that local laws were followed when planning the march, the mayor refused permission to hold the rally on May 18, citing public safety grounds, specifically the “prevention of riots and protection of health, morals and the rights and freedoms of others.”¹¹ In the mayor’s opinion, the negative reaction of the community to homosexuality in general meant that the march “was therefore likely to cause a negative reaction and protests against the participants, which could turn into civil disorder and mass riots.”¹²

In response to the mayor’s refusal to allow them to demonstrate, the organizers submitted notice of a second protest, a picket of the decision to be held at Lubyanskaya Square, at the same date and time as the original march they planned. The next day, May 19, the organizers formally challenged the mayor’s decision in the Tverskoi District Court.¹³ Four days later, on May 23, the deputy prefect of the Moscow Central Administrative Circuit issued a refusal for the

⁸ *Alekseyev* ¶ 9.

⁹ PRIDE AND VIOLENCE, *supra* note 5, at 2.

¹⁰ In order to ensure compliance with local laws, organizers “undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order by the participants and to comply with regulations on restriction of noise levels.” *Alekseyev* ¶ 11.

¹¹ *Id.* ¶ 12. Ironically, on the same day that the mayor issued his decision, Russia assumed the six-month chairmanship of the Council of Europe, “the continent’s principle body concerned with human rights.” PRIDE AND VIOLENCE, *supra* note 5, at 2. Despite a pledge by Russia’s foreign minister, Serey Lavrov, that Russia’s tenure as chair would be “devoted to openness,” the NGO Human Rights Watch found a “centralized campaign in the [Moscow] mayor’s office against any attempts to publicly show support” for Russia’s LGBT community. *Id.* As with Shvetsova’s March 17 letter, the objections to the rally by Russian citizens and religious groups were cited as a reason for the rejection.

¹² *Alekseyev* ¶ 12. In defense of his decision, Mayor Luzhkov cited “numerous petitions . . . by representatives of legislative and executive State bodies, religious denominations, Cossack elders and other individuals.” *Id.*

¹³ *Id.* ¶ 14; PRIDE AND VIOLENCE, *supra* note 5, at 4.

organizers' second requested rally, the Lubyanskaya picket.¹⁴ The rationale behind the second decision was the same as the first—a gathering of gay activists to promote LGBT rights was a threat to the public order of Moscow.

On May 25, the mayor again voiced his disapproval of both homosexuality and the efforts of gay activists to publicly promote gay rights, saying that people with sexual “deviations” should not publicly demonstrate and that Muscovites agreed with him: “I thank the citizens of Moscow as 99.9% of them in recent days also believe it is unacceptable to hold such parades.”¹⁵ The Moscow Pride Festival opened that same day, hosting both domestic and foreign participants in a two-day event of lectures and discussions leading up to the planned May 27 march. Activists and political figures came from around the world to participate, including the United Kingdom, Germany, Austria, France, the United States, Poland, Latvia, Moldova, and Belarus.¹⁶ The first event of the festival was a lecture by Merlin Holland, Oscar Wilde’s grandson. During Holland’s lecture, over a dozen people stood and began shouting “Russia free of faggots!” before spraying the audience with mace.¹⁷

The following day, May 26, saw a couple of significant events. First, the mayor’s opposition to both homosexuality and public expressions of gay rights was again quoted by Interfax, reiterating his firm opposition to allowing a gay pride parade to happen, and highlighting the objections of religious groups.¹⁸ More importantly, the Tverskoi District Court dismissed the complaint filed by Alekseyev and Gay Russia. In its rejection of the complaint, the court relied upon provisions in the Assemblies Act that addressed the responsibility of authorities to ensure the safety of planned events.¹⁹

¹⁴ *Alekseyev* ¶ 15.

¹⁵ PRIDE AND VIOLENCE, *supra* note 5, at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ The mayor was quoted as saying that no gay pride parade would happen as long as he was mayor. He went on to say that all three “major” faiths—Christianity (specifically the Russian Orthodox Church), Judaism, and Islam—opposed the events, which were unacceptable in Russia (unlike some “progressive” Western countries). *Alekseyev* ¶ 16. Interfax also quoted the mayor as saying: “That’s the way morals work. If somebody deviates from the normal principles [in accordance with which] sexual and gender life is organised, this should not be demonstrated in public and anyone potentially unstable should not be invited.” *Id.*

¹⁹ The court *did* acknowledge that the Assemblies Act permitted holding the planned rally, provided that administrative notice requirements were met, and prohibited the interference of organizers, authorities, or other individuals, with the free expression of

The court concluded that, under the Assemblies Act, Moscow officials' refusal to allow the event had legitimate grounds; that the onus was on the organizers to propose time, date, and venue changes; and that the organizers' right to hold public events had not been violated.²⁰ Alekseyev appealed the Tverskoi court's decision on the grounds that Article 12 of the Assemblies Act actually required *officials*, not organizers, to propose time, date, and venue changes for events. He also challenged the court's conclusion that the ban was justified on public safety grounds, arguing that any safety concerns could have been alleviated by providing police protection for participants in the event.²¹

In addition to the appeal, Alekseyev and other organizers decided to hold two events on May 27. The first was a march to place flowers at the Tomb of the Unknown Soldier in Aleksandrovskiy Garden at the Kremlin, in a bid to "express[] . . . opposition to nationalism and extremism."²² The second planned event was a vigil in front of a statue of Yuri Dolgoruky outside of City Hall to protest the mayor's ban.²³ At 2:30 p.m. on the 27th, Alekseyev and other organizers and attendants of the festival, totaling approximately fifteen people,²⁴ approached the gate to the Tomb and were met by approximately two to three hundred protestors, including "younger and older Orthodox and nationalist counter-protestors, and contingents of elderly women carrying crosses and icons."²⁵ There was a police presence at the Tomb, an estimated one hundred and fifty members of the special riot squad OMON (*Otriad Militsii Osobogo Naznacheniy*), but they only intervened to arrest Alekseyev for breaching the conditions for holding a public demonstration.²⁶ The protestors beat some of the

participants unless they contravened the parameters of the planned event or breached public order. *Id.* ¶ 17.

²⁰ *Id.*

²¹ *Id.* ¶ 18.

²² PRIDE AND VIOLENCE, *supra* note 5, at 4.

²³ *Id.*; *see also* Alekseyev ¶ 19.

²⁴ Alekseyev ¶ 20.

²⁵ PRIDE AND VIOLENCE, *supra* note 5, at 4–5.

²⁶ *Id.* at 5; *see also* Alekseyev ¶ 21. Alekseyev recounted the events to Human Rights Watch:

I saw a huge group of people gathered there, shouting "death to sodomites," "out of Russia," "we will not allow you to put things here, our grandfathers died fighting against people like you." I said, "My grandfather died fighting against your kind." I said to myself, I will not stop—I will go on. But the gate was closed. Then the police suddenly appeared out of nowhere. They began pushing all of us back from the gate. Then . . . several officers[] seized me from behind and started to shove me

participants while OMON detained the others; a number of protestors threw objects at the activists, including eggs, bottles, and rocks.²⁷

After the small group of LGBT activists withdrew from the Tomb to move towards the site of the second planned event, anti-gay protestors continued to battle both bystanders and police. Police arrested between twenty-five and fifty demonstrators, but the “vast majority . . . who had been engaged in violence remained at large.”²⁸ These protestors made their way towards the site of the planned picket, continuing to assault people they perceived to be gay rights supporters on the streets along the way. When the remaining gay activists arrived at City Hall, a large contingent of anti-gay demonstrators was already waiting for them, in addition to the violent group of protestors who were still chasing after them from the Tomb.²⁹ Amongst the protestors waiting at City Hall was Nikolai Kurianovich, a member of the Duma from the right-wing Liberal Democratic Party. Kurianovich stood upon the steps of the statue the gay rights activists planned their vigil around and warned the crowd that “Russia would become like ‘putrid America and dying Europe’ if it permitted the ‘gay mafia’ to triumph, and led the crowd in chanting ‘Gays and lesbians to Kolyma’—the Stalin-era prison camp.”³⁰ Local police were again present, but only to arrest gay rights activists, rather than the rabidly anti-gay crowd that surrounded them.³¹

from the square and through the crowd. They pushed me very violently through the square and put me in the [police] bus.

PRIDE AND VIOLENCE, *supra* note 5, at 5. British activist Peter Tatchell, who had been a participant in the Pride Festival and march to the Tomb, said of the violence they encountered: “We were immediately set upon by about 100 fascist thugs and religious fanatics who began pushing, punching and kicking us.” Rex Wockner, *Pride Moscow*, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N (ILGA) (May 29, 2006), <http://ilga.org/ilga/en/article/812>.

²⁷ PRIDE AND VIOLENCE, *supra* note 5, at 5.

²⁸ *Id.*; see also Wockner, *supra* note 26.

²⁹ PRIDE AND VIOLENCE, *supra* note 5, at 6; *Alekseyev* ¶ 22.

³⁰ PRIDE AND VIOLENCE, *supra* note 5, at 6.

³¹ *Id.* One of the remaining organizers, Dimitri Makarov, approached a colonel with the police to ask for protection against the extremists, only to be arrested:

I showed him our application [to hold the demonstration], said this was a manifestation within the law. I asked him to defend the picketers against the extremists who controlled the square. He pointed to us and said to the officers, “Arrest them. Take them to the bus.” He said we had organized an unsanctioned demonstration! . . . I pointed out the demonstration of the nationalists that was already going on: I said, *that* is illegal, shouldn’t you stop that? The officers said, “We can’t, there is a deputy leading it.” I said, “What about the people standing there listening to him?” They said, “Well, they are listening to a deputy.”

During the fracas, several LGBT activists arrived and unfurled large rainbow flags in front of the statue, including an openly gay member of the German Bundestag, Volker Beck.³² The crowd immediately reacted with violence: skinheads surrounded the activists and ripped the flags away from them. A representative of Human Rights Watch was shoved to the ground. Beck and his partner were struck in the face with rocks and fists. Police intervened, but “instead of trying to separate the two groups they encircled all of them, crushing them tightly together and forming a close cordon within which the violence continued.”³³ A number of arrests were made, including both the violent counter-protestors and the non-violent LGBT demonstrators. A leader of Russia’s lesbian movement, Yevgenia Debrianskaia, was arrested while speaking to journalists about the violence. As she told Human Rights Watch:

I was appalled. I saw an unsanctioned demonstration, headed by a Duma parliamentarian, who was calling for gay people to be killed, and no one was disturbing him or interfering. . . . The journalists . . . turned their cameras to me. . . . I said, I came to exercise my civic responsibility, about the unfair ban on gay people. . . . The extremists started to throw things at me, rocks and bottles and soda. A policeman with three big stars on his shoulder broke through the journalists and told me my actions were illegal and I was under arrest.³⁴

Beck was also arrested, along with his partner; he later told the news agency Deutsche Presse Agentur that the security forces had not protected them, but prevented them from escaping the violence: “We were left without any protection.”³⁵

Reflecting on the event, activist Peter Tatchell placed a large part of the blame on Mayor Luzhkov, saying his “homophobia created the atmosphere which gave a green light to the fascists to attack the Moscow pride participants.”³⁶ Throughout the day a number of people

Id.

³² PRIDE AND VIOLENCE, *supra* note 5, at 6–7.

³³ *Id.* at 7.

³⁴ *Id.*

³⁵ Wockner, *supra* note 26. When the police realized who Beck was, they immediately released him and his partner, telling the men “they had only detained us for our own security!” PRIDE AND VIOLENCE, *supra* note 5, at 7.

³⁶ Wockner, *supra* note 26. In the aftermath of the violence, the director of Human Rights Watch’s LGBT Rights Program, Scott Long, also pinpointed Moscow officials as the catalyst of the violence: “The authorities in Moscow have endorsed discrimination and fostered an environment that allowed hatred to rise Instead of leading Muscovites to embrace equality, Mayor Luzhkov supported and promoted homophobia. Given this failure of leadership, the violent ending should surprise no one.” *Russia: Investigate*

were beaten, detained, arrested, and harassed by anti-gay demonstrators and police. Skinheads roamed the streets, tracking down any remaining gay activists (or people they thought to be supporters) to continue the violence and harassment, largely unchecked by police.³⁷ While it is unknown exactly how many arrests were made in connection with the events of May 27, Human Rights Watch was able to identify at least six LGBT supporters who were arrested, including organizers Alekseyev, Dmitri Makarov, and Alexei Kozlov, who were charged with organizing unsanctioned demonstrations.³⁸ Makarov has stated that he was also harassed by police at the station: “They threatened me too, saying . . . ‘[w]e’ll beat you with the legal code till you realize what an unsanctioned demonstration is.’”³⁹

Following the violence of May 27, Alekseyev and Gay Russia attempted to get the Russian court system to recognize their right to have their public assemblies sanctioned by local governments. Multiple court challenges were filed, and activists waited as their cases slowly worked through the Russian judicial system, hitting roadblock after roadblock, only to have the courts sustain the bans.⁴⁰

Attacks on Gay Pride March, HUMAN RIGHTS WATCH (June 2, 2006), <http://www.hrw.org/news/2006/06/01/russia-investigate-attacks-gay-pride-march>.

³⁷ PRIDE AND VIOLENCE, *supra* note 5, at 9. One French participant who was seriously injured, Pierre Serne, told Human Rights Watch about the difficulty in finding safe haven or help that day:

I was asking people on the streets to help me, asking where the police were. People avoided me. And when some skinheads saw that no one was doing anything, they started to follow me again. I saw two Russian photographers who were covering the event. I asked them to call the police. But the skinheads started chasing all three of us, mainly, though, after me. They began hitting me again. Then the police arrived, at last. . . . They arrested five of [the skinheads]. Then they took me to the bus. I was put in with the skinheads. . . . Those guys were just laughing in the bus, like the others on the street, as if they knew they had no fear of anything.

Id.

³⁸ *Id.*

³⁹ *Id.* at 10.

⁴⁰ On June 16, Alekseyev and Gay Russia decided to file another court challenge to the city’s prohibition of the City Hall picket. Five weeks later, on August 22, the Taganskiy District Court of Moscow dismissed the challenge on the grounds that public safety concerns justified the ban; Alekseyev immediately appealed. *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, ¶ 25 (2010). The Moscow City Court finally reviewed the pending appeal of the Tverskoi District Court’s May 26 decision upholding the ban on September 19; it found no fault with the lower court’s decision and upheld it as “justified in the circumstances.” *Id.* ¶ 26. Over two months passed before it reviewed the appeal of the Taganskiy District Court’s August 22 ruling, and it found no fault in that decision either. *Id.* ¶ 27.

The years since 2006 have seen similar attempts to organize pride rallies, and similar obstacles set up by the city to prevent them. In both 2007 and 2008, organizers submitted multiple requests and plans for a variety of gay pride events; every single request was rejected, ostensibly on the grounds of public safety.⁴¹ After three years of being prevented from obtaining relief by domestic courts, Alekseyev filed an application with the European Court of Human Rights, claiming violations of his rights under the European Convention. Every ruling the domestic courts had given subverted the constitutional rights of Alekseyev and other LGBT Russians, and, as the European Court of Human Rights would eventually rule, their human right to freely assemble without being subjected to discriminatory restrictions.

II

RELEVANT LAW

A. Domestic Laws

There are dual levels of domestic law at play in *Alekseyev*. The first is the Constitution of the Russian Federation, which guarantees Russians freedom of association and the right to peaceful assembly. Article 30 contains the right to association.⁴² Article 31 guarantees the right to peaceful assembly.⁴³ Article 55(3) provides for those freedoms to be restricted by federal laws under certain circumstances, such as the protection of public morals and the rights of others.⁴⁴

⁴¹ In 2007, Alekseyev and others attempted to organize a march similar to the one they had attempted in the previous year. The march and a picket (similar to the 2006 picket) were banned on the grounds of “public order, prevention of riots and protection of health, morals and the rights and freedoms of others.” *Alekseyev* ¶ 32. On May 27, after attempting to march to the mayor’s office to file petitions protesting the bans, a small number of activists, including Alekseyev, were detained for twenty-four hours for disobeying a lawful order. Both the District and City Courts upheld the city’s decisions, finding public safety concerns justified the bans. *Id.* ¶¶ 37–38. In 2008, organizers were particularly careful about complying with the city’s laws but still received denials of every one of their twenty-five requests. *Id.* ¶¶ 40–44. As in previous years, court challenges were filed in District and City Courts, but the government won each challenge. *Id.* ¶ 46.

⁴² See CONSTITUTION OF THE RUSSIAN FEDERATION, art. 30(1) (“Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed.”).

⁴³ *Id.* at art. 31 (“Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets.”).

⁴⁴ *Alekseyev* ¶ 49. See also CONSTITUTION OF THE RUSSIAN FEDERATION, art. 55(3) (“The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of

The other level of domestic law is the Assemblies Act, which local officials used to justify the bans. The Assemblies Act was created with the aim of “ensuring realization of the constitutionally mandated right of citizens of the Russian Federation to peaceful assembly without weapons, to hold rallies, meetings, demonstrations, marches and picketing.”⁴⁵ The Act gives the organizer of a public event the right to hold public demonstrations—including marches—provided the organizer meets certain requirements.⁴⁶ Article 12 of the Assemblies Act governs the responsibilities of the executive authority. There is no provision in this section granting the government authority to outright ban a public event as long as the aforementioned requirements have been met. Officials are limited to proposing alternate venues, appointing a representative to assist organizers of the event, and taking on various tasks that help promote and maintain public order.⁴⁷ Article 18 actually prohibits executive interference in the rights of the participants except in certain circumstances: “The promoter of a public event, officials and other citizens shall have no right to prevent participants in the public event from expressing their opinion in a manner not violating the public order and rules of procedure for holding the public event.”⁴⁸

B. International Laws

Two aspects of international human rights law are necessary to understanding this case. The first is the widely recognized right to free assembly, the primary claim of Alekseyev before the European Court.⁴⁹ The right to assemble is guaranteed by multiple international

the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.”).

⁴⁵ Federal Law No. 54-FZ on Rallies, Meetings, Demonstrations, Marches and Picketing, June 19, 2004, available at <http://legislationline.org/documents/action/popup/id/4367> [hereinafter Assemblies Act].

⁴⁶ Assemblies Act at art. 5(3)(1). These requirements include notifying the executive authority of the planned event; notifying the authority of changes to the event within a specified period of time; ensuring compliance with any conditions for holding the event; ensuring that participants in the event maintain public order; and ensuring, to the extent possible, public order and the safety of citizens during the event. *Id.* at art. 5(4)(i)–(v).

⁴⁷ *Id.* at art. 12(1)(i)–(vii).

⁴⁸ *Id.* at art. 18(1).

⁴⁹ Three articles of the European Convention were at question in *Alekseyev*: (1) freedom of assembly and association, Article 11; (2) the right to an effective remedy, Article 13; and (3) the prohibition of discrimination, Article 14. Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 [hereinafter European Convention]. The primary violation that *Alekseyev* sought relief for

instruments, most notably the Universal Declaration of Human Rights (UDHR), the European Convention, and the International Covenant for Civil and Political Rights (ICCPR).⁵⁰ The Charter of Fundamental Rights of the European Union (EU Charter) also guarantees the freedom of peaceful assembly and association. The second aspect is the stance of the international legal community on discrimination based on sexual orientation. A number of international instruments address both the importance of the right to free assembly and the pernicious effects of sexual orientation discrimination. State discrimination against sexual minorities has been studied, discussed, and generally condemned by the Committee of Ministers, the Council of Europe, and the EU Agency for Fundamental Rights; it has also been recognized by both the European Court of Human Rights and the European Court of Justice as a generally impermissible form of discrimination.

1. Freedom of Assembly

Aside from the UDHR and the European Convention, the ICCPR, to which Russia is a party, also contains the right of peaceful assembly:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order . . . the protection of public health or morals or the protection of the rights and freedoms of others.⁵¹

The EU Charter, which is the “first formal EU document to combine and declare all the values and fundamental rights . . . to which EU citizens should be entitled,” also contains a guarantee of the freedom

was the Article 11 right. The Article 13 claim was a result of the ineffectiveness of the Russian judicial system in respect to adjudicating the applicant’s claim in a timely manner. Article 14 is considered a “parasitic” right—finding an Article 14 violation is contingent upon finding violations of another article. *See generally* Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 212 (2009).

⁵⁰ *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 20(i), U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to freedom of peaceful assembly and association.”); European Convention, *supra* note 49, at art. 11; International Covenant on Civil and Political Rights, art. 21, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵¹ ICCPR, *supra* note 50, at art. 21. Russia signed the treaty on March 18, 1968, and ratified it on October 16, 1973. *See Status of the ICCPR*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated Jan. 28, 2012).

of assembly and association.⁵² Article 12 of the Charter states: “Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters.”⁵³

Regardless of a wide recognition of the freedom of assembly, this right is not without limitations. Legitimate aims for restricting freedom of assembly can include national security; public safety; prevention of disorder or crime; protection of health or morals; and protection of the rights and freedoms of others.⁵⁴ However, under the European Convention, “restrictions should be (1) prescribed by law, (2) have a legitimate aim, and (3) be necessary in a democratic society to achieve those aims.”⁵⁵ The Court applies this three-part test after confirming that public authorities did in fact interfere with the rights in question.

In addition to the three-part test employed to determine if a restriction on assembly is legitimate, the Court has set some limits on what constitutes a legitimate aim.⁵⁶ Governments have an obligation to not only allow assemblies whose viewpoints they disagree with, but also an obligation to protect the people participating in those assemblies from violence.⁵⁷ The Organization for Security and Cooperation in Europe (OSCE) and the Office for Democratic Institutions and Human Rights (ODIHR) produced guidelines for states on how to guarantee and execute effective rights of free assembly, recognizing that “[t]he freedom of peaceful assembly can be an important strand in the maintenance and development of

⁵² *EU Charter of Fundamental Rights*, EU CHARTER, www.eucharter.org (last visited Mar. 28, 2012). The EU Charter became a binding part of EU Law when the Treaty of Lisbon came into force in December of 2009.

⁵³ Charter of Fundamental Rights of the European Union, art. 12(1), 2000 O.J. (C 364) 1 (Dec. 18, 2000) [hereinafter EU Charter]. Article 12(1) corresponds to Article 11 in the European Convention. See European Convention, *supra* note 49, at art. 11.

⁵⁴ COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 72 (2d ed. 2011), available at http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf [hereinafter SEXUAL ORIENTATION DISCRIMINATION IN EUROPE].

⁵⁵ *Id.*

⁵⁶ For example, the “morality” exception does not give a state free hand to quell any public assembly it deems immoral. Authorities are still obligated to respect the right of assembly for people whose opinions or lifestyles they may find controversial or unwelcome.

⁵⁷ SEXUAL ORIENTATION DISCRIMINATION IN EUROPE, *supra* note 54, at 72–73.

culture, and in the preservation of minority identities.”⁵⁸ It extends the definition of “peaceful” assemblies to include those that “may annoy or give offence to persons opposed to the ideas or claims that a particular assembly is promoting,” a defense particular to states attempting to justify restrictions on LGBT rights to assembly.⁵⁹

2. *Sexual Orientation Discrimination*

Sexual orientation discrimination has recently become a cause of concern amongst many international bodies, especially within the European community. The Council of Europe—which consists of the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, and the European Court of Human Rights—has been “extensively involved” in advocating for and protecting the right of assembly for LGBT persons.⁶⁰ In one notable example, Thomas Hammarberg, the Commissioner for Human Rights for the Council of Europe, issued a statement in response to the Moscow ban on May 26, 2006, the day before the riots. He classified the right to peaceful assembly as a “fundamental right[] in a democratic society [that] belong[s] to all people, not just the majority. A demonstration may annoy or give offence to persons opposed to the ideas or claims expressed, but this cannot be a reason to ban a peaceful gathering.”⁶¹

In 2010, the Committee of Ministers issued Recommendation CM/Rec(2010)5 on measures to combat discrimination on the grounds of sexual orientation or gender identity (Recommendation on Discrimination). Section III explicitly addresses freedom of expression and peaceful assembly in the context of sexual orientation discrimination: “Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.”⁶² Article 15 calls upon member

⁵⁸ OSCE/ODIHR PANEL OF EXPERTS ON THE FREEDOM OF ASSEMBLY, GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY 13 (2007) [hereinafter ODIHR GUIDELINES].

⁵⁹ *Id.*

⁶⁰ Ronald Holzhaecker, *State-Sponsored Homophobia and the Denial of the Right of Assembly in Europe 19* (unpublished panel paper for the American Political Science Association, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643314.

⁶¹ Statement, Thomas Hammarberg, *Freedom of Assembly Belongs to All People* (May 26, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1010053&Site=COE>.

⁶² Council of Europe Comm. of Ministers, Recommendation CM/Rec(2010)5 on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity

states to ensure that law enforcement protects peaceful gay rights demonstrators from any attempts to interrupt the free exercise of their right to assembly, and Article 16 asks member states to ensure that administrative and legal procedures are not used to ban peaceful LGBT assemblies.⁶³ The recommendation even goes so far as to ask public officials to use media to publicly condemn attempts to interfere with the lawful expression of the right to assemble by gay rights supporters.⁶⁴

In addition to the Recommendation on Discrimination, the Parliamentary Assembly has also passed a resolution on sexual orientation and gender identity discrimination. Resolution 1728 reaffirms that “[s]exual orientation and gender identity are recognised as prohibited grounds for discrimination.”⁶⁵ The Resolution, in addition to clarifying both the Council of Europe’s and the Court’s positions on sexual orientation discrimination, specifically addresses freedom of assembly and LGBT rights. Section six states that “[t]he Assembly is particularly concerned by the violation of the rights to freedom of assembly and freedom of expression for LGBT persons in a number of Council of Europe member states since these rights are pillars of democracy.”⁶⁶ Bans and attempted bans on gay rights demonstrations are illustrative of why the Parliamentary Assembly is concerned, and this is reiterated in Section 16.1.⁶⁷ The Resolution is also critical of the “overt or tacit support some politicians have given

§ III(14), 1081st Mtg. of the Ministers’ Deputies (Mar. 31, 2010), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=1606669> [hereinafter Recommendation on Discrimination].

⁶³ *Id.* § III, arts. 15–16. Article 15 reads as follows:

Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.

Article 16 seems almost tailored as a response to Moscow’s approach to banning pride parades: “Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example *on grounds of public health, public morality and public order.*” *Id.* § III, art. 16 (emphasis added).

⁶⁴ *Id.* at art. 17.

⁶⁵ Parliamentary Assembly, *Discrimination on the Basis of Sexual Orientation and Gender Identity*, Resolution 1728 § 2, 17th Sitting (Apr. 29, 2010) [hereinafter Resolution 1728].

⁶⁶ *Id.* § 6.

⁶⁷ *Id.* § 16.1 (calling on member states to “ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards”).

to violent counter-demonstrations,” the potency of which was demonstrated in Moscow by the actions of Mayor Luzhkov and the Duma member Kurianovich.⁶⁸

There are some notable non-legal instruments that are taken into consideration by the Court and other international human rights bodies when deciding cases on sexual orientation discrimination. One is advice provided by the EU Agency for Fundamental Rights (FRA) in a recently published report on sexual orientation discrimination in EU member states. In that report, the FRA specifically noted the importance of pride events to LGBT persons, finding that “pride marches or similar gatherings and events constitute an important means through which LGBT persons exercise their right to freedom of assembly and freedom of expression.”⁶⁹ The FRA report highlights actions taken by the European Parliament to promote the recognition of LGBT rights of assembly,⁷⁰ and also makes recommendations on how local governments can facilitate that recognition. One recommendation that is particularly germane to the current case calls for eliminating the use of “public order” concerns as an excuse for officials to violate those rights.⁷¹

Another non-legal instrument is the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). Drafted in 2006 by human rights law experts, the Yogyakarta Principles contain twenty-nine principles that discuss what rights are protected under international law with respect to sexual orientation and gender

⁶⁸ *Id.* § 6.

⁶⁹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE EU MEMBER STATES 17 (2010), available at http://fra.europa.eu/fraWebsite/attachments/FRA-homophobia-synthesis-report-2011_EN.pdf.

⁷⁰ *Id.* at 19. The policies highlighted by the FRA are “[v]arious European Parliament resolutions adopted between 2006 and 2007” that found bans on Pride marches to “contravene the principles protected by the ECHR,” and a 2009 resolution on a Lithuanian law called the Protection of Minors Against the Detrimental Effects of Public Information. *Id.* The Lithuanian law contained language that effectively banned information on same-sex relationships, and the Parliament’s resolution “reaffirm[ed] the importance of the EU fighting against all forms of discrimination, including discrimination based on sexual orientation.” *Id.* at 18–19.

⁷¹ *Id.* (“Arguments regarding the preservation of ‘public order’ should not be used to impose undue restrictions on LGBT-related events and other manifestations of LGBT identities or relationships. Public authorities should ensure that homophobic counter-demonstrations do not hinder lawful LGBT events.”).

identity.⁷² Principle 20 contains the right to freedom of peaceful assembly and association, and is defined as follows:

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.⁷³

In addition to defining the freedom of assembly and association in the context of sexual orientation and gender identity discrimination, the Yogyakarta Principles detail positive obligations on states to ensure that these rights are realized and protected. These duties include ensuring that legislative and administrative measures protect LGBT rights of assembly, that adequate police protection is provided to demonstrators against potentially violent counter-demonstrators, and that these rights are not restricted on the grounds of public order, public morality, public health, and public security.⁷⁴ In *Alekseyev*, the Russian government is alleged to have violated every single one of these duties.

III LEGAL ARGUMENTS

A. The Allegations

The Court considered allegations that three rights of the European Convention were violated. Article 11(1), or the right to freedom of assembly, states that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the

⁷² David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT’L L. 821, 822, 833 (2010). Signatories to the Principles include notable human rights jurists, human rights treaty body members, UN Special Rapporteurs, law professors, and human rights activists. Two NGOs also participated: the International Commission of Jurists (ICJUR) and the International Service for Human Rights (ISHR). *Id.* at 840.

⁷³ INT’L COMM’N OF JURISTS, YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, Principle 20 (Nov. 2006) [hereinafter YOGYAKARTA PRINCIPLES].

⁷⁴ *Id.* at Principle 20, §§ (A)–(E).

right to form and to join trade unions for the protection of his interests.”⁷⁵ Article 11(2) provides for exceptions to this right:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.⁷⁶

The Court’s primary question was centered on section two, asking whether the ban imposed by Mayor Luzhkov was in accordance with the law and “necessary in a democratic society” to protect the interests of any of the enumerated reasons.

In addition to Article 11, the Muscovite government was alleged to have violated Article 13, or the right to an effective remedy.⁷⁷ The alleged violation of this article stems from the Russian judicial system’s repeated refusal to recognize the claims of the applicant or ameliorate the harm of the bans, and from the statutory guidelines that made it impossible to receive a final decision on the ban before the event’s scheduled date. The Court was then asked to determine if the violations of Articles 11 and 13 were motivated by discrimination, which would be a violation of Article 14: “The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁷⁸

B. Russia’s Arguments

The Russian government’s argument revolved around three points: (1) the bans on the applicant’s public events are lawful; (2) the bans pursue legitimate aims; and (3) the bans are necessary in a democratic society. To bolster its first claim, the government pointed to the domestic legal instruments in question, the Constitution and the

⁷⁵ European Convention, *supra* note 49, at art. 11(1).

⁷⁶ *Id.* at art. 11(2).

⁷⁷ *Id.* at art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

⁷⁸ *Id.* at art. 14. The phrase “other status” has been interpreted to include a variety of grounds for protection, including marital status and sexual orientation. *See* O’Connell, *supra* note 49, at 13.

Assemblies Act. It argued that the inevitably violent confrontation between the activists and counter-demonstrators was a risk to public safety, and that these grounds were sufficient to justify banning the public event under Article 55 § 3 of the Constitution and Article 8(1) of the Assemblies Act.⁷⁹ The government also claimed to be operating within its margin of appreciation under Article 11(2), arguing for leeway when it comes to protecting the public during potentially volatile public events.⁸⁰ It claimed that the ban was the only way to maintain public order “because no other measure could have adequately addressed the security risks.”⁸¹

With respect to its second argument, the government claimed that it had three legitimate aims in banning gay pride demonstrations: (1) protecting public safety, (2) protecting morals, and (3) protecting the rights and freedoms of others.⁸² Its public safety concerns are well documented, though the violence came from the counter-demonstrators instead of the organizers and their supporters. To support its argument that it was acting in protection of morals, the

⁷⁹ Alekseyev v. Russia, Nos. 4916/07, 25924/08 and 14599/09, ¶ 57 (2010). Article 55 § 3 of the Constitution, *supra* note 49, reads:

The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

Article 8(1) of the Assemblies Act reads: “A Public event may be carried out at any place suitable for the purposes of the given event provided the holding of such event creates no threat of collapse of buildings and structures or any other threat to the security of participants in the public event.”

⁸⁰ The “margin of appreciation” doctrine is analogous to judicial discretion; it is “based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.” Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L.J. 711, 711 (2007).

⁸¹ Alekseyev ¶ 58. The government also claimed that a ruling contrary to its domestic courts’ rulings would make the Court a “court of fourth instance.” The Fourth Instance Doctrine is meant to maintain a high level of deference to national court systems, and the Court will generally only question the rulings of a domestic court “where the interpretation by the national court is ‘arbitrary,’ or where it is a part of a Convention requirement that national law be complied with Even so, it is very exceptional for the Court to disagree with any decision by a national court on its interpretation and application of its own national law.” D.J. HARRIS, M. O’BOYLE, E.P. BATES & C.M. BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 15 (2d ed. 2009).

⁸² See Paul Johnson, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v. Russia*, 11 HUM. RTS. L. REV. 578, 580 (2011).

government relied on the religiosity of the Russian people. It argued that promotion of homosexuality was “incompatible with the ‘religious doctrines for the majority of the population.’”⁸³ It supported this claim with the statements by local religious leaders and organizations condemning pride parades specifically, and homosexuality generally.⁸⁴ Allowing the gay pride parade to go forward would be an insult to religious Russians who object to homosexuality, the government argued; it would be a “terrible debasement of their human dignity.”⁸⁵ To buttress its religious protection claim, the government fell back on the guarantees of respect and protection of individual religious and moral beliefs found in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the ICCPR.⁸⁶

The government concluded its argument by disputing the idea that there was a consensus within the Council of Europe on the extent to which homosexuality was accepted in each country, a claim meant to

⁸³ *Alekseyev* ¶ 59.

⁸⁴ These statements came from the Orthodox Church, the Supreme Mufti for Russia, and the head of the Muslim authority of Nizhniy Novgorod, and ranged from threatening mass protests to calling for the stoning of homosexuals. See Johnson, *supra* note 82, at 581. The Orthodox Church protested the parade on the belief that it was sin-promoting propaganda. The Supreme Mufti promised that Muslims and other “normal” people would protest *en masse*. And the Muslim authority in Nizhniy Novgorod claimed that, “as a matter of necessity, homosexuals must be stoned to death.” *Id.*

⁸⁵ *Alekseyev* ¶ 59.

⁸⁶ See ICCPR, *supra* note 50, at art. 18(1) (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”). The ICESCR only references religious protection in the context of preventing religious discrimination in state fulfillment of its provisions: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . religion.” International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3. Reliance on this treaty to prove the point of religious discrimination is inapt, as none of the rights enumerated in the ICESCR are alleged to have been violated by the presence of a gay pride parade, let alone on religious grounds. The Russian government claimed that allowing gay pride parades would “breach the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality.” *Alekseyev* ¶ 60. It argued that “the democratic State must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens, including believers.” *Id.* In other words, allowing realization of LGBT Russians’ right to freely assemble would trample on the rights of religious Russians to have religiously rooted negative views on homosexuality; the Russian government saw itself as protecting the bulk of its population from having their religious rights encroached upon by a small portion of the population.

invoke the margin of appreciation doctrine.⁸⁷ It first argued for keeping expressions of homosexuality or LGBT support purely in the private sphere, such as clubs, bars, and entertainment facilities; the idea was that homosexuality was something that “involuntary spectators” should not be exposed to, especially children.⁸⁸ The government then claimed that because, in its opinion, Muscovites were not ready to accept gay pride parades or other public demonstrations of LGBT support, it was the duty of the Moscow government to “demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality.”⁸⁹

C. Alekseyev’s Arguments

Every argument made by the Russian government was strongly contested by Alekseyev. There are three basic points that rebut every claim made by the government: (1) domestic law does not provide for an outright ban on public events, merely for proposed changes in date, time, or venue; (2) the government’s so-called “legitimate aims” for the bans are inapplicable; and (3) the bans are *not* necessary in a democratic society. The first point is supported by Article 8(1) of the Assemblies Act, which governs public events where there are safety concerns. There is no language in that section allowing officials to ban an event for public safety concerns; rather, they are required to suggest another venue.⁹⁰ Even if the Court had found that the

⁸⁷ The government wanted to demonstrate that there was a lack of agreement on the extent of LGBT rights throughout Europe that justified a wide margin of appreciation from the Court. Typically, when dealing with public morals issues, the Court “generally submits that Contracting States have a wide margin of appreciation, and defers to the national authorities’ judgments.” See Bakircioglu, *supra* note 80, at 717. A lack of a “uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role.” *Id.* at 727.

⁸⁸ *Alekseyev* ¶ 61.

⁸⁹ *Id.* ¶ 62. It again referred to the numerous statements from religious groups, civic leaders, and Russian celebrities condemning the gay pride parade.

⁹⁰ *Id.* ¶ 64. Article 12(1)(2) states that the governing body, upon receipt of notice of a public event, is obligated “to deliver to the promoter of the public event, within three days from receipt of the notice . . . a well-motivated proposal to alter the place and/or time of holding the public event.” Assemblies Act, art. 12(1)(2). Even if the proposed public event has goals that are counter to the provisions of the Constitution of the Russian Federation, or defy administrative or criminal bans enacted by the government, the Assemblies Act only gives the governing body authority to “immediately give to the promoter of the public event a motivated caution in writing to the effect that the promoter and also other participants in the public event . . . may be held responsible as appropriate.” Assemblies Act, art. 12(2). Nothing in the Act provides for an outright ban on public events, regardless of their content or the manner in which they are held.

Assemblies Act provided for public safety bans, Alekseyev argued, the government failed to prove its case on the other two requirements in Article 8 § 2 of the European Convention: that the bans pursue legitimate aims and are necessary in a democratic society.

Alekseyev rejected all three legitimate aims put forward by the government to justify the bans. The first, public morals, was rejected because “the Government’s definition of ‘morals’ included only attitudes that were dominant in public opinion and did not encompass the notions of diversity and pluralism.”⁹¹ Additional arguments pointed out that the proposed activities were actually demonstrations in favor of civil liberties—a goal hardly considered morally objectionable by most—and that no “immoral” behavior, such as nudity or public sexual activity, had been planned for any of the events. The Court noted that the Russian government had not shown that any concrete harm to persons or society would result from the gay pride rallies. Alekseyev argued that, contrary to this notion of societal harm, “the events would have been of *benefit* to Russian society by advocating the ideas of tolerance and respect for the rights of the lesbian and gay population.”⁹²

In response to the government’s purported aim of protecting public safety and preventing disorder, Alekseyev pointed out that every planned march was intended to be peaceful. The government’s resistance rested on the assumptions of violence from counter-demonstrators. However, the Court noted that the government never assessed the scale of potential violence between demonstrators and counter-demonstrators, which undermined the government’s claim that it was unable to provide adequate security for the events.⁹³ While the Court does not mention any arguments made by Alekseyev to counter the government position that the protection of religious freedoms of a majority of its population was a legitimate aim for the ban, it does address this claim in its assessment of the case.⁹⁴

Finally, Alekseyev disputed the claim that the bans are necessary in a democratic society by referencing the Court’s established case law. Referring to the 2007 decision in *Bączkowski v. Poland*, the landmark case which found that administrative roadblocks that effectively ban gay pride parades can constitute Article 11 violations, the applicant

⁹¹ Alekseyev ¶ 65.

⁹² *Id.* (emphasis added).

⁹³ *Id.* ¶ 66. The government never submitted reasons why security was not possible at any of the rejected venues in the three years that the Court examined (2006–2008).

⁹⁴ For discussion on this point, see *infra* p. 124 and notes 99–100.

argued that “the mere possibility of confusing and even shocking part of society could not be regarded as a sufficient ground for such a sweeping measure as a total ban” on gay pride events.⁹⁵ Alekseyev argued that the values of a democratic society include pluralism, tolerance, and broadmindedness, and that bans on gay pride events like the ones in question are incompatible with these democratic characteristics. In his mind, the government not only discouraged participation in a process necessary to a democratic society (freedom of assembly), but had also encouraged the negative attitudes expressed by counter-demonstrators that the event organizers and their goals were immoral. This had the effect of “depriving the minority of a lawful right to hold a peaceful demonstration, a right that was inherent in a society striving to be democratic.”⁹⁶ This disapproval, and the concurrent violation of democratic aims, led to the government’s prohibition on what was essentially a lawful demonstration, and to its failure to protect the participants.

IV THE COURT’S ASSESSMENT

The Court immediately noted in its rationale that there is “no doubt” that the applicant’s Article 11 rights were interfered with by the Russian government; this point was actually conceded by both parties. The question the Court was considering was whether or not the bans were *justified*. It wasted no time in finding that there was no legitimate justification for the bans enacted by Moscow; consequently, the Court easily found that the Russian government had committed an unjustified Article 11 violation in banning the pride events. Referring back to its decision in *Bączkowski*, it noted that “the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a ‘democratic society.’”⁹⁷ The Court has found in the past that the hallmarks of a democratic society, as argued by Alekseyev, are pluralism, tolerance, and broadmindedness.⁹⁸ In the course of pursuing these aims, the Court has allowed the interests of individuals

⁹⁵ *Alekseyev* ¶ 67; *see also* *Bączkowski and Others v. Poland*, No. 1543/06, ¶ 64 (2007).

⁹⁶ *Alekseyev* ¶ 67.

⁹⁷ *Bączkowski* ¶ 61 (citations omitted).

⁹⁸ *Id.* ¶ 63. The Court put particular emphasis on pluralism, noting: “pluralism is . . . built on genuine recognition of, and respect for, diversity. . . . The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.” *Id.* ¶ 62 (citations omitted).

to be subordinated by those of a group: “[D]emocracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁹⁹

A. Public Safety

The Court then turned to the first of the three “legitimate aims” the Russian government claimed, public safety. A large part of the government’s evidence to defend this argument rested on the petitions presented from those religious and civil organizations that objected to the planned pride events.¹⁰⁰ In response to this argument, the Court referred to its previous case law, noting that Article 11 protects any public event that “may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote.”¹⁰¹ This protection imposes an affirmative duty upon governments to take “reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.”¹⁰² The Court found that the government failed in this duty, and that the petitions it presented in support of its public safety justification were, at least in part, “irrelevant to safety considerations.”¹⁰³

Despite this level of discretion, the Court emphasized that the mere presence of a risk is insufficient grounds for a ban; the government must show assessments of the potential scale of the violence, as well as steps taken to mitigate potential violence while still maintaining the

⁹⁹ *Alekseyev* ¶ 70 (citations omitted). This appears to be part of a broader argument rebutting the Russian government’s position that religious freedom of individuals and groups who oppose homosexuality justify the bans. One commentator has noted that the implication of this position is that “no matter how dominant a religion is in a society, faith should not assume any special status in balancing the protection of the Article 11 rights of homosexuals with the rights and freedoms of others.” Johnson, *supra* note 82, at 589.

¹⁰⁰ The Court pointed out that those petitions were not all of the same ilk. Some merely expressed disapproval of the pride events and homosexuality. Others expressed plans to demonstrate against the pride parade, and still others explicitly threatened violence if the parade was allowed. *Alekseyev* ¶ 72.

¹⁰¹ *Id.* ¶ 73 (citations omitted).

¹⁰² *Id.* (citations omitted). The first set of petitions presented carried no threats of violence or counterdemonstrations, and were thus “irrelevant.” *Id.* ¶ 74.

¹⁰³ Those petitions that carried threats of violence or counter-demonstrations were relevant insofar as security arrangements were concerned, an area where governments have been given relatively wide latitude. *Id.* ¶ 75 (“As a general rule, where a serious threat of a violent counterdemonstration exists, the Court has allowed the domestic authorities a wide discretion in the choice of means to enable assemblies to take place without disturbance.”).

rights of its LGBT citizens to demonstrate peacefully.¹⁰⁴ In this case, the Russian government failed to show any attempts to assess the potential violence of counter-demonstrations and create security plans to protect the pride parade, opting instead to just ban the event outright.¹⁰⁵ The Court rejected the government's argument that the violent threats necessitated a ban on the events, noting that if violent threats were truly a concern of the Moscow government, it would have prosecuted those responsible for making the threats.¹⁰⁶ Furthermore, regardless of the government's failure to adequately assess the risks involved in holding pride events, threats of violence should not automatically warrant a complete ban on pride parades: "[I]f every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion."¹⁰⁷ These factors were paramount in the Court's finding that the Russian government's bans were not justified by public safety concerns, but were in fact a secondary consideration to the government's concerns about public morals.

B. Public Morals

To support its conclusion that the government's primary concern was about public morals, the Court first pointed to the discriminatory statements made by government officials, specifically the mayor of

¹⁰⁴ *Id.*

¹⁰⁵ Even if the Muscovite government had done some assessment of the counter-demonstrations, the Court found that there was only a potential total of about one hundred protestors, a number that would hardly overwhelm the security forces of a city the size of Moscow. *Id.*

¹⁰⁶ Again, the Russian government did not make any attempt to take these steps. *Id.* ¶ 76. The Court noted that those who threatened violence against the pride participants, specifically the Muslim cleric from Nizhny Novgorod who called for the stoning of homosexuals, avoided any culpability: "[I]t does not appear that the authorities in the present case reacted to the cleric's call for violence in any other way than banning the event he condemned." *Id.* The Court also pointed out that the government's ban not only avoided the issue of violence against LGBT participants, but also encouraged the confrontations with those who participated in the pride events: "By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organizations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order." *Id.*

¹⁰⁷ *Id.* ¶ 77.

Moscow.¹⁰⁸ In addition to the mayor's own comments that celebrations of gay pride are "inappropriate," the government argued that pride events should be banned on principle, "because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults."¹⁰⁹ The government's objection on morality grounds was, in the Court's opinion, insufficient grounds for banning the events under public law, and was clearly disproportionate to either of the aims put forward by Russia.¹¹⁰

The Court reiterated the importance of freedom of peaceful assembly to promoting democratic principles in finding that Article 11 guarantees apply to all assemblies—except those with violent intentions on behalf of the organizers or that deny central tenets of a democratic society. Citing a previous decision in *Sergey Kuznetsov v. Russia*, the Court stated that "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it."¹¹¹ Ultimately, the Court found that the planned pride events would not have risen to the level of controversy that the government claimed it would.¹¹² Additionally, the comments of Muscovite officials demonstrated that the primary concern was not the *behavior* of the participants, but their open identification as sexual minorities.

¹⁰⁸ The Mayor's comments that those who deviate from "normal principles in organizing one's sexual life" should not publicly display their "deviations," coupled with deputy mayor Shvetsova's remark that propaganda in favor of LGBT rights could be considered "propaganda for immorality," clearly show that concern for public morals was paramount to Moscow's government. PRIDE AND VIOLENCE, *supra* note 5, at 3.

¹⁰⁹ *Alekseyev* ¶ 78.

¹¹⁰ *Id.* ¶ 79. In fact, during the domestic proceedings, the government relied solely on public safety grounds as justification for the ban, while ignoring the public morality arguments that it would eventually make before the Court. *Id.*

¹¹¹ *Id.* ¶ 80 (citing *Sergey Kuznetsov v. Russia*, No. 10877/04, ¶ 45 (2008)). Underlying this point is the concept that conditioning minority rights on acceptance by the majority is counter to the foundational principles of the Convention. As the Court points out, if minority rights are contingent on majority approval, then minority rights of religion, expression, and assembly would be merely theoretical and not practical, as required by the European Convention. *Alekseyev* ¶ 81 (citations omitted).

¹¹² Both *Alekseyev* and the government acknowledge that there was no nudity or other graphic, obscene activities planned; the government also acknowledged that its condemnation of homosexuality was limited to expressions in the public sphere. *Id.* ¶ 82.

C. Margin of Appreciation

The Court also rejected the government's margin of appreciation argument, which rested on the theory that a lack of consensus in Europe on LGBT issues justified its approach to public expressions of homosexuality and support of gay rights. This rejection is not entirely surprising, given the Court's recent jurisprudence on the margin of appreciation doctrine in the context of LGBT rights.¹¹³ The Court referred to established case law that reflected a "long-standing European consensus" on a variety of matters concerning gay rights: decriminalization of consensual homosexual relations between adults, military service, and parental rights are just some examples.¹¹⁴ Regardless of the presence of consensus, it still requires authorities to not overstep this margin by acting "arbitrarily."¹¹⁵

The presence of general consensus in support of LGBT rights of assembly amongst member states led the Court to reject the government's margin of appreciation doctrine. The Court also reiterated its position that "any decision restricting the exercise of freedom of assembly must be based on an acceptable assessment of the relevant facts."¹¹⁶ Since the only factor that Moscow's government took into account before banning the pride events was public opposition and personal views on morals, it failed to meet this burden.¹¹⁷ This conclusion, combined with the Court's rejection of the

¹¹³ As one commentator has noted, despite some inconsistencies in application there has been a "progressive narrowing" of the margin of appreciation the Court grants states in respect to sexual orientation issues since the 1980s. Johnson, *supra* note 82, at 589. Johnson points out that the Court has relied on the presence of European consensus only in certain circumstances concerning gay rights. For example, the Court considered Europe's lack of consensus on same-sex marriage in allowing for a wide margin of appreciation in *E.B. v. France*, but did not consider the margin of appreciation doctrine at all in another case concerning same-sex adoption. *Id.* at 589–90.

¹¹⁴ *Alekseyev* ¶ 83. Despite this general consensus, there are still some areas where Europe is divided on the extent of LGBT liberty (specifically marriage), and the Court has generally allowed a wide margin of appreciation to countries on these issues.

¹¹⁵ *Id.* The Court emphasized that states' margin of appreciation "goes hand in hand with European supervision." This supervision defeated the Russian government's argument that the Court was acting as a court of fourth instance. *See HARRIS ET AL.*, *supra* note 81. It also noted that any absence of European consensus was irrelevant in this case because there is a fundamental difference between conferring substantive rights on homosexuals (such as marriage) and recognizing their right to campaign for those substantive rights. No other member states are ambiguous on the right of homosexuals to openly identify as such, or prevent homosexuals from exercising rights of free assembly.

¹¹⁶ *Id.* ¶ 85.

¹¹⁷ As the Court took care to note, the mayor of Moscow and his government strived to keep homosexuality out of the public sphere based on the notion that homosexuality is a

government's alleged legitimate aims and margin of appreciation arguments, led the Court to conclude that the government's ban on LGBT-identified public events "did not correspond to a pressing social need and was thus not necessary in a democratic society," thereby violating Alekseyev's Article 11 rights.¹¹⁸

D. Other Violations

While the Article 11 violation was the thrust of this case, the Court also found that the government violated Alekseyev's right to an effective remedy under Article 13 of the European Convention, and did so with discriminatory purposes, a violation of Article 14.¹¹⁹ Article 13 was violated because the domestic courts and laws were structured to make a successful appeal on a ban effectively impossible.¹²⁰ For a remedy to be effective, there must be the

conscious, anti-social choice. Not only did the government fail to offer any evidence to justify this conclusion, but the Court pointed out that "[t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults.'" *Id.* ¶ 86.

¹¹⁸ *Id.* ¶¶ 87–88.

¹¹⁹ Article 13 of the Convention reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention, *supra* note 49, at art. 13. Article 14, governing the prohibition of discrimination, states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* at art. 14.

¹²⁰ For the Article 13 claim, Alekseyev argued that he was denied an effective remedy for the Article 11 violation because there was no procedure in place to guarantee him a final decision before the planned date of the march. The government countered this argument by pointing to available judicial remedies, some of which Alekseyev did not attempt to pursue. *Alekseyev* ¶¶ 90, 92. The government also argued that the event organizers waited too long before filing court and administrative challenges, casting doubt on Alekseyev's argument that a judicial remedy would not have been provided before the planned date of the events. Alekseyev responded by saying that he had filed the appeals as soon as he received the full text of the judgment; furthermore, he claimed that due to the notice provisions in the Assemblies Act and the sections of the Code of Civil Procedure concerning the entry of judgments into force, any first-instance judgments or appeals would necessarily become final only after the planned date of the events. Article 7(1) of the Assemblies Act holds that notices of public events must be submitted to the governing body "within the period not earlier than fifteen and not later than ten days prior to the holding of the public event." Notices for pickets must be submitted no later than three days of the event. Assemblies Act at art. 7(1). For example, the events planned for May 27, 2006, were banned by the first-instance court on May 26. There was no possible way to seek redress in a manner that would allow the events to proceed the following day. Any judicial decision overturning the ban would have been retrospective and, consequentially, futile towards remedying the damage of the ban. The Court sided with Alekseyev, relying

possibility of obtaining a ruling *before* the planned time of the event in question: “It is . . . important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities . . . should act.”¹²¹ The Court easily found an Article 14 violation, referring to government officials’ own statements as evidence that bias was the driving force behind the bans.¹²² Because the Court had previously found that the main reason for the ban was government disapproval of public events aimed at promoting homosexuality, and because it found an undeniable link between officials’ discriminatory statements and the ban, it concluded that there had been unjustified discrimination against Alekseyev in the violation of his Article 11 right.¹²³

Ultimately, the Court found that Russia had violated all three of the Articles in question by illegally denying the right of Alekseyev to exercise his freedom of assembly, based on discriminatory purposes, and by not providing him with a timely, effective remedy.¹²⁴

on the idea that “the timing of public events is crucial for the organisers and participants.” *Alekseyev* ¶ 98. As mentioned in Part II, *supra* p. 102, Alekseyev and Gay Russia specifically scheduled pride for May 27 in order to mark the anniversary of the decriminalization of homosexuality in the Russian Federation.

¹²¹ *Alekseyev* ¶ 98.

¹²² Relying on Article 14 in conjunction with Article 11, Alekseyev alleged that the government violated his Article 11 rights because of his sexual orientation, saying that it was clear that the real reason for the ban was official disapproval of his moral standing. *Id.* ¶¶ 101, 105. Sexual orientation is covered under Article 14, as the Court found in *Kozak v. Poland* in 2010. “Furthermore,” the Court wrote in that opinion, “when the distinction in question operates in this intimate and vulnerable sphere of an individual’s private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of.” *Kozak v. Poland*, No. 13102/02, ¶ 92 (2010). The margin of appreciation afforded to states in the context of sexual orientation is narrow, and the principle of proportionality “does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances.” *Alekseyev* ¶ 108. As found by the Court and reiterated by the Council of Europe’s Parliamentary Assembly, “a difference in treatment is discriminatory if it has no objective and reasonable justification.” Resolution 1728, *supra* note 65, § 2. The government denied Alekseyev’s allegations, arguing that there was no discriminatory intent behind the ban. The government acknowledged the “existence” of sexual minorities and the necessity of addressing discrimination against LGBT Russians; however, it argued that “in view of their antagonistic relations with religious groups, it could prove necessary to place restrictions on the exercise of their rights.” *Alekseyev* ¶ 104.

¹²³ The Court also determined that the government had not provided any justification showing that the impugned distinction was compatible with Convention standards. *Id.* ¶ 109.

¹²⁴ The decision was issued October 21, 2010, and referred to the Grand Chamber of the European Court of Human Rights. The Grand Chamber rejected the referral request on April 11, 2011, thereby making the Court’s decision final. Press Release, European Court

Alekseyev requested €40,000 in non-pecuniary damages and approximately €17,500 in legal fees before both domestic courts and the European Court. The Court awarded Alekseyev the full amount of legal fees and €12,000 in damages, resulting in a €29,500 fine for the Russian government. While the government is expected to pay the fine, whether or not this case will have an impact on Russia's approach to LGBT rights, especially Article 11 rights, is yet to be seen, though recent developments have not been promising.¹²⁵

V IMPLICATIONS

There are three main issues to consider when assessing the implications of *Alekseyev* for Russia and for sexual minorities who are denied their rights under the European Convention. First, the ruling reinforces the strength of LGBT freedom of assembly in Europe. Second, the Court's decision represents a broadening understanding of gay rights in Europe. And third, the decision highlights the Russian government's contracting stance towards recognition of homosexuality and protection of LGBT rights. These three variables lead to the conclusion that while the Russian state may continue to restrict LGBT rights, especially those involving public assembly, the European Court is ready to defend the rights of sexual minorities in Russia, with the strong support of the Council of Europe and other European institutions.

A. LGBT Freedom of Assembly in Europe

The primary effect of *Alekseyev* is its explicit recognition of a human right to public assembly and association for sexual minorities. This stance is a continuation of the court's decision in *Bączkowski*, called the "most explicit statement on the obligation of states toward LGBT assemblies."¹²⁶ Explicit acknowledgement of sexual minority rights is especially important since the Convention does not mention

of Human Rights, Court's Judgment Concerning Repeated Unjustified Ban on Gay-Rights Marches in Moscow is Now Final (Apr. 15, 2011), available at http://www.echr.coe.int/echr/en/header/press/links/archived+news/archivesnews_2011.htm.

¹²⁵ Member states are required under the European Convention to comply with the decisions of the Court. See European Convention, *supra* note 49, at art. 46(1) ("Binding Force and Execution of Judgments.").

¹²⁶ Holzhaecker, *supra* note 60, at 18. *Bączkowski* is a case that "demonstrate[s] the Court's heightened awareness of the unacceptability of discrimination on grounds of sexual orientation and its greater readiness to scrutinize cases coming before it in this regard." HARRIS ET AL., *supra* note 81, at 598.

sexual orientation or gender identity as grounds of discrimination prohibited under Article 14 or Protocol No. 12.¹²⁷ The decision in *Alekseyev* reinforces the notion that the Court is ready, willing, and able to scrutinize cases of sexual orientation discrimination. Additionally, *Alekseyev* gives judicial effect to the Committee of Ministers' Recommendation on Discrimination.¹²⁸ Incorporating this recommendation into the Court's jurisprudence will only strengthen the position of LGBT persons claiming Article 11 violations under the European Convention.

B. Pride in Europe

The second notable aspect of the *Alekseyev* decision is its reflection of a growing understanding of LGBT rights in Europe, specifically the right of assembly. A 2011 report released by the Council of Europe's Commissioner for Human Rights noted that pride parades and other LGBT "cultural events" take place without problems in most member states.¹²⁹ Despite this widening recognition, pride participants in Eastern Europe face a higher risk of government prohibition and assault than in most countries in Western Europe. At least twelve member states have banned or created administrative impediments for pride or other cultural LGBT events, including Poland, Turkey, Ukraine, Lithuania, and, of course, the Russian Federation.¹³⁰ Aside from Russia, violence has been threatened or has

¹²⁷ See European Convention, *supra* note 49, at art. 14; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.1 (2000). Despite the absence of sexual orientation as a prohibited ground of discrimination, the European Court of Human Rights has recognized that Article 14 covers sexual orientation, and it is mentioned in the explanatory report to Protocol No. 12. Holzacker, *supra* note 60, at 19.

¹²⁸ Paul Johnson, *Russian Ban on Homosexual Propaganda Violates Human Rights*, JURIST (Dec. 1, 2011, 8:12 AM), <http://jurist.org/hotline/2011/12/paul-johnson-russia-lgbt.php>. As discussed in Part III, the Recommendation on Discrimination is a comprehensive approach to conferring affirmative obligations on states to protect sexual minorities from discrimination, with a number of provisions aimed specifically at protecting freedom of expression and peaceful assembly.

¹²⁹ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 73. In July 2010, EuroPride in Warsaw became the first European-wide gay pride event held in Eastern Europe, drawing an estimated 8000 participants—a fitting transformation for the city where the *Bączkowski* case was born. Kamil Tchorek, *Warsaw's Gay Pride Reveals the Face of Modern Poland*, GUARDIAN (July 19, 2010), <http://www.guardian.co.uk/commentisfree/2010/jul/19/poland-gay-pride-warsaw>.

¹³⁰ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 73–74. Another case concerning gay pride bans in Moldova is currently pending before the European Court of

erupted at gay pride events in Latvia, Hungary, Serbia, and Georgia; the Council of Europe has also documented violent attacks on pride parades in no less than fifteen member states, from Sweden to Ukraine, since 2004.¹³¹

C. Restrictions on LGBT Freedom in Russia

Even though the Court found multiple violations of Alekseyev's rights and fined the Russian government, LGBT Russians still struggle to have their voice heard without government interference or prohibition. Despite active gay communities in Moscow and St. Petersburg, the U.S. State Department has noted that "[s]ocietal animosity toward gays remain[s] strong."¹³² In June 2011, the European Parliament adopted a resolution at the EU-Russia Summit in Nizhny Novgorod that explicitly voiced disapproval for the

Human Rights. See *Genderdoc-M v. Moldova*, No. 9106/06 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394>.

¹³¹ *The Long March: Gay Rights in Eastern Europe*, ECONOMIST (Oct. 26, 2010), http://www.economist.com/blogs/easternapproaches/2010/10/gay_rights_eastern_europe. The Economist notes that attacks on gay pride events in Eastern Europe "are part of a broader trend that has seen politics lurch to the right across the continent in recent years." *Id.* See also *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 75. Violence at pride parades is still very much a concern in a number of Eastern European countries; at the 2010 Pride parade in Belgrade, Serbia, riots erupted when anti-gay demonstrators clashed with police, resulting in over 140 injuries. *Serbia Riots Leave Scores Injured*, AL JAZEERA (Oct. 11, 2010), <http://www.aljazeera.com/news/europe/2010/10/2010101015466495888.html>. In 2011, approximately 10,000 anti-gay demonstrators attacked about 200 LGBT activists and allies in Split, Croatia. *Croatia: Don't Force Change in Pride March Route*, HUMAN RIGHTS WATCH (May 31, 2012), <http://www.hrw.org/news/2012/05/31/croatia-don-t-force-change-pride-march-route>. Ukrainian gay rights activists cancelled the planned 2012 pride parade after threats of violence from anti-gay demonstrators, as well as assaults on activists themselves. *Ukraine: Investigate Brutal Attack on Gay Activist*, HUMAN RIGHTS WATCH (June 26, 2012), <http://www.hrw.org/news/2012/06/26/ukraine-investigate-brutal-attack-gay-activist>.

¹³² U.S. STATE DEP'T, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RUSSIA (Apr. 8, 2011), available at <http://www.state.gov/documents/organization/160474.pdf> [hereinafter STATE DEP'T REPORT]. The report cites a number of hate crimes against gays in Russia over the past few years, focused largely around public pride events, including the kidnapping of Alekseyev by Muscovite security personnel. One gay Muscovite who recently obtained asylum in the United States because of sexuality-based persecution faced in Russia spoke with *The Moscow Times* about how difficult it was to be a known homosexual in Russia: "I participated in a nonsanctioned gay-pride parade at Vorobyovy Gory . . . It was ruthlessly suppressed. Participants were arrested. Those who were not arrested, myself included, were left bleeding, bruised and swollen." Nikola Krastev, *Why a Gay Muscovite Sought, and Won, U.S. Asylum*, MOSCOW TIMES (Aug. 15, 2012), <http://www.themoscowtimes.com/news/article/why-a-gay-muscovite-sought-and-won-us-asylum/466605.html>.

continuing ban on gay pride parades in spite of the Court's ruling, saying that the Parliament:

Regrets that, contrary to Russia's obligations as a member of the Council of Europe to uphold freedom of assembly, peaceful citizens' gatherings continue to be banned and violently dispersed, including a gay pride march in Moscow for the sixth consecutive year, disregarding a final ruling made in April 2011 by the European Court of Human Rights.¹³³

Regardless of the Parliament's position, Russia (and particularly Moscow) has continued to restrict LGBT assemblies, as well as other rights. The Moscow government has refused to recognize the substance of the Court's ruling in *Alekseyev* and continues to ban gay pride parades; in fact, the most recent attempt to hold a gay pride demonstration—in May 2012—ended in the arrest of about forty demonstrators from both sides, including Alekseyev.¹³⁴ After Mayor Luzhkov was removed from his post by then-President Dmitri Medvedev in late 2010, gay rights activists had hoped that the new mayor, Sergei Sobyenin, would take a softer line on pride parades than his predecessor.¹³⁵ However, Mayor Sobyenin explicitly stated in November 2011 that he would not allow gay pride parades to be held in Moscow, because Muscovites would oppose the event and their opinion “had to be ‘respected.’”¹³⁶ Other government officials have been more vehement in their opposition to gay pride events. In response to attempts to organize a pride march, the governor of the

¹³³ *European Parliament Resolution of 9 June 2011 on the EU-Russia Summit* (June 9, 2011), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0268+0+DOC+XML+V0//EN&language=EN> [hereinafter EU-Russia Resolution]. See also Intergroup on LGBT Rights, *European Parliament Calls on Russia to Authorise Gay Prides* (June 9, 2011), <http://www.lgbt-ep.eu/parliamentary-work/european-parliament-calls-on-russia-to-authorise-gay-prides/>.

¹³⁴ Alexander Tikhomirov, *Moscow Gay Pride Protests Blocked by Russia Police*, HUFFINGTON POST (May 27, 2012), http://www.huffingtonpost.com/2012/05/27/moscow-gay-pride-protests_n_1548992.html#s=1026401.

¹³⁵ See Simon Shuster, *Moscow's Mayor Fired: A Win—and a Risky Move—for Medvedev*, TIME (Sept. 28, 2010), <http://www.time.com/time/world/article/0,8599,2022106,00.html>.

¹³⁶ *Moscow Mayor Pledges No Gay Pride Parades on His Watch*, RIA NOVOSTI (Nov. 24, 2011), <http://en.ria.ru/society/20111124/169012089.html>. While Sobyenin initially approved the event in late 2010, he reversed course in early 2011 and Moscow Pride was once again banned. See Ben Aris, *New Moscow Mayor Says Yes to Protest*, TELEGRAPH (Dec. 2, 2010), <http://www.telegraph.co.uk/sponsored/russianow/society/8177000/New-Moscow-mayor-says-yes-to-protest.html>.

Tambov Region responded: “Tolerance?! Like Hell! Faggots should be torn apart. And their pieces should be thrown in the wind.”¹³⁷

The freedom of assembly is not the only right that has been restricted in the context of LGBT Russians in recent years. There has been significant attention to a new law in St. Petersburg purporting to prevent “homosexual propaganda,” which has largely been seen as an attempt to stifle gay expression. The law penalizes “public actions directed at the propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors” with fines of up to USD 17,000, and defines homosexual propaganda as “the targeted and uncontrolled dissemination of generally accessible information capable of harming the health and moral and spiritual development of minors.”¹³⁸ Aside from the well-known instances of LGBT discrimination in Russia, the U.S. State Department noted more common occurrences of discrimination in its annual human rights report:

[T]he majority of gays hide their orientation due to fear of losing their jobs or their homes, as well as the threat of violence. . . . Medical practitioners . . . limit or deny gay and lesbian persons health services due to intolerance and prejudice. According to recent studies, gay men faced discrimination in workplace hiring practices. Openly gay men were targets for skinhead aggression; police often failed to respond out of indifference.¹³⁹

Additionally, LGBT Russians who attempt to use the European Court of Human Rights face potential harassment: “Amnesty International and other human rights groups reported past reprisals against applicants to the court, including killings, disappearances, and intimidation. According to press reports and human rights NGOs, as of September 2009 at least six applicants to the ECHR had been killed or abducted.”¹⁴⁰

¹³⁷ *Sexual Orientation Discrimination in Europe*, *supra* note 54, at 57.

¹³⁸ Michael Schwartz, *Anti-Gay Law Stirs Fear in Russia*, N.Y. TIMES, Feb. 29, 2012, at A14.

¹³⁹ STATE DEP’T REPORT, *supra* note 132, at 83. For additional information on hate crimes against sexual minorities in Russia, see Russian LGBT Network, *Discrimination and Violence Against Lesbian and Bisexual Women and Transgender People in Russia*, 8–9 (Shadow Report submitted for the 46th CEDAW Session) (July 12–30, 2010), http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork_RussianFederation46.pdf.

¹⁴⁰ STATE DEP’T REPORT, *supra* note 132, at 21.

CONCLUSION

Ultimately, the Court's decision will likely have little impact on local and regional governments, as evidenced by the actions in Moscow, St. Petersburg, and Krasnodar. However, *Alekseyev* is an important case within the broader context of LGBT human rights. It marks the first decision on gay rights in Russia from the European Court of Human Rights, continues the tradition of European recognition of LGBT rights to assembly and association that was started in *Bączkowski*, and explicitly finds a human right to assembly for sexual minorities attempting to express this right through gay pride events. Although the Russian Federation's actions since the Court's decision was finalized have demonstrated its unwillingness to recognize the rights of LGBT Russians to publicly express themselves, this decision strengthens the Court's jurisprudence on gay rights, giving Russian activists a stronger platform from which to fight the government's continued violations. In the meantime, Nikolai Alekseyev continues to fight for LGBT rights, defying Russian authorities with bold, public expressions of support for equality: "I don't want to wait any more for my freedoms or civil rights as a gay man."¹⁴¹

¹⁴¹ Aris, *supra* note 136.

