A MULTILATERAL CONVENTION ON OUTLAWING INCITEMENT TO ACTS OF TERRORISM UNDER INTERNATIONAL LAW

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CONTENT

ABSTRACT

Terrorist activities have occurred throughout history. In this paper, we study the relationship between incitement to violence, and recruiting, training or convincing others to commit acts of violence and the limitation on the right to free speech as determined by the Supreme Court

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and international tribunals. We advocate bringing accused perpetrators of such international crimes before the courts via universal jurisdiction and offer a solution: a multilateral convention providing for the rendition of suspects who have solicited or persuaded others to perform terrorist acts, whether or not the acts actually occur and are successful.

INTRODUCTION

When a person persuades, encourages, instigates, pressures, trains or solicits another person or group so as to cause that person or group to commit an act of international terrorism, unless there is a treaty of extradition between the state where the terrorist offense has taken place or has been instigated etc., to take place, and the state where the person suspected of doing such instigation etc., is found, very often the suspect goes free. There is no legal reason or motivation for the requested state to render the suspect to the requesting state. To overcome this problem, we propose a multilateral convention. Such a convention would require the arrest and extradition of individuals suspected of training, motivating, inciting or soliciting others to engage in international terrorist activities that have taken place or were or are planned to take place in the requesting state. The convention would not attempt to define a "terrorist activity," since that has eluded international lawyers and states for generations, rather it would work much the same way that typical bilateral extradition treaties work today, working within the frameworks of the national laws of the requesting and the requested state. We propose a separate convention, and not simply amending the Statute of the International Criminal Court, since a number of prominent states are not participants in the ICC.[1]

Under the domestic laws of many countries, a person who solicits or entices another to commit a crime is guilty of a punishable offense and is prosecuted for such crime. The person is arrested and tried. But how do we bring those who incite or solicit acts of international terrorism when they are in a far off land, outside the reach of our police and our courts? In today's world they often go free.

The bombings in Boston on the day of the 2013 Marathon race were generally considered an act of terrorism.[2] Some believe the Boston

1. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. For example, China, the United States, India, Pakistan, Indonesia, Turkey Israel are not members, though the United States has signed the Statute, but not ratified it. *See id.*

2. Mark Landler, *Obama Calls Blasts an 'Act of Terrorism,'* N.Y. TIMES (Apr. 16, 2013), *available at* http://www.nytimes.com/2013/04/17/us/politics/obama-calls-marathon-bombings-an-act-of-terrorism.html?adxnnl=1&adxnnlx=1380121442-

Bombing suspects received training or indoctrination outside the United States.[3] The American press believed that a person "radicalized" at least one of the Tsarnaev brothers, causing the Boston carnage.[4] The FBI tried very hard to find that person.[5] According to CNN, by July of 2015, there were more U.S. citizens charged in jihadist-style terrorism related cases than at any time since the attacks of September 11, 2011.[6] Who inspires such activity? Who educates or trains perpetrators to engage in such activity? Now, many believe that the group known as ISIS is doing so to a large degree.[7] Should we or can we do anyting about such inspiration or even training?

The attacks on Westgate Mall in Nairobi, Kenya,[8] are reported to be the work of Al Shabab militants from Somalia, apparently trained there and recruited from there; others think some may have even come from Kenya itself,[9] though as the head of Kenya's military has stated: "We are fighting global terrorism here,"[10] as many believe the group included

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3. Anderson Cooper, *Were Bombing Suspects Trained Overseas?*, CNN (Apr. 23, 2013, 11:14 PM), *available at* http://ac360.blogs.cnn.com/2013/04/23/were-bombing-suspects-trained-overseas/?iref=allsearch (last visited Dec. 20, 2015).

4. Peter Weber, *Who is 'Misha,' the Armenian Muslim Who Radicalized Tamerlan Tsarnaev?*, WEEK (Apr. 24, 2013), *available at* http://theweek.com/article/index/243163/who-is-misha-the-armenian-muslim-who-radicalized-tamerlan-tsarnaev (last visited Dec. 20, 2015).

5. *See* James Nye & David McCormack, *FBI Closing in on 'Misha': Agents Identify Mysterious Bald, Red-Bearded Armenian-American Man Accused of Radicalizing the Boston Bombers*, DAILY MAIL (Apr. 27, 2013, 4:08 PM), *available at* http://www.dailymail.co.uk/news/article-2315605/Boston-bombers-FBI-reveal-theyve-identified-Misha-mysterious-bald-red-bearded-Armenian-American-man.html#ixzz31cOTtOK5 (last visited Dec. 20, 2015).

6. *See* Peter Bergen & David Sterman, *A History of Attacks Against U.S. Military Installations*, CNN (July 17, 2015, 8:46 PM), *available at* http://www.cnn.com/2015/07/16/opinions/bergen-chattanooga-shooting/index.html (last visited Dec. 20, 2015).

7. Ashley Fantz & Dana Ford, *Massachusetts Man Accused of Plot to Bomb Crowded Places on Behalf of ISIS*, CNN (July 14, 2015, 10:55 AM), *available at* http://www.cnn.com/2015/07/13/us/massachusetts-isis-arrest/index.html (last visited Dec. 20, 2015).

8. Daniel Howden, *Terror in Westgate Mall: The Full Story of the Attacks That Devastated Kenya*, GUARDIAN (Oct. 4, 2013, 8:12 AM), *available at* http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined (last visited Dec. 20, 2015).

9. Duncan Miriri, *Two Kenyan Police Killed in Attack in Northeast County*, REUTERS (Sept. 26, 2013, 6:30 AM), *available at* http://www.reuters.com/article/2013/09/23/us-kenya-attack-idUSBRE98K03V20130923 (last visited Dec. 20, 2015).

10. Duncan Miriri & James Macharia, *Militants Hold out as Kenya Forces Try to Crush Cross-Border Jihad*, REUTERS (Sept. 23, 2013, 5:33 PM), *available at* http://www.reuters.com/article/kenya-attack-idUSL5N0HJ3MV20130923 (last visited Dec. 20, 2015).

fighters from many parts of the world.[11] Planners, plotters, instigators and trainers prepared the militants who carried out the two attacks on the World Trade Center in New York.[12] Terrorists often do not work by themselves and often do not start out life as terrorists. Frequently someone "turns" them or radicalizes them to become terrorists. Just as often, the person or persons who have done the "turning" are found in a state other than the one in which the terrorist incident occurred or was planned to have occurred, rendering the suspects outside the jurisdiction of the state that is the target of the terrorist attack. Some states simply are frustrated by this and the perpetrators go free. Sometimes in other cases, for example such as in the case of the United States, the state chooses the option of its own unlawful activity and resorts to extra-legal means, often called "extraordinary rendition,"[13] Whenever one of these two cases occurs—either doing nothing out of frustration, or resorting to extra-legal actions—the respect for international law breaks down. We suggest a solution: a multilateral convention providing for the rendition of those individuals who are believed to have engaged in the activity of persuading, encouraging, instigating, and pressuring training or soliciting terrorist acts, whether or not the acts actually occur and are successful. The state in which a terrorist act or planned terrorist act is to occur—the target state—would use its own definition of an act of international terrorism and therefore its own statutory definition for the solicitation of such crime—if such activity is a crime under its domestic law—and request another state party to the convention in which the suspect is found, to extradite that person to the requesting state for interrogation and prosecution, if prosecution is warranted. The requested state would go through the safeguards that are normal in such treaties, as explained below, in deciding whether or not to comply with the request, much like they would in all other cases of extradition requests.

I. THE LAW

What do citizens expect or even demand in terms of protection under the law? Especially when dealing with the subject of crime, the law is

11. *Id.*

12. *See* Luis Martinez, *9/11 Plotters Defer Pleas at Guantanamo Bay Arraignment*, ABC NEWS (May 5, 2012), *available at* http://abcnews.go.com/blogs/politics/2012/05/911-plotters-accused-refuses-to-answer-in-guantanamo-bay-arraignment/ (last visited Dec. 20, 2015); *see also Al Qaeda Chief Khalid Sheikh Mohammed Confesses to Planning Sept. 11, Gitmo Transcript Shows*, FOX NEWS (Mar. 15, 2007), *available at* http://www.foxnews.com/story/2007/03/15/al-qaeda-chief-khalid-sheikh-mohammed-confesses-to-planning-sept-11-gitmo/ (last visited Dec. 20, 2015).

13. *See infra* p. 15 (discussing the United States' use of extraordinary rendition in the case of terrorist suspects).

considered to be an instrument of social control.[14] By enacting laws society attempts to achieve uniform behavior, often by describing behavior that is prohibited.[15] The desired behavior is then encouraged by discouraging the undesired behavior through punishment.[16] The populations of many states today consider themselves to be living under the rule of law.[17] Those populations believe, among other things, that the rule of law provides to them as citizens the advantages of not only protection from would be wrongdoers, but also the prevention of arbitrary and corrupt government, the restraint of vengeance and the provision of individual liberty and economic prosperity.[18]

Some of the very first principles of the concept of the rule of law are that a law must be made public and must be reasonably clear in meaning and specific in what it prohibits.[19] And, of course, it must be applied equally to all, that is, without discrimination.[20] The rule of law is considered an essential element of a functioning democracy and a functioning economy.[21] This sentiment has been echoed time and again,[22] including by the United Nations itself, which has said:

> Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission. Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the effective protection of human rights, and to sustained economic progress and development. The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the United Nations work.[23]

States have for a very long time generally considered themselves united by some fundamental principles of law into a legal community, governed by law, even though there at times may be disagreement as to

14. WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 1-3 (Marian Quinn Barnes ed., 7th ed. 1967).

15. *Id.* at 3-4.

16. *Id.* at 64.

17. ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 18 (Peter Adams et al. eds., 2d ed. 2001).

18. *Id.*

19. O. Lee Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 448-50 (2001).

20. ALTMAN, *supra* note 17, at 18.

21. *Id.*

22. *Id.*

23. *U.N. & The Rule of Law*, UNITED NATIONS, *available at* http://www.un.org/en/ruleoflaw/index.shtml (last visited Dec. 20, 2015).

the meaning or substance of such law or laws.[24] Another principal tenet of the rule of law is that government should maintain peace and order, for the most part through a system of laws or rules that specify both violations and their corresponding sanctions accruing to violators. This leads to the notion that no act can be regarded as a crime unless there is a specific law prohibiting it and no one can be punished unless they have committed an unlawful act described as a crime. Legal scholars refer to these concepts as nullum crimen sin lege ("no crime without a law") and nulla poena sin crimine ("no punishment without a crime").[25] In other words, crimes must be clearly defined.[26] As will be described below, acts generally considered acts of terrorism, or simply acts of violence are unlawful in most countries at the state level. Although laws prohibiting acts of violence that are in some ways similar do exist at the state level in many states, the "rule of law" at the international level lags behind,[27] especially in the area of curtailing or controlling violence, notably international terrorism.[28]

It has been said that an effective legal system must be capable of reflecting the changing needs of the society in which it exists and functions.[29] Accordingly, just as a state's legal system must have a viable process of continuous law-making in order to regulate the evolving activities of its society, so must the international community have a system of legally binding principles and norms controlling the relations among the member states of the international community, which evolve or grow over time, so as to reflect the changing conditions within the international community.[30] Examples of the international community's laws evolving and spawning new laws are areas such as human rights law, commerce and technology treaties. These areas of law making their mark increased international interdependence and cooperation in the recent past.[31] Large areas of the Law of the Sea and of Space Law have recently come about because of innovations in technology.[32] In other words, societal and technological changes produce new international

24. GENNADII M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 13 (1993).

25. ALTMAN, *supra* note 17, at 5.

26. *Id.*

27. Frederick V. Perry, *Multinationals at Risk: Terrorism and the Rule of Law*, 7 FLA. INT'L U. L. REV. 43, 61 (2011).

28. *See generally id.*

29. DANILENKO, *supra* note 24, at 1.

30. *Id.*

31. *Id.*

32. *Id.* at 2.

laws. This evolving situation has caused the International Court of Justice to say that "throughout its history, the development of international law has been influenced by the requirements of international life."[33] Further, in describing the sources of international law, the International Court of Justice described at least one multilateral treaty as constituting international legislation.[34] Of course there is no international legislator and using the term "legislation" for international law generally is merely a metaphor.[35] The point is that international law both changes and expands with the times and the dominant source of international law today is treaties,[36] particularly multilateral treaties. Indeed, "[w]e live in the age of treaties. Increasingly, bilateral and multilateral written agreements are used for the creation of new international legal standards."[37]

Changes in the world's commercial and geopolitical realities have given rise to new opportunities, but also new dangers. Our changing world and its rapidly evolving technology have given rise to an increasing proliferation of acts of international terrorism. Further, those changes have also given rise to a concomitant and increasing fear of as well as frustration with international terrorism, at least partly caused by the frequent inability to arrest and bring to justice the perpetrators of acts of international terrorism. It is for this reason that we propose the negotiation, drafting and execution of a broad multilateral convention on the extradition of terrorist suspects, not the perpetrators of attacks, since that has so far proved an impossibility for a number of reasons, rather extradition—or prosecution—of those who instigate such acts. Such a convention could be accomplished under the auspices of the United Nations. "A convention is a treaty on matters of common concern, usually negotiated on a regional or global basis and open to adoption by many nations."[38] Conventions are very often sponsored by the United Nations or some other intergovernmental organization within the U.N. system.[39] We suggest therefore a multilateral convention negotiated and drafted under the sponsorship of the United Nations. Just as contracts in the domestic legal sense make for private law between the parties to the

33. 1949 I.C.J. 178; *see also* DANILENKO, *supra* note 24, at 5.

34. DANILENKO, *supra* note 24, at 6.

35. *Id.*

36. Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, *in* NATIONAL TREATY LAW AND PRACTICE 1, 1 (Duncan B. Hollis et al. eds., 2005).

37. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 1 (2007).

38. RICHARD SCHAFFER, BEVERLY EARLER & FILBERTO AGUSTI, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 251 (6th ed. 2006).

39. CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW 65 (2010).

contract, so do treaties (or multilateral conventions) make law binding upon their signatories.

The United States is party to over 10,000 treaties still in force.[40] France has nearly 7,000 international agreements in effect and China is a party to over 6,000 bilateral agreements and 273 multilateral agreements.[41] Treaties, therefore, are accepted as normal practice by countries all over the world, and a multilateral treaty is "the nearest thing we yet have to a general statute in international law."[42] There seems to be widespread desire for the rule of law. In its *Millennium Declaration*, the General Assembly of the United Nations stressed the need to strengthen the international rule of law.[43] We believe such a convention would do just that, by providing for international cooperation in the capture, detention and rendition of suspects.

Intergovernmental Organizations, such as the United Nations, and states themselves have traditionally been the prime movers in creating treaties and in general, international organizations organize, negotiate and conclude most multilateral treaties today.[44] Only states and Intergovernmental Organizations can be parties to a treaty. But now Non-Governmental Organizations ("NGOs"), though not signatories, are taking part in treaty making.[45] In fact, in general, "Civil society has become an important participant in today's multilateral treaty-making, thanks in large part to the considerable significance States now accord its work."[46] As an example, in the field of humanitarian law, the International Committee of the Red Cross ("ICRC") has been very active in representing civil society.[47] It may therefore be beneficial for the advocates of a multilateral convention of the type we propose to engage with influential NGOs as well as the ICRC.

II. AD HOC TRIBUNALS

For certain international crimes, especially those of "grave breaches of the Geneva Convention of 1949, violations of the laws and customs of

40. *Treaty Affairs: The Office of Assistant Legal Adviser for Treaty Affairs*, U.S. DEPT. STATE, *available at* http://www.state.gov/s/l/treaty/index.htm (last visited Dec. 20, 2015).

41. Hollis, *supra* note 36, at 1.

42. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 638 (7th ed. 2008).

43. *See, e.g.*, G.A. Res. 65/1 (Oct. 19, 2010).

44. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 392-93 (2d ed. 2007).

45. *See* Louise Doswald-Beck, *Participation of Non-Governmental Entities in Treaty-Making: The Case of Conventional Weapons*, *in* MULTILATERAL TREATY-MAKING 41, 41 (Vera Gowland-Debbas ed., 2000).

46. *Id.*

47. *Id.*

war, genocide and crimes against humanity," [48] the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, has established tribunals to try those accused of such acts.[49] The creation of such tribunals and their mandates do not give them authority to create new law, rather they are constrained to apply current international law, that is customary international law, or principles that are *erga omnes. Erga Omnes* is defined as "obligation[s] under general international law . . . [reflecting] common values and . . . concern for compliance, so that a breach of that obligation enables all States to take action."[50] Such tribunals apply customary international law and treaty law generally. The creation of such tribunals is however expensive, though they often are created because of some impediment or reluctance to prosecute on the part of the state wherein the crimes occurred or of which the defendants are nationals. It is expected that the International Criminal Court ("ICC") will now deal with those activities that were formerly tried in such *ad hoc* tribunals. But the ICC is supposed to get involved only when for one reason or another the domestic court of the state in which the suspect is found either does not or cannot prosecute the suspect. Currently the best place to try those who have incited or solicited international terrorist activities appears to be domestic courts, but how does a domestic court bring before it a suspect that is found in a distant state? How does the court get not only physical presence of the suspect, but also jurisdiction over him or her?

III. EXTRADITION AND JURISDICTION

According to *Black's Law Dictionary*, the term jurisdiction means:

> The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or ad- mitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.[51]

48. Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360, 363 (1994).

49. *See generally* BROWNLIE, *supra* note 42, at 587-607.

50. *Obligations and Rights Erga Omnes in International Law*, 71 ANNUAIRE DE L'INSTITUT DE DROIT INT'L art. 1(a) (2005), *available at* http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_01_en.pdf (last visited Dec. 20, 2015).

51. *What is Jurisdiction?*, LAW DICTIONARY, *available at*

Under widely accepted norms of International law, five grounds are accepted as the basis on which states can base their criminal jurisdiction: "Territorial jurisdiction" arises from offenses occurring within a state's territory; "nationality jurisdiction" is based on the fact that the defendant is a national of the state claiming jurisdiction; "passive personality jurisdiction" arises when the victim of the offense is a national of the prosecuting state; "protective jurisdiction" is based on the acts that have an effect on important state interests or national security; and "universal jurisdiction" is based on the notion that some international crimes are so egregious that a violation of them by anyone, anywhere, warrants any state taking jurisdiction.[52]

Implementing the desire not to allow perpetrators of atrocities to get away with their crimes has been an objective of the international community for a long time.[53] In fact, that was the impetus that gave rise to the ICC.[54] According to the work of the International Law Commission, there are more than 60 multilateral treaties that create universal jurisdiction and provide the alternatives of extradition or prosecution of suspects of international crimes as defined in such treaties.[55]

So the question becomes, how do we assure that those accused of perpetrating international crimes are brought before the courts? Of course the maxim of being guilty until proven innocent goes without saying, but the accused, the suspects, should at least stand trial, in other words, they should be investigated, interrogated and possibly prosecuted for their crimes. The issue is how to encourage states to seek them out, arrest them and then either prosecute them or send them to a state that will prosecute them, in other words, extradite them. The Latin term, and the term used in international legal parlance is *aut dedere aut judicare*, prosecute or extradite. The principle of *aut dedere aut judicare* is closely related to universal jurisdiction, but it prohibits a state from shielding an international criminal.[56]

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http://thelawdictionary.org/jurisdiction/ (last visited Dec. 20, 2015).

52. *See* Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191 (1997); *see also* BROWNLIE, *supra* note 42, at 300-05.

53. Miša Zgonec-Rožej & Joanna Foakes, *International Criminals: Extradite or Prosecute?*, CHATHAM HOUSE 3 (July 2013), *available at* https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf (last visited Dec. 20, 2015).

54. *Id.*

55. *Id.*

56. Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, at 7, IOR 53/004/2011 (Oct. 5, 2011).

A widely accepted method of motivating courts is through the use of universal jurisdiction. In the estimation of Amnesty International, "Universal jurisdiction, an essential tool of international justice, is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.[57]

Universal jurisdiction is "based on the nature of the crime, not on any nexus between the forum State and the matter under consideration. It is normally relied upon in a criminal law context to prosecute core international crimes."[58] Practically speaking municipal courts take such jurisdiction in cases of piracy and slave trading more than anything else.[59] In a 2005 resolution of the Institut de Droit International, universal jurisdiction is discussed in the following terms:

> Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.
>
> Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person.[60]

The trouble is that everyone has to agree on what the elements of universal jurisdiction are and how it is to be implemented. Ian Brownlie and Malcolm Shaw, two famous British writers on international law, like the Institut de Droit International, also believe that domestic courts have universal jurisdiction under customary international law[61] for certain crimes that are "particularly offensive to the international community as a whole."[62] Resolutions of the U.N. General Assembly tell states to extradite or prosecute offenders for certain crimes, providing for

57. *Id.* at 1.

58. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 310 (4th ed. 2010).

59. *Id.*

60. *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, 71 ANNUAIRE DE L'INSTITUT DE DROIT INT'L ¶¶ 1-2 (2005), *available at* http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_03_en.pdf (last visited Dec. 20, 2015).

61. *See* BROWNLIE, *supra* note 42, at 306.

62. MALCOLM N. SHAW, INTERNATIONAL LAW 668 (6th ed. 2008).

universal jurisdiction.[63] General Assembly resolutions, while they may provide evidence of customary international law, do not generally create it.[64] Some are of the view that universal jurisdiction is a troublesome concept and not widely accepted under customary international law as being law, that is, as a norm, requiring or allowing action.[65] Those people believe that a treaty is required that provides for universal jurisdiction for the crimes enumerated in the treaty.

In order for a state's judicial and or prosecutorial system to prosecute a suspect for an international crime, the prosecuting state must have the legal ability to do so, either under the state's domestic law, under a treaty to which it is a party or both, or if the state believes that customary international law so provides, simply under universal jurisdiction. Not all treaties that define international crimes provide for or require signatories to either prosecute or extradite, and even of those that do, not all are what is known as self-executing.[66] Further, of those that have such requirements, that is, appear to be self-executing on their face, some states' systems do not require or allow their courts to prosecute based merely on a treaty obligation: they require their own domestic law to provide for it. Further, even in the case where a treaty defines the crime, provides for the obligation to prosecute or extradite and further requires the state signatory to create domestic implementing legislation, many states do not implement the law to give effect to the treaty obligations. There are further obstacles to the implementation of the concept of either universal jurisdiction or simply jurisdiction and extradition obligations under treaties. First is the matter that a state wishing to prosecute must request that the state wherein the suspect is located arrest and extradite the suspect. Will the requested state comply? There is the issue of whether a state, which under its domestic laws or pursuant to an international treaty, possesses the judicial and or prosecutorial will to arrest and then extradite or arrest and then prosecute itself. Whenever two or more states are involved with one another there are also international relations implications. There is always the question of

63. *See* G.A. Res. 2840 (XXVI) (Dec. 18, 1971); G.A. Res. 3074 (XXVIII) (Dec. 3, 1973).

64. Int'l Law Ass'n London Conference, *Statement of Principles Applicable to the Formation of General Customary International Law*, 55-56 (2000); *see also* SHAW, *supra* note 62, at 114.

65. Zgonec-Rožej & Foakes, *supra* note 53, at 12-13.

66. Under current United States' law, a self-executing treaty is one that the courts will enforce absent domestic implementing legislation, that is, the treaty creates a domestic legal obligation without such legislation. Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 1, 52-53 (2012); *see also* Medellin v. Texas, 552 U.S. 491, 493 (2008).

whether the state has the political will to arrest or to prosecute.

Often the answers to such questions hang on matters having little to do with the criminality of the offense. Whether a state will arrest and extradite or prosecute itself is a matter of international relations, that is, politics; it is sometimes a matter of how incensed the population of the potentially prosecuting state might be over the offense. It might be related to how the state of citizenship of the potential defendant view the prospect of extraditing or prosecuting its citizens for an act taking place in another state. The decision may depend on the extent to which such state may wish that the suspect be prosecuted.

Terrorist attacks such as that in New York of September 11, 2001, the attack in Bali, that in London, in Madrid and others provide a serious challenge for governments in trying to address the problem of international terrorism.[67] Not all states have bilateral extradition treaties between them. Not all states are signatories to multilateral treaties requiring extradition or prosecution. No universal convention defines international terrorism, which means that it is therefore doubly difficult, under current international law, for someone to be guilty of the crime of solicitation or incitement to international terrorism. Since international terrorism, has no accepted universal definition the incitement offense can hardly have one. The international convention that appears to come closest to providing a definition of international terrorism and at the same time outlawing solicitation is the International Convention for the Suppression of the Financing of Terrorism.[68] In view of this shortcoming in international law how do states seek out, capture and bring to justice the suspected person or persons implicated in planning or soliciting the attacks in the absence of an extradition treaty covering the matter between the state seeking the suspect and the state in which the suspect is found? Without effective lawful means at their disposal, some states engage in extrajudicial—read unlawful—means to deal with the situation, such as the United States practice of what is termed "extraordinary rendition."

As discussed above, normally suspects are transferred from one state to another to answer charges against them by means of judicial processes pursuant to extradition treaties, if there is one between the two sates concerned. At times states will, absent a treaty, simply cooperate out of comity. In those cases where an extradition treaty exists, the suspect has the ability to challenge the extradition, but in the case of extraordinary

67. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 3 (2005).

68. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197.

rendition, there is an "extrajudicial transfer of a person from one State to another," generally for the purpose of arrest, detention, and/or interrogation by the receiving State.[69] When this occurs the suspect has no access to the judicial system to challenge the rendition; sometimes the rendition occurs with the consent of the state in which the suspect is found and sometimes it does not.[70] The United States has engaged in another related practice. The United States' policy of allegedly rendering suspected terrorists for the purpose of arrest, detention and interrogation to States who are known for practicing torture has been considered by some to be a highly questionable practice.[71] Such renditions are generally considered unlawful.[72] Torture is of course outlawed.[73]

The European Parliament was concerned about the possible involvement of European governments in such unlawful activity and conducted an investigation.[74] A situation in which states are encouraged to conduct unlawful activities because of a void in the law that does not provide for lawful rendition, that is, for extradition, causes the law not to be respected. When a large, influential state like the United States flaunts the rule of law, states can lose respect for the rule of law, and the rule of law breaks down.

Multilateral conventions or treaties are, as mentioned above, the most popular way that law is created in the international realm.

69. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE, 1 (2009) (emphasis omitted).

70. *Id.*

71. *See* Jane Mayer, *Outsourcing Torture*, NEW YORKER (Feb. 14, 2005), *available at* http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture (last visited Dec. 20, 2015).

7[2] *23 Americans Convicted of Kidnaping Italy*, CHI. TRIBUNE (Nov. 5, 2009), *available at* http://articles.chicagotribune.com/2009-11-05/news/0911050257_1_armando-spataro-judge-oscar-magi-abu-omar (last visited Dec. 20, 2015).

73. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984). "The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires signatory parties to take measures to end torture within their territorial jurisdiction and to criminalize all acts of torture. Unlike many other international agreements and declarations prohibiting torture, CAT provides a general definition of the term. CAT generally defines torture as the infliction of severe physical and/or mental suffering committed under the color of law. CAT allows for no circumstances or emergencies where torture could be permitted." MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES summary (2009).

74. *Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners Working Document on 'Extraordinary Renditions,'* at 2 (Nov. 16, 2006), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe380593_en.pdf (last visited Dec. 20, 2015).

Extradition treaties are popular[75] and they appear to work. For example, the United States has significantly increased its law enforcement cooperation with foreign states and extraditions involving the United States have significantly increased in recent years.[76]

Extradition treaties are in the nature of a contract and generate the most controversy with respect to those matters for which extradition may not be granted. In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses, capital offenses, crimes that are punishable under only the laws of one of the parties to the treaty, crimes committed outside the country seeking extradition, crimes where the fugitive is a national of the country of refuge, and crimes barred by double jeopardy or a statute of limitations.

Extradition is triggered by a request submitted through diplomatic channels. In the United States, it proceeds through the Departments of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty, whether it provides sufficient evidence to satisfy probable cause to believe that the fugitive committed the identified treaty offense(s), and whether other treaty requirements have been met. If so, the magistrate certifies the case for extradition at the discretion of the Secretary of State. Except as provided by treaty, the magistrate does not inquire into the nature of foreign proceedings likely to follow extradition.[77]

Of course any norms or treaties that cause persons to be arrested for political activity, which may, in some cases, be nothing more than having voiced one's political views, or even for what the United States Supreme Court has termed "symbolic speech,"[78] is troublesome for some courts and for some countries, since this gives rise to freedom of speech issues in many states, or what the United States terms First Amendment issues. So there is a potential problem in defining where the limits of free speech ends and talk or activities that amount to incitement of another to commit a crime—in this case terrorist acts—begins. What do states do when their enthusiasm for protection and extradition bump up against notions of free

75. *See* MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1 (2010). The United States has such treaties with over 100 states. *Id.*

76. *Id.* at 1 & n.3.

77. *Id.* at 1.

78. Texas v. Johnson, 491 U.S. 397, 404 (1989).

speech?

The second potential problem is the disparity in states' definitions of terrorism. If the United States, for example, were asked to extradite a suspect to Russia, where the law defining terrorism is so broad that robbing a liquor store or even peaceful demonstrations could be considered an act of terrorism, the United States would have a problem with such an extradition (of course the United States does not currently have an extradition treaty with Russia). The Supreme Court of the United States, because of the nature of its Constitution, has rigorously defended the right of freedom of speech, and the government has defended it abroad in treaty negotiations. The problem becomes defining how the right to freedom of expression functions and where the right begins and ends? It is worth analyzing the right to freedom of speech.

IV. PHILOSOPHICAL FOUNDATIONS OF FREE SPEECH IN MODERN WESTERN CULTURE

The sources for the right of freedom of speech as embodied in modern constitutional and international law are rooted in the philosophies of the Protestant Reformation and Enlightenment. For example, in 1644, nearly a century and a half prior to the adoption of the U.S. Constitution, John Milton powerfully argued that the freedom to express one's views "can serve as a powerful force against political abuse and stagnations."[79] Also, in England, the Bill of Rights passed by parliament in 1689 included a guarantee of free speech within the confines of parliament, providing "that the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."[80] Likewise, the late 17th century Dutch philosopher, Benedict Spinoza championed the basic right to free speech.[81] Perhaps most famously Voltaire, the 18th century French enlightenment representative "considered protection of offensive speech to be a moral duty."[82] Inspired by Voltaire, on August 26, 1789, during the French Revolution, the French National Assembly adopted the Declaration of the Rights of Man, which affirmed free speech as an "unalienable right,"

79. Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY Part VI (Mar. 1, 1995), *available at* http://digitalcommons.law.yale.edu/yslop_papers/6

80. Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1688, 1 W. & M. c. 2 (Eng.).

81. Justin Steinberg, *Spinoza's Political Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 10 (Edward N. Zalta et al. eds., Winter ed. 2013).

82. Winfred Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN L. J. 1, 1 (2003).

providing that "[t]he free communication of ideas and opinions is one of the most precious of the rights of man."[83]

Though the right to freedom of speech has a rich historical tradition in the Western world, it was rarely thought to be an *absolute* right. Though Milton argues forcefully against the evils of government censorship, he steadfastly refused to extend the benefits of freedom of speech to those who practiced the Catholic faith.[84] Spinoza too allowed for the possibility that it could be counter-productive, if not "'very dangerous,' to grant unlimited freedom of speech."[85] Also, and more pertinently, Spinoza believed that the government should ultimately retain "full discretion to determine which actions are acceptable and what forms of speech are seditious."[86] Even the leadership of the French Revolution understood the limits of the right to free expression, providing in the Declaration of the Rights of Man that "[e]very citizen may, accordingly, speak, write, and print with freedom, *but shall be responsible for such abuses of this freedom as shall be defined by law*."[87] Lastly, in the 19th century, English philosopher John Stuart Mill, who presented "perhaps the most famous liberal defense of free speech" likewise recognized that free speech had its limits, arguing that the government could limit an individual's right to free expression where such actions were designed "to prevent harm to others."[88] It is this "harm principle" which establishes the philosophical underpinnings for subsequent government limitation of free speech.

V. FREE SPEECH UNDER THE U.S. CONSTITUTION

A. *Background and Adoption of the First Amendment*

The Constitution of the United States was signed by a majority of delegates to the Constitutional Convention in Philadelphia, Pennsylvania on September 17, 1787.[89] However, only 39 of the 55 delegates to the Convention signed the document, many refusing to do so because the

83. Loi du 26 août 1789 Déclaration des Droits de l'Homme et du Citoyen [Law of Aug. 26, 1789, Declaration of the Rights of Man and of the Citizen] pmbl., art. 11 (Fr.) [hereinafter Dec. Rights of Man].

84. *See* Blasi, *supra* note 79, Part III.

85. Steinberg, *supra* note 81, § 3.5.

86. *Id.*

87. Dec. Rights of Man, *supra* note 83, art. 11 (emphasis added).

88. David van Mill, *Freedom of Speech*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3 (Edward N. Zalta et al. eds., Spring ed. 2015) (citation omitted).

89. *The Constitution*, WHITE HOUSE, *available at* http://www.whitehouse.gov/our-government/the-constitution (last visited Dec. 20, 2015).

document lacked a bill of rights.[90] According to the process adopted at the Convention, the Constitution would only become effective after it had been ratified by 9 of the 13 state legislatures.[91] Debate was contentious, with some states approving the Constitution, but with others refusing until the Constitution was amended to incorporate a bill of rights to codify the rights of individuals which would be protected from intrusion by the new government.[92]

The Federalists, those who supported adopting the Constitution without amendment, argued that there was no need for a bill of rights, since individuals did not cede any individual liberties to the new government by adopting the constitution.[93] Others, however, insisted on the need for amendments enumerating certain fundamental individual liberties.[94] Future president Thomas Jefferson, was one of the main proponents of the Bill of Rights, arguing that:

> I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade. *These are the rights of thinking, and publishing our thoughts by speaking or writing. . .*[95]

Ultimately, Jefferson and the other advocates of the bill of rights prevailed and the Constitution and the Bill of Rights, consisting of ten amendments, were proposed to the First Congress on March 4, 1789. This amendment, along with the other amendments comprising the bill of rights were approved by the First Congress on September 15, 1789, and transmitted to the state legislatures for later adoption.[96] The first of these amendments provides, in part, as follows: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[97]

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *The Constitution*, *supra* note 89.

95. Craig R. Smith, *The Aliens are Coming: John Adams and the Federalist Attack on the First Amendment*, CTR. FOR FIRST AMEND. STUD. 1, *available at* www.firstamendmentstudies.org/wp/pdf/alien.pdf (last visited Dec. 20, 2015) (quoting Jefferson's letter dated March 18, 1789, to David Humphries) (emphasis added).

96. *Bill of Rights*, NAT'L ARCHIVES, *available at* http://www.archives.gov/exhibits/charters/bill_of_rights.html (last visited Dec. 20, 2015).

97. U.S. CONST. amend. I (emphasis added).

B. *Alien and Sedition Acts*

During the administration of President John Adams, just a few short years after adoption of the First Amendment, the constitutionally guaranteed right to freedom of speech the new government encountered its first existential crisis involving international intrigue. The Adams administration found itself engaged in an escalating conflict with the revolutionary French government.[98] Jefferson's party, the Democratic-Republicans, were supporters of the ideals of the French revolution. In response to the escalating tensions with France and, perhaps unjustifiably, fearing the encouragement of revolution in the United States from new French immigrants and their Democratic-Republican allies, the Federalist-controlled Congress passed the Alien and Sedition Acts. "The Alien and Sedition Acts included the following summarized provisions:

> *Naturalization Act*: No alien shall be admitted to citizenship unless he has resided within the United States for at least fourteen years. No native, citizen, subject, or resident of a country with which the United States is at war shall be admitted to citizenship.
>
> *Alien Act*: The President may order all such aliens as he shall judge dangerous to the peace and safety of the United States to depart.
>
> *Alien Enemies Act*: When war is declared or invasion threatened, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.
>
> *Sedition Act*: Any persons combining or conspiring with intent to oppose any measure or measures of the government of the United States shall be liable to fines up to $5,000 and imprisonment up to five years. Any person writing, uttering, or publishing any false, scandalous and malicious writing or writings against the government, the Congress, or the President shall be liable to fine up to $2,000 and imprisonment up to two years.[99]

The Acts were brazen violations of the First Amendment but were ultimately never challenged in court. Empowered by the new legislation, roughly two dozen people were arrested by the new laws, with 15 or more being indicted and 11 cases going to trial, resulting in 10 convictions. Perhaps the most stunning arrest was that of Congressman George Lyon

98. Smith, *supra* note 95, at 1 (quoting Jefferson's letter dated March 18, 1789, to David Humphries).

99. *Id.*

of Kentucky under the provision of the Sedition Act. In defiance of the law, Lyon was re-elected while in jail and remained in Congress when his Democratic-Republican colleagues successfully blocked the Federalist's efforts to expel him.[100]

The Democratic-Republicans, led by Jefferson and Madison, had unsuccessfully opposed the passage of the Acts, but through legislative arm-twisting were able to include a provision mandating that the Acts would terminate as of March 1, 1801, the first day of the next presidential administration.[101] After the Acts were passed and implemented, the opposition continued to fight back ferociously.[102] Jefferson and Madison worked to build popular support against the acts, advocating for states' rights, limited presidential power and free speech.[103] Ultimately, the acts became overwhelmingly unpopular and the Federalist's, who had controlled the reins of government for a nearly a dozen years, fell from power. Now in control, Jefferson immediately pardoned everyone who was convicted under the Acts or waiting trial.[104] The Federalists would never recover from this loss and ultimately disbanded as a political party.[105]

The momentous events leading to the passage and enforcement of the Acts shattered any maximalist, utopian views of the freedom of speech contained in the First Amendment. In the United States, the freedom of speech could not be thought of as absolute. This incident also established a precedent for future acts of government to suppress the freedom of speech under circumstances of civil unrest or perceived agitation by foreign agents.

C. *Civil War*

The crisis involving the Alien and Sedition Acts is just the first example of the U.S. government responding to a foreign crisis by expanding internal restrictions on the freedom of speech at home, thereby "expanding an external threat into an internal threat."[106] There are repeated examples throughout American legal history of the federal government acting to restrain the freedom of speech to safeguard the

100. *Id.*
101. *Id.*
102. *Id.* at 8.
103. Smith, *supra* note 95, at 5.
104. *Id*. at 8.
105. *Id.* at 7.
106. Craig R. Smith, *The Patriot Act in Historic Context*, CTR. FOR FIRST AMEND. STUD. 1, *available at* http://www.firstamendmentstudies.org/wp/pdf/patriot_act.pdf (last visited Dec. 20, 2015).

United States from actual, or perceived foreign threats. During the 1860s, the Lincoln administration, concerned with the potential for subversive activities of confederate sympathizers, suspended the right of *habeas corpus* and jailed newspaper editors and other secessionists who opposed Union policies.[107] Habeas corpus, Latin for "you [should] have the body," is the right imbedded in Common Law and the U.S. Constitution allowing a court to release a prisoner who is being held unjustly by the government.[108] In 1861, John Merryman, a secessionist from Maryland was taken into military custody and immediately appealed to the Supreme Court to be released under a writ of habeas corpus.[109] In the ruling of *ex parte Merryman* the Supreme Court rejected Lincoln's arguments that he was not subject to the jurisdiction of the Court, and issued the writ.[110] Lincoln, however continued to defy the order and insist on the supremacy of the President's ability to suspend the writ. In 1964, southern sympathizer Lambdin Milligan was arrested in Indianapolis and brought before a military tribunal on charges of treason and subversion.[111] Lincoln's attorneys argued that during a time of war the President's "powers must be without limit, because if defending, the means of offense may be nearly illimitable."[112] Only after the war, and Lincoln's untimely death, did the Court rule that Lincoln had overstepped the proper boundaries of presidential authority, and established that a prisoner's right to challenge detention could only be suspended for a limited period of time and only under exigent circumstances.[113] In writing for the majority, Justice David Davis stated, "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real."[114] According to the Court, no longer should an external threat to U.S. security be used as a pretext for suspension of individual liberties.

D. *Red Scare*

Despite the Supreme Court's rebuke in *Ex Parte Milligan*,

107. *Id.*

108. *Ex parte* Milligan, 71 U.S. 2, 3 (1866).

109. *Ex parte* Merryman, 17 F. Cas. 144, 147 (C.C.D. Md. 1861).

110. *Id.* at 152.

111. *Ex parte* Milligan, 71 U.S. at 6.

112. *Id.* at 18 (quoting arguments of U.S. Supreme Court briefs by Attorney General Stanberry and Benjamin Butler).

113. Alex McBride, *Ex Parte Milligan (1866)*, PBS (2006), *available at* www.pbs.org/wnet/supremecourt/antebellum/landmark_exparte.html (last visited Dec. 20, 2015).

114. *Ex parte* Milligan, 71 U.S. at 127.

subsequent presidential administrations would continue to use real or perceived foreign threats to curtail civil liberties. Concerned with internal opposition to the U.S. entry into World War I, President Woodrow Wilson urged Congress to pass a series of laws, the Espionage Act, the Trading with the Enemy Act and, finally, the Sedition Act to curtail domestic opposition to government policies.[115] The Espionage Act, allowed the Postmaster to suppress any journals, letters or other publications which he believe to be a threat to national security.[116] The Trading with the Enemy Act created a commission to publish information, and to correct supposed disinformation, regarding the war efforts. Lastly, the Sedition Act, amending the Espionage Act, in perhaps the most direct assault on the freedom of speech, made it a federal crime to "use disloyal, profane, scurrilous, or abusive language" about the government, the Constitution, the flag or the military.[117] The laws were intended to target the opponents of the war and "[m]ore than 2,000 people were prosecuted under the original and amended Espionage Act, including the Socialist spokesman and draft opponent, Eugene V. Debs, who was sentenced to 10 years in prison."[118]

Unlike the Supreme Court during the Civil War, the Court upheld the constitutionality of the Espionage Act and its progeny. In *Schenck v. U.S.*, the court unanimously upheld the conviction of an activist who distributed leaflets opposing the draft and urged peaceful opposition to the law and as a result was charged with "a conspiracy to violate the Espionage Act . . . attempting to cause insubordination in the military . . . and to obstruct . . . recruit[ment]."[119] In upholding the conviction, Oliver Wendell Holmes applied a fact based analysis, stating that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[120] Applying this rule to Mr. Schenck's situation, Holmes concluded that during wartime, as opposed to peacetime, the government had far more latitude in restricting the right to free expression.[121] The

115. Smith, *supra* note 106, at 3.

116. *Id.*

117. The Espionage Act of 1917, DIGITAL HISTORY (2014), *available at* http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3904 (last visited Dec. 20, 2015).

118. The Sedition Act of 1918, DIGITAL HISTORY (2014), available at http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3903 (last visited Dec. 20, 2015).

119. Schenck v. United States, 249 U.S. 47, 48-49, 53 (1919).

120. *Id.* at 52.

121. *Id.*

Court later relied on its own precedent in *Schenck* in upholding the conviction of Eugene Debs.[122] In establishing this rule of "clear and present danger," Holmes echoed Mill's "harm" principle and further established a legal precedent for subsequent government limitation of free expression in times of war or national conflict.

E. *The Court's Changing Perspective on Incitement*

In the wake of the *Schenck* and *Debs* ruling, and with the nation still caught up in the "Red Scare," the Supreme Court in subsequent rulings in the 1920s would continue to give wide latitude to the government in its efforts to regulate inflammatory speech. In the landmark case *Whitney v. California*,[123] the Court ruled on the constitutionality of California's Criminal Syndicalism Act, which expressly prohibited "advocating, teaching or aiding . . . terrorism as a means of accomplishing a change in industrial ownership . . . or effecting any political change."[124] The defendant, Charlotte Anita Whitney, a 52-year old Wellesley graduate from a prominent California family and a member of the Communist Labor Party of California was arrested under the Act following a speech given by Ms. Whitney on November 28, 1919, to the Women's Civic Center of Oakland in which she spoke out against recent lynchings and race riots.[125] Following protests from the American Legion and other patriotic organizations, a local police inspector arrested Ms. Whitney on the grounds that her participation several weeks prior to the speech in the formation of the Communist Labor Party California violated the Act. [126] Whitney was later tried and convicted of violating the Act and sentenced to 1 to 14 years in prison.[127] Whitney challenged her conviction, arguing that the statute violated her constitutional right to free speech and the protection of the due process clauses of the Fifth and Fourteenth amendments to the Constitution and her case eventually reached the Supreme Court.[128] The Court upheld the conviction and, relying on the rationale of *Schenck*, held that "a State . . . may punish those who abuse this freedom by utterances . . . tending to . . . endanger the foundations of organized government and threaten its overthrow by unlawful means"

122. Debs v. United States, 249 U.S. 211, 215, 217 (1919).

123. *See generally* Whitney v. California, 274 U.S. 357 (1927).

124. *Id.* at 360.

125. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 656 (1988).

126. *Id.* at 657.

127. *Id.* at 659.

128. *Whitney*, 274 U.S. at 362**.**

and was not open to question.[129]

In his famous concurring opinion, Justice Louis Brandeis, joined by Holmes, argued against the majority's interpretation of the First Amendment. Brandeis argued that the government could only prohibit speech which advocated violent revolution "only if under the particular circumstances of the case the speech in question creates a clear and imminent danger of serious injury to the state."[130] Brandeis was drawing a new line in the government's power to regulate speech. Mere "fear of serious injury cannot alone justify suppression of free speech . . . there must be reasonable ground to believe that danger apprehended is imminent . . . that the evil to be prevented is a serious one."[131] Ironically, though the Court used the *Schenck* case as a philosophical basis for its decision, Holmes, the author of the *Schenck* opinion, joined with Brandeis in his concurrence.

The ruling in *Whitney* would stand for over 40 years until the 1969 decision of the Supreme Court in *Brandenburg v. Ohio*.[132] In June of 1964, Clarence Brandenburg held a Ku Klux Klan rally on a farm in Hamilton County, Ohio.[133] The event was televised locally and nationally and at the event, twelve hooded figures burned a cross and shouted Klan slogans advocating racial hatred and uttering other violent threats.[134] Mr. Brandenburg then took the podium and threatened: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[135] The State of Ohio soon indicted Brandenburg under its own Criminal Syndicalism Act and charged him with advocating the violence in order to accomplish "political reform."[136] Brandenburg was convicted, fined $1,000 and sentenced to one to ten years in prison. Brandenburg appealed the conviction, arguing that the Act violated his First Amendment right to free speech and Fourteenth Amendment right to due process.

The Court held that the Act violated Brandenburg's right to free

129. *Id.* at 371 (quoting the majority opinion).

130. Blasi, *supra* note 125, at 666.

131. *Whitney*, 274 U.S. at 376.

132. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

133. Susan Gilles, *30th Annual Sullivan Lecture: Brandenburg v. State of Ohio: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 517 (2010).

134. *Id.*

135. *Brandenburg*, 395 U.S. at 446.

136. *See* Gilles, *supra* note 133, at 518.

speech,[137] and in doing so expressly overruled its decision in *Whitney*. The Court employed a new, two-pronged test to evaluate speech acts. The Court explained that speech can be prohibited by the government if it is "directed at inciting or producing imminent lawless action and is likely to incite or produce such action."[138] In applying this reasoning, the Court explained that Ohio's Criminal Syndicalism Act "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[139] The court considered the statute to be overly broad" since by the statute's terms "mere advocacy [is] not distinguished from incitement to imminent lawless action."[140]

In one of the most recent Supreme Court cases construing government restrictions on inflammatory speech, the Supreme Court struck down a Virginia Statute which made it a crime "for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place," and which specified that "[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group."[141] In a plurality opinion, the Supreme Court of Virginia held that while a state could ban cross burning carried out with an intent to intimidate, the provision of the statute which made cross burning in and of itself "prima facie" evidence of intent to intimidate was unconstitutionally overbroad.[142] In doing so, the Court was applying the *Brandenburg* test and finding that cross burning in and of itself was not sufficient to tilt the balance in favor of a conviction. The Court was also implicitly relying on Brandeis' reasoning in *Whitney*, failing to see cross burning in the absence of proven intent sufficient to prohibit expressions of opinion, regardless of how distasteful it may be.

F. *Post 9/11*

In the aftermath of the September 11, 2011 attacks on the World Trade Center and the Pentagon, the U.S. government, as it had done during the Alien and Sedition Act Crisis, the Civil War and during the Red Scare of World War I, took steps to limit civil liberties in reaction to an external threat to the nation's security.[143] President Bush declared a

137. *Brandenburg*, 395 U.S. at 449.
138. *Id.* at 447
139. *Id. at* 395.
140. *Id* at *Syllabus.*
141. Virginia v. Black, 538 U.S. 343, 348 (2003).
142. *Id.* at 351.
143. *See* Smith, *supra* note 106, *passim.*

"war on terror."[144] This war was to be fought both abroad, and at home. Similar to Lincoln, President Bush decided to use military tribunals to try enemy combatants.[145] The most significant legislation affecting civil liberties was the Patriot Act which significantly tightened immigration, surveillance, money laundering and security standards.[146] Among the key declarations of the Patriot Act, was a provision which made it a federal crime (subject to punishment by fine and up to 15 years in prison) to "knowingly provide material support" to any foreign organization designated by the Secretary of State as a terrorist organization.[147] The goal of the law was to stop terrorism before it happened by draining its sources of funding.[148] However, much like the Alien and Sedition Acts, the law was implemented in a wide ranging fashion. Many were prosecuted for violating the law by providing weapons directly to known terrorist groups.[149] However, other "prosecutions were based on sending money to groups that engaged in both humanitarian work and violence."[150] Among the groups charged with such activities were organizations tied to independence movements for Kurds in Turkey and Tamils in Sri Lanka respectively.[151] The defendants, arguing that they were engaged in purely humanitarian activities, challenged the constitutionality of the law and claimed that the provisions of the statute were unacceptably vague and violated their First Amendment rights to freedom of speech and association.[152] The case eventually reached the Supreme Court. In a 6-3 decision, the Court upheld the statute, deciding that the law was not impermissibly vague and determining that the phrase "material support" was not an inappropriate impingement on the organizations' First Amendment rights. The Court reasoned that "material support" most often did not involve speech and, when it does, the statute is carefully drawn to affect a narrow range of activities.[153] Moreover, the Court articulated that the government's interest in combatting terrorism

144. *See* Richard W. Stevenson, *President Makes It Clear: Phrase is 'War on Terror,'* N.Y. TIMES (Aug. 4, 2005), *available at* http://www.nytimes.com/2005/08/04/politics/04bush.html (last visited Dec. 20, 2015).

145. Smith, *supra* note 106, at 4, 8.

146. *See id.* at 8 & n.34.

147. 18 U.S.C. § 2339B(a)(1) (2012).

148. *See* Adam Liptak, *Civil Liberties Today*, N.Y. TIMES (Sept. 7, 2011), *available at* http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all (last visited Dec. 20 2015).

149. *See id.*

150. *Id.*

151. Holder v. Humanitarian Law Project, 561 U.S. 1, 9 (2010).

152. *See id.* at 10-11.

153. *See id.* at 25-26.

outweighed any resulting and limited impact on First Amendment rights caused by the statute.[154] In the Court's view, the deference to Congress and the President under the circumstances was warranted and in passing the law both branches had determined that even providing seemingly "benign" support to a terrorist organization strengthened that organization.[155]

VI. FREE SPEECH UNDER INTERNATIONAL LAW

A. *Sources*

The right to freedom of expression also "finds protection in all major human rights systems."[156] The right to freedom of speech is specifically guaranteed by the Universal Declaration of Human Rights ("UDHR"), adopted by the UN General Assembly in 1948 and by the International Covenant on Civil and Political Rights ("ICCPR"), adopted by the UN General Assembly in 1966. Article 19 of the UNDR provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[157]

Similarly, Article 19, Section 2, of the ICCPR provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[158]

The right to freedom of expression is also protected by all of the three regional human rights treaties, the European Convention on Human Rights ("ECHR"), the American Convention on Human Rights ("ACHR") and the African Charter on Human and Peoples'

154. *See id.* at 36.

155. *See* Adam Liptak, *Court Affirms Ban on Aiding Groups Tied to Terror*, N.Y. TIMES (June 21, 2010), *available at* http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=all (last visited Dec. 20, 2015).

156. Toby Mendel, *Hate Speech Rules Under International Law*, CTR. FOR L. & DEMOCRACY 1 (Feb. 2010), *available at* http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf (last visited Dec. 20, 2015).

157. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 19 (Dec. 10, 1948).

158. International Covenant on Civil and Political Rights art. 19, ¶¶ 1-2, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

Rights ("ACHPR").[159]

B. *Limitations*

As with rights under national constitutions, the freedom of expression under international law "is not an absolute right, and it may be limited to protect overriding public and private interests , including equality and public order."[160] The ICCPR includes specific provisions curtailing the right under certain circumstances, including cases where curtailment of the right is justified by national security priorities. Article 19, paragraph 3 of the ICCPR provides:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[161]

It is interesting to note that the UDHR does not include a specific limitation on the right to freedom of expression, whether generally, or in a national security context (this perhaps reflects the fact that the UDHR was adopted in the aftermath of World War II, when the wounds opened by the excesses of fascism were still fresh).[162]

So even though we find that "[f]reedom of speech is a fundamental right recognized in international law and entrenched in most national constitutions,"[163] rights to free speech are not absolute anywhere, and there is a line between simple political speech and incitement to commit a crime. The United States for one is ever mindful of protecting free speech, for example the law respecting inciting a riot, which is a crime, states:

> As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such

159. Mendel, *supra* note 156, at 3.

160. *Id.* at 1.

161. ICCPR, *supra* note 158, art. 19, ¶ 3.

162. Mendel, *supra* note 156, at 1-2.

163. Navanethem Pillay, *Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance*, 14 NEW ENG. J. INT'L & COMP. L. 203, 203 (2008).

act or acts.[164]

But inciting a riot is unlawful and incitement, or solicitation, as it is often termed under U.S. law, is an inchoate crime, meaning that the offense is the solicitation itself, whether or not the solicited crime is actually carried out. Accordingly, U.S. federal law states that:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.[165]

U.S. state laws are similar. For example the Florida law states:

> A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation . . .[166]

Many states have embedded in their national laws prohibitions against solicitation or incitement to crimes, particularly in the realm of "hate speech."[167]

International law appears to have been a little muddled on the notion of incitement or solicitation,[168] but the statute of the International Criminal Court seems to have clarified the matter, accepting the proposition that incitement to commit a crime or solicitation to commit a crime are punishable offenses under the Court's statute:

> Article 25
>
> Individual criminal responsibility
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction

164. 18 U.S.C. § 2102(b) (2006).

165. 18 U.S.C. § 373(a) (2006).

166. FLA. STAT. § 777.04(2) (2015).

167. *See* Pillay, *supra* note 163, at 203.

168. *See generally* Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823 (2006).

> of the Court if that person:
>
> . . . .
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.[169]

As can be seen, the notion of outlawing solicitation to commit criminal acts is widely known and punished worldwide. Further, though many states respect the principle of freedom of expression, and provide safeguards therefore, there are widely accepted exceptions to such freedom. Although there is currently no universally accepted definition of international terrorism, states around the world and their citizens speak of it, and many states have statutes criminalizing and defining terrorism.[170]

The multilateral convention that we propose would be accomplished under the auspices of the United Nations treaty convention making procedure. It would not deal with suspects who have actually committed terrorist acts—though such a convention is probably long overdue—since defining terrorism is too difficult a task to accomplish any time soon. Such a convention would require the arrest and extradition of individuals suspected of training, motivating, inciting or soliciting others to engage in international terrorist activities that have taken place or were or are planned to take place in the requesting state. The convention would not attempt to define a "terrorist activity," rather it would work much the same way that typical bilateral extradition treaties work today, working within the frameworks of the national laws of the requesting and the requested state. The normal bilateral extradition treaty permits a requesting state to request extradition of a person who is accused of

169. Rome Statute of the International Criminal Court, *supra* note 1, art. 25(3).

170. *See* Perry, *supra* note 27, at 63-65.

committing a crime as defined in the laws of and committed within or under the jurisdiction of the requesting state. Most extradition treaties allow the requested state to refuse extradition if the alleged crime is a political offense, if the crime is not a crime in the requested state or if the crime carries the death penalty in the requested state (unless the requested state receives assurances that the death penalty will not be imposed). There are therefore safeguards in those cases where the definition of the crime might be very broad in the requesting state, and not so broad, rather more specific, in the requested state. Further the laws of many countries provide that after the judiciary has approved extradition the final approval is a political one. In the case of the United States, the Secretary of State must approve extraditions.[171] Thus under U.S. law, the country's current foreign relations are taken into account.

Multilateral conventions that provide for extradition and for universal jurisdiction already exist.[172] Those conventions set forth the obligation to extradite, and also certain safeguards. For example, the U.N. Convention for the Suppression of the Financing of Terrorism of 1999 provides:

> Article 9
>
> 1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.
>
> 2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.
>
> . . . .
>
> Article 10
>
> 1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of

171. GARCIA & DOYLE, *supra* note 75, at 18.

172. See for example, among others, the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. Treaty Doc. No. 106-6, 2149 U.N.T.S. 256, and the International Convention for the Suppression of the Financing of Terrorism, *supra* note 68.

> any other offence of a grave nature under the law of that State.
>
> . . . .
>
> Article 11
>
> 1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.
>
> 2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.
>
> 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.[173]
>
> In this way, if there is a wide disparity between the laws defining international terrorism of the requested and requesting state, the requested state can refuse on the grounds that the offense in the requesting state for which extradition is requested is not an offense in the requested state, and the suspect will not be rendered to the requesting state. As already mentioned, this is already widely practiced in the international practice of extradition.

CONCLUSION

When a person persuades, encourages, instigates, pressures, trains or solicits another person or group so as to cause that person or group to commit an act of international terrorism, unless there is a treaty of extradition between the state where the terrorist offense has taken place or has been instigated etc., to take place, and the state where the person suspected of doing such instigation etc., is found, very often the suspect goes free. There is no legal reason or motivation for the requested state to render the suspect to the requesting state. When such a situation occurs, some are simply frustrated by their inability to prosecute the felon; other states are encouraged to take the matter into their own hands, despite the fact that extrajudicial or "extraordinary renditions" are

173. International Convention for the Suppression of the Financing of Terrorism, *supra* note 68.

unlawful. This is problematic for international law. In the former case, a guilty party can go free. In the latter case, the law is not respected. In both cases, the rule of law breaks down.

A possible solution might be a multilateral convention providing for the rendition of suspects who have engaged in the activity of persuading, encouraging, instigating, pressuring training or soliciting terrorist acts, whether or not the acts actually occur and are successful. If such activity takes place within a state, that state would use its own definition of an act of international terrorism, and request another state party in which the suspect is found, to extradite that person. The requested state would go through the safeguards that are normal in such treaties in deciding whether or not to comply with the request. If the world were to agree on such a convention, it would be one step closer to closing the loopholes that exist in international law as it pertains to terrorist offenses. If someone somewhere, living in some state other than the United States, did "turn" the Tsarnaev brothers to conduct the bombings at the Boston Marathon, or taught them how to make bombs, perhaps he or she would lawfully be brought to justice.