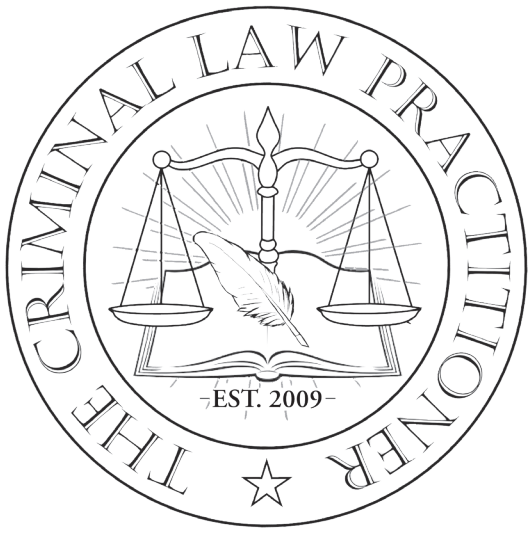
American University Washington College of Law

THE CRIMINAL LAW PRACTITIONER

Volume XII, Issue I

Fall 2021

Articles


THE CRIMINAL LAW PRACTITIONER
EST. 2009

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

THE CRIMINAL LAW PRACTITIONER

American University Washington College of Law

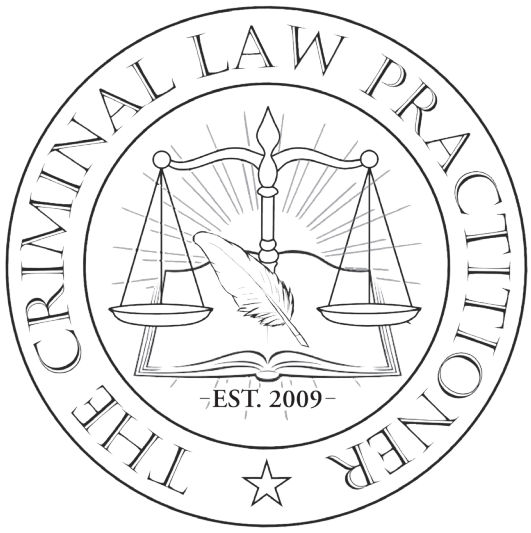
THE CRIMINAL LAW PRACTITIONER

CONTENTS

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

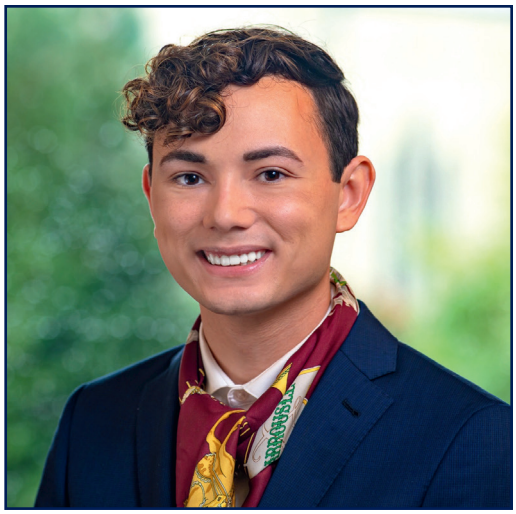
THE CRIMINAL LAW PRACTITIONER

300 Nebraska Avenue, N.W., Washington, D.C. 200016 | Capitol Building Suite CT-02
Website: https://crimlawpractitioner.org


THE CRIMINAL LAW PRACTITIONER
EST. 2009

Letter from the Editor

Jordan Hulseberg, The Criminal Law Practitioner



Dear Reader,

Thank you for your interest in The Criminal Law Practitioner. I am proud to share our Fall Issue with you. This fall, we have two novel and thoughtful examinations of criminal law. As our publication's name suggests, The Criminal Law Practitioner is principally dedicated to producing helpful content for criminal law practitioners. I am confident that this issue will live up to that mission. Accordingly, each piece has included a dedicated section for practitioners, explaining how the article's subject matter explicitly impacts practitioners.

I would also like to thank our dedicated spading and editing staff, and I would particularly like to thank our executive editor, Nicolle Sayers. Nicolle closely managed our publication process, and this publication would not exist without her.

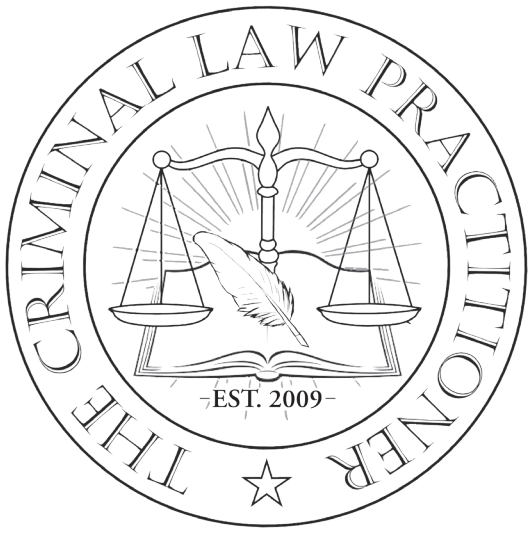
We will release our next issue in mid-winter, and we are eager to share that publication with you. Moving forward, The Criminal Law Practitioner will publish three times each academic year: in mid-fall, mid-winter, and mid-spring.

I encourage you to visit our website, CrimLawPractitioner.org, to read our latest legal analysis as well as our profiles of criminal law practitioners.

If you are interested in publishing with The Criminal Law Practitioner or you would like to be featured in our practitioner profiles, please contact CLP@wcl.american.edu.

Warmly,

Jordan Hulseberg
Editor-in-Chief


THE CRIMINAL LAW PRACTITIONER
EST. 2009

"EVOLVING STANDARDS OF DECENCY" REQUIRE THAT A CAPITAL DEFENDANT ONLY BE SENTENCED TO DEATH BY A UNANIMOUS JURY: WHY THE ALABAMA SUPREME COURT DECISION IN *EX PARTE BOHANNON* VIOLATES THE CONSTITUTION AND SUPREME COURT PRECEDENT

SEPHORA GREY

TABLE OF CONTENTS

INTRODUCTION

Alabama courts have continuously held that its capital sentencing statute is constitutional, even in light of Supreme Court precedent suggesting otherwise.[1] Although the Supreme Court has not given concrete guidance on whether the Sixth Amendment protections that apply during the trial phase apply equally at the sentencing phase,[2] the Court insists that the requirements of due process are heightened at capital sentencing,[3] and it has provided us with enough guidance as to what a constitutionally valid capital sentencing statute entails.[4] The Alabama supreme court holds that their capital sentencing statute is constitutional because the jury, and not the judge, unanimously decides whether an aggravating circumstance exists beyond a reasonable doubt.[5] However, the Alabama Court has failed to account for other factors in their capital sentencing statute that contradict Supreme Court precedent and the Sixth and Eighth Amendments to the Constitution.[6] Alabama's capital sentencing statute removes important protections specified by the Sixth and Eighth Amendments that protect capital defendants at the sentencing phase. This paper argues that removing these protections violates well-established Supreme Court precedent as well as the Constitution, which requires that a death sentence only be imposed by a unanimous jury.

Part I of this paper will discuss the Alabama Supreme Court's decision in *Ex parte Bohannon*,[7] and give an overview of the factual background of the case. Part II will discuss Supreme Court precedent in *Furman v. Georgia,*[8] *Gregg v. Georgia,*[9] *Apprendi v. New Jersey,*[10] *Ring v. Arizona,*[11] *Hurst v. Florida,*[12] and *Ramos v. Louisiana.*[13] In discussing this precedent, this Part will analyze the history of the death penalty and underscore the current standard by which a capital sentencing statute is analyzed. Part III will apply Supreme Court precedent to Alabama law and discuss why the ruling in *Bohannon* was incorrect. Part III is broken into two parts; the first part, Part III-A,

1 Jeffrey Wermer, *The Jury Requirement in Death Sentencing After* Hurst v. Florida*,* 94 DENV. L. REV. 385, 407 (2017) (discussing that after *Hurst*, the Alabama Supreme Court found no problems with its capital sentencing statute); *see also*, *id.* n.191 (discussing how the Supreme Courts of the states of both Florida and Alabama distinguished their statutes from the statutes that Ring v. Ariz. applied to).

2 "[I]t is hard to discern a constitutional difference between procedural rights at noncapital sentencing and the 'heightened' protections the Court accords to capital sentencing. Instead, the Court has been quick to note that due process, even at capital sentencing, does not 'implicate the entire panoply of criminal trial procedural rights.'" John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969 (2005) (quoting Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977)).

3 Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

4 *See* discussion *infra* Part II (summarizing Supreme Court precedent on what a constitutionally valid death penalty statute will entail).

5 *Ex parte* Bohannon, 222 So. 3d 525, 532 (Ala. 2016).

6 *See* discussion *infra* Parts III-A & III-B.

7 *Ex parte* Bohannon, 222 So. 3d 525 (Ala. 2016).

8 Furman v. Georgia, 408 U.S. 238 (1972).

9 Gregg v. Georgia, 428 U.S. 153 (1976).

10 Apprendi v. New Jersey, 530 U.S. 466 (2000).

11 Ring v. Arizona, 536 U.S. 584 (2002).

12 Hurst v. Florida, 577 U.S. 92 (2016).

13 Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

will discuss how Alabama law enables arbitrary and capricious jury sentencing in violation of early Supreme Court precedent. The second part, Part III-B, will discuss how Alabama law violates a defendants Sixth Amendment rights. Finally, Part IV will discuss how evolving standards of decency require a unanimous jury sentence prior to sentencing a defendant to death.

PART I

In the *Bohannon* case, the defendant, Jerry Bohannon, along with two other men, Anthony Harvey and Jerry Duboise, were in the parking lot of an Alabama nightclub around 7:30am on December 11, 2010.[14] Security cameras showed that Duboise and Bohannon were having a conversation until Duboise moved away from Bohannon and slightly pushed him.[15] Harvey then came over to join them,[16] and the three men appeared to be having a conversation until Harvey and Duboise turned to walk away from Bohannon.[17] Bohannon reached under his shirt for a gun.[18] Bohannon cocked the gun, causing the two men to turn around and look at Bohannon before turning to run away.[19] Bohannon pursued the men, shooting at them multiple times.[20] The two men turned a corner and then reappeared with guns of their own.[21] A gunfight ensued.[22] Harvey received a single gunshot wound to the upper left chest as well as skull trauma and a shoe print on his face.[23] Duboise received multiple gunshot wounds; one bullet striking his liver, and another striking his stomach and kidney.[24] Witnesses also claimed that Bohannon pistol whipped Duboise in the face, dislodging his teeth from his mouth and fracturing his skull.[25] "Both Harvey and Duboise died from injuries inflicted by Bohannon."[26]

In June 2011, Bohannon was charged with two counts of capital murder in connection with the deaths of Harvey and Duboise.[27] Following a jury trial, Bohannon was convicted on both counts.[28] During the penalty phase of the trial,[29] the jury recommended by a vote of 11-1 that Bohannon be sentenced to death, and the circuit court sentenced Bohannon to death for each capital murder

14 *Ex parte* Bohannon, 222 So. 3d at 527.
15 Bohannon v. State, 222 So. 3d 457, 469 (Ala. Crim. App. 2015).
16 *Id.*
17 *Ex parte* Bohannon, 222 So. 3d at 527.
18 Bohannon v. State, 222 So. 3d at 469.
19 *Ex parte* Bohannon, 222 So. 3d at 527.
20 *Id.*
21 *Id.*
22 *Id.*
23 Bohannon v. State, 222 So. 3d at 470.
24 *Id.*
25 *Id.*
26 *Ex parte* Bohannon, 222 So. 3d at 527.
27 *Id.*
28 *Id.*
29 *See* discussion *infra* Section III-A(1) for explanation of the penalty phase.

conviction.[30] Bohannon appealed, and the Court of Criminal Appeals affirmed one of Bohannon's capital-murder convictions but remanded the case for the circuit court to set aside one of Bohannon's capital-murder convictions, and its sentence in light of a double-jeopardy violation.[31] Then, on remand, the Court of Criminal Appeals affirmed Bohannon's death sentence.[32] The Supreme Court of Alabama granted certiorari review based on two grounds;[33] (1) whether Bohannon's death sentence must be vacated in light of *Hurst v. Florida*,[34] and (2) whether the circuit court's characterization of the jury's penalty phase determination as an advisory recommendation conflicts with *Hurst*.[35] The Alabama Supreme Court answered "no" to both questions, and upheld Bohannon's death sentence.[36]

The Alabama Supreme Court stated that because Alabama law requires a jury to make the unanimous finding of an aggravating circumstance, the sentencing statute does not violate Supreme Court precedent.[37] The Alabama Supreme Court found that the United States Supreme Court has not held that the Sixth Amendment requires that a jury impose a capital sentence;[38] and also found that the jury is permitted to make a sentencing recommendation to the judge.[39] Part III of this paper will show that the Alabama Supreme court was incorrect as to its decision on both questions, as Bohannon's death sentence conflicts with the holding in *Hurst*.[40]

PART II

The death penalty has long been a contested issue in the United States. In 1972, the Supreme Court struck down the constitutionality of the death penalty in *Furman v. Georgia*,[41] holding that the unlimited discretion afforded to sentencing authorities resulted in arbitrary and capricious application of the death penalty in violation of the Eighth and Fourteenth Amendments.[42] The lack of guidance, the Court held, permitted the death penalty to be discriminatorily and disproportionately carried out on the poor and on blacks.[43] In an attempt to reign in the discretion afforded to sentencing officials, many states began to modify their capital sentencing statutes.[44]

30 *Ex parte* Bohannon, 222 So. 3d at 527.
31 *Id.*
32 *Id.*
33 The court reviewed the lower courts holding on four grounds, however this paper will only discuss two.
34 577 U.S. 92 (2016).
35 *Ex parte* Bohannon, 222 So. 3d 525, 527 (2016).
36 *Id.*
37 *Id.* at 532.
38 *Id.* at 533.
39 *Id.* at 534.
40 *See* discussion *infra* Section III-B
41 408 U.S. 238 (1972).
42 Furman v. Georgia 408 U.S. 238 (1972).
43 *Furman*, 408 U.S. 238, 249-50 (1972) (Marshall, J., concurring).
44 Paul Wallace, *Capital Punishment: A Legal Overview Including Supreme Court Decisions of the 2004-2005 Term*, at 2-3 (The Supreme Court reviewed the capital sentencing laws of five additional states: Georgia, Florida, Texas, Louisiana, and North Carolina).

One such law came under Supreme Court review in 1976.[45] In one of the most prominent death penalty rulings that still guides states' capital sentencing statutes today, *Gregg v. Georgia*[46] ruled the death penalty constitutional, just four years after *Furman v. Georgia* was decided.[47] The Court, in *Gregg v. Georgia*, held that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."[48] In reaching its decision, the Court analyzed the Georgia statute at issue in the case and held that in order to comport with the Eighth Amendment, the Court must determine if the sentence "comports with the basic concept of human dignity."[49] The Eighth Amendment has been interpreted in a flexible manner that must accord with the evolving standards of decency.[50] Evolving standards of decency provide that a sentence may comport with the concept of human dignity if (1) the penalty accords with the dignity of man, (2) the punishment does not involve unnecessary and wanton infliction of pain, and (3) the punishment is not grossly out of proportion to the severity of the crime.[51] Since *Gregg v. Georgia*, the Supreme Court has provided states with more guidance on what states may permit judges and juries to do at sentencing.

In the noncapital case of *Apprendi v. New Jersey*, the Supreme Court held that New Jersey's hate crime statute, which authorized the increase in a maximum prison sentence based on a judge's finding,[52] violated the due process clause of the Fourteenth Amendment.[53] "[A]ny fact that increases the penalty for crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."[54] The Court further found that although the state legislature placed its hate crime enhancer within the sentencing provisions of the criminal code, it did not mean that the finding of the biased purpose to intimidate was not an essential element of the offense.[55] The Court made clear that it was not impermissible for judges to exercise discretion, taking into consideration various factors when imposing a judgment within the range prescribed by statute,[56] but due process and associated jury protections extend, to some degree, "to determinations that go not to a defendant's guilt or innocence, but simply to the length of his

45 Gregg v. Georgia, 428 U.S. 153 (1976).
46 *Id.*
47 Furman v. Georgia, 408 U.S. 238 (1972).
48 428 U.S. 153 at 187 (1972).
49 *Id.* at 182.
50 *Id.* at 173 ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").
51 Gregg v. Georgia, 428 U.S. at 173.
52 N.J. STAT. ANN. § 2C:29-4(a) (West 1995); N.J. STAT. ANN. § 2C:43-6(a)(2); N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000); N.J. STAT. ANN. § 2C:43-7(a)(3).
53 Apprendi v. New Jersey, 530 U.S. 466, 466 (2000).
54 *Id.*
55 *Id.* at 495.
56 *Id.* at 481.

sentence."[57] Two years after the *Apprendi* decision, the Supreme Court decided *Ring v. Arizona*.[58]

In *Ring*, the defendant was sentenced to death after the jury found Ring guilty of the first-degree felony of murder and the judge found that the two aggravating circumstances outweighed the mitigating circumstances.[59] The question was whether, as Arizona law provided, it was constitutional for an aggravating circumstance to be found by the judge, or whether that determination must be entrusted to the jury.[60] The U.S. Supreme Court held that Arizona law, which permitted a judge to find the aggravating circumstance necessary to impose the death penalty, was an unconstitutional violation of the Sixth Amendment right to a jury trial.[61] In its finding, the Court stated that a judge may not do the fact-finding necessary to determine the presence or absence of aggravating factors necessary for the imposition of the death penalty,[62] officially expanding its holding in *Apprendi* to apply to defendants in capital cases.[63] After the Court's decision in *Ring v. Arizona*, the Supreme Court took up the constitutionality of Florida's death penalty statute in *Hurst v. Florida*.[64]

The Supreme Court in *Hurst v. Florida*, ruled that Florida's capital sentencing statute violated the Sixth Amendment.[65] The statute in question consisted of a jury rendering an advisory verdict for a sentence of life or death, which then permitted the judge to ignore that verdict.[66] "[N]otwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death."[67] The Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[68] The Supreme Court, in earlier decisions, had stated that the judge may exercise discretion when imposing sentences within statutory limits.[69] However, in *Apprendi*, the Court held that the Due Process Clause of the Fourteenth Amendment requires that any finding that exposes a defendant to a greater punishment than is authorized by a jury's verdict must be submitted to the jury and proven beyond a reasonable doubt.[70] A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished by jury verdict alone.[71] The holding in *Hurst*, therefore expanded on the Court's holdings in *Apprendi*, and *Ring*,

57 *Id.* at 484 (quoting Scalia, J., dissenting in Almendarez-Torres, 523 U.S., at 251).
58 Ring v. Arizona, 536 U.S. 584 (2002).
59 *Id.* at 595.
60 *Id.* at 597.
61 *Id.* at 585.
62 *Id.*
63 *Id.* at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.") .
64 Hurst v. Florida, 577 U.S. 92 (2016).
65 *Id.* at 94.
66 *Id.* at 95-96.
67 *Id.* at 96.
68 *Id.* at 94.
69 *Apprendi*, 530 U.S. at 481.
70 *Id.* at 490.
71 *Id.* at 482-83.

requiring the jury to do the necessary fact-finding in a capital case, and prohibits a judge from overriding a jury's sentence.[72]

Finally, in the most recent case of *Ramos v. Louisiana*,[73] the Supreme Court held that "[t]he Sixth Amendment right to a jury trial . . . requires a unanimous verdict to convict a defendant of a serious offense."[74]

So, the current standard for analyzing the constitutionality of the death penalty is (1) a sentencing statute may not permit the arbitrary and capricious imposition of death penalty;[75] (2) any fact-finding that conditions the imposition of the death penalty must be entrusted to the jury, a jury's mere recommendation is not enough;[76] (3) Any fact that exposes the defendant to a greater punishment than authorized by the jury's guilty verdict must be submitted to the jury, a defendant may not be exposed to a penalty exceeding that which he would receive if punished by jury verdict alone;[77] and (4) the imposition of the death penalty must comport with the Eighth Amendment and evolving standards of decency.[78]

What the current precedent does not make clear is whether the Supreme Court's most recent holding in *Ramos v. Louisiana*, requiring unanimous jury verdicts in noncapital cases, applies to capital defendants at the penalty phase. In the earlier noncapital case of *Apprendi v. New Jersey*, the Supreme Court extended the protections found in that case, to apply to capital defendants in *Ring v. Arizona*.[79] This paper similarly argues that the holding in *Ramos v. Louisiana*, applies with equal force to capital defendants at the penalty phase. Defendants in capital cases, are entitled to a unanimous jury sentence before the death penalty can be imposed.[80] As this paper will show, to hold otherwise would be to violate the Constitution and well-established Supreme Court precedent.

PART III-A

ALABAMA LAW PERMITS ARBITRARY AND CAPRICIOUS SENTENCING IN VIOLATION OF *FURMAN V. GEORGIA* AND *GREGG V. GEORGIA*

The imposition of the death penalty under Alabama law is arbitrarily and capriciously applied to capital defendants and violates the Eighth Amendment's ban on cruel and unusual punishment. Alabama law eliminates the protection against

72 Hurst v. Florida, 577 U.S. 92, 98-99 (2016).
73 Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
74 *Id.* at 1391.
75 *Furman*, 408 U.S. 238, 294-95 (1972).
76 *Apprendi*, 530 U.S. at 466; *Ring*, 536 U.S. at 597; *Hurst*, 577 U.S. at 95-96.
77 *Apprendi*, 530 U.S. at 490; *Hurst*, 577 U.S. at 94.
78 Gregg v. Georgia, 428 U.S. 153, 155 (1976).
79 *Ring*, 536 U.S. 584, 589 (2002).
80 Note that in noncapital trials death is not on the table but a conviction must be nonetheless be unanimous.

arbitrary and capricious sentencing that first caused concern in *Furman v. Georgia*.[81] In *Furman*, the Court cited evidence showing that the death penalty was unequally imposed in instances where defendants were poor, young, ignorant, and black.[82] The Court, in holding the death penalty unconstitutional, said that the "unequal application of the death penalty was a violation of the Eighth Amendments' ban on cruel and unusual punishment."[83] A punishment is cruel and unusual when it is (1) contrary to established law and (2) unequal in its application as to each defendant.[84]

Alabama's Trial System is Contrary to Established Law

In reinstating the constitutionality of the death penalty, the Supreme Court in 1976, held that a capital sentencing statute that permits a bifurcated trial where sentencing authorities are apprised of any information relevant to the imposition of a sentence, and also provides for standards to guide its use of that information, can be found constitutional.[85] The bifurcated trial system was therefore meant to provide suitable direction and alleviate concerns of arbitrary and capricious sentencing.[86]

In the first stage of a bifurcated trial, the defendant's guilt or innocence is determined, the guilt phase,[87] and in the second stage a sentencing hearing is conducted, the penalty phase.[88] At the penalty phase, standards involving mitigating and aggravating factors are to be considered to help guide the sentencing authority.[89,90]

Before a defendant may be sentenced to death, the jury must find that an aggravating circumstance exists beyond a reasonable doubt.[91] The goal of the bifurcated trial system is to ensure that the question of sentence is not considered until the determination of guilt has been made.[92]

---

81 *Furman*, 408 U.S. 238, 249 (1972) (holding that the imposition of the death sentence followed discriminatory patterns and was unconstitutional as applied).

82 *Id.* at 250.

83 *Id.*

84 *Furman*, 408 U.S. at 248-49 (Douglass, J., concurring) (holding that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments. A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." "[I]t is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.").

85 Gregg v. Georgia 428 U.S. at 155.

86 *Id.* at 195 (holding that the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information).

87 *Id.* at 163.

88 *Id.*

89 *Id.* at 189 ("We have long recognized that for the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

90 *Id.* at 189 ("We have long recognized that for the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

91 *Ex parte* Bohannon, 222 So. 3d at 529; *Ring,* 536 U.S. at 585.

92 Gregg v. Georgia, 428 U.S. at 190-91.

Alabama law deprives a capital defendant of the benefits of a bifurcated trial system. Alabama law specifically defines what types of crimes are capital offenses,[93] and outlines specific aggravating circumstances for those crimes.[94] At the guilt phase, the jury hears all the admissible evidence offered against the defendant to determine if the defendant is guilty of the capital offense, and must unanimously convict.[95] However, because the capital offenses and the aggravating circumstances have substantial overlap, or in some instances, the aggravating circumstance is included in the offense itself, once a jury has found a defendant guilty of a capital crime, the defendant has automatically become death eligible.[96] Although the law does not require that the aggravating circumstance be outlined in a separate statute,[97] it is unconstitutional for death to be on the table for every defendant who has committed a crime.[98] Under Alabama law, every capital defendant who has committed a crime will be eligible for the death penalty. Alabama's truncated system, therefore, removes the protection against cruel and unusual punishments, guaranteed by the Eighth Amendment to be provided to all defendants.

Nonunanimous Jury Sentences Result in Unequal Application to Similarly Situated Defendants

The Alabama capital sentencing statute functions as a discretionary statute that permits the unequal application of the law to similarly situated defendants. Arbitrary and capricious application of the death penalty exists when there is unequal application of the death penalty to defendants who are similarly situated.[99] "This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."[100] Alabama law provides that "if the jury determines that one or more aggravating circumstances exist . . . it shall return a verdict of death."[101] Alabama law further does not require jury unanimity when sentencing a defendant to death, rather, "[t]he decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors."[102] Alabama's capital sentencing statute, which permits a capital defendant to be sentenced to death on a nonunanimous jury, is a significant factor that permits arbitrary and capricious sentencing in violation of the Eighth Amendment.[103] Despite this, the Alabama Supreme Court

93 ALA. CODE § 13A-5-40.
94 ALA. Code § 13A-5-49.
95 ALA. Code § 13A-5-43.
96 Wermer, *supra* note 1, at 409 (discussing how a conviction of a capital crime in Alabama makes a defendant eligible for death).
97 Tuilaepa v. California 512 U.S. 967, 972 (1994) (holding that "[t]he aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).").
98 "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Id.*
99 *Furman*, 408 U.S. at 274 (Brennan, J., concurring).
100 *Id.*
101 ALA. Code § 13A-5-46(e)(3).
102 ALA. Code § 13A-5-46(f).
103 "Cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

argues that because its law requires a jury to make the unanimous finding of an aggravating circumstance, its capital sentencing statute does not violate the Sixth Amendment or Supreme Court precedent.[104] However, the lack of jury unanimity ensures that some defendants will be sentenced to death while others will not.[105] Those defendants who have a jury where only nine jurors choose to implement the death penalty will be subjected to life imprisonment, whereas a defendant under similar circumstances, may be subjected to death if a tenth juror votes in favor of the death penalty. Regardless of each individual jurors' reasons for not wanting to impose the death penalty, defendants under the non-unanimity requirement, will be subjected to two different and unequal outcomes in the punishment process. This result is the exact kind of arbitrary and capricious sentencing that *Furman* wanted to prevent.[106] The Court has long held that "equal protection under the law is implicit in the Eighth Amendment's ban on 'cruel and unusual punishment'."[107] Alabama must therefore require jury unanimity prior to imposing a death sentence. Capital defendants at the penalty phase are still protected by the guarantees of the Eighth Amendment. The "significant function [of the cruel and unusual punishment clause in the Eighth Amendment], is to protect against the danger of arbitrary infliction [of punishments]."[108] The Alabama statute therefore, by permitting nonunanimous jury verdicts, is unconstitutional and has violated the Constitution and well-established Supreme Court precedent.

Some scholars argue that judge-imposed death penalty sentences would promote consistency and alleviate arbitrary and capricious sentencing.[109] However, there is no evidence that provides a judge will be more consistent or effective at imposing the death penalty.[110] Additionally, a judge who is far-removed from the position of the defendant will not be in the best place to determine what an adequate sentence is for a defendant whom he cannot empathize with or understand.[111]

104 *Ex parte* Bohannon, 222 So. 3d at 532.

105 *See* Mark J. MacDougall & Karen D. Williams, *The Federal Death Penalty Scheme is not a Model for State Reform of Capital Punishment Laws*, 67 AM. U. L. REV. 1647, 1660-61 (2018) (discussing concerns of continuing disparate applications of capital punishment nationwide). *See also*, Chenyu Wang, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 394-95 (2012) (discussing how jury unanimity produces more accurate results).

106 *See supra* note 41-43.

107 *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring).

108 *Furman*, 408 U.S. at 277 (Brennan, J., concurring).

109 Proffitt v. Florida, 42 U.S. 242, 252 (1976) ("judicial sentencing should lead to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

110 John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2024 (2005) "there is no evidence that judges are any more consistent than juries in distinguishing "appropriate" cases for capital punishment. Individual judges are no less likely than individual jurors to be influenced by their own experiences, fears, personal morality, religion, politics, or any of the many circumstances that may affect sentencing judgments." *See also*, *id.* n.331-32.

111 *Gregg*, 428 U.S. at 190 (stating that jury sentencing has been considered desirable in capital cases to "maintain a link between community values and the penal system.").

PART III-B

ALABAMA'S DEATH PENALTY SENTENCING STATUTE VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHTS

Apprendi v. New Jersey, *Ring v. Arizona*, and *Hurst v. Florida*, state that the Sixth Amendment guarantees a defendant's right to an impartial jury,[112] and require that a jury engage in the fact-finding necessary to impose a death sentence.[113] Alabama permits the imposition of the death penalty in violation of both of these Sixth Amendment requirements.

The double counting present in Alabama law prevents the jury from engaging in the fact-finding that is required to impose a death sentence. Double counting is when a particular capital offense necessarily includes one or more aggravating circumstances that is relevant in determining the sentence.[114] *Hurst* makes clear that the Sixth Amendment protects a defendant's right to an impartial jury.[115] "An impartial jury consists of … jurors who will conscientiously apply the law and find the facts."[116] This right requires a death sentence to be on a jury's verdict and not a judge's fact-finding.[117] When a jury recommends a death sentence to the court, that sentence must be based on sufficient facts as reflected in the jury verdict or admitted by the defendant.[118] The Supreme Court in *Hurst* held that "[Under the Sixth Amendment] [a] jury's mere recommendation is not enough [to satisfy the imposition of a death sentence]."[119] In order to make an informed sentencing decision supported by the facts in a particular case, the jury must be informed of all elements or ingredients of the charged offense.[120] The Sixth Amendment right to jury trial also "applies where a finding of fact both alters the legally prescribed [sentencing] range *and* does so in a way that aggravates the penalty."[121] Additionally, the U.S. Supreme Court, in *Apprendi,* made clear that "due process and associated jury protections extend . . . to the length of [a defendant's sentence]."[122]

In *Bohannon*, Bohannon argued that, because "the jury was not informed during the guilt phase that a finding of the existence of the aggravating circumstance . . . would make him eligible for the death penalty, the jury did not know the consequences of

[112] Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); Ring v. Arizona, 536 U.S. 584, 597 n.3 (2002); Hurst v. Florida, 577 U.S. 92, 97 (2016).
[113] *Apprendi*, 530 U.S. at 497; *Ring*, 536 U.S. at 589; *Hurst*, 577 U.S. at 94.
[114] *Ex parte* Bohannon, 222 So. 3d 525, 529 (Ala. 2016).
[115] *Hurst*, 577 U.S. at 97.
[116] Lockhart v. McCree, 476 U.S. 162, 163 (1986).
[117] *Hurst*, 577 U.S. at 94.
[118] *Id.* at 100.
[119] *Id.* at 94.
[120] Alleyne v. United States, 570 U.S. 99, 107-08 (2013) (holding that any fact that produces a new penalty or increases a penalty for a criminal defendant beyond a prescribed sentencing range constitutes an ingredient or element of the offense and any such ingredient is a fact that must be found by the jury).
[121] *Id.* at 113.
[122] Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

its decision."[123] The Alabama Supreme Court held Bohannon's claim had no merit, stating that the jury was informed that:

> If, however, the jury finds the defendant guilty of the offense of capital murder, the jury would be brought back for a second phase, or what we know as the penalty phase of this case. And, at that time, the jury may hear more evidence, will hear legal instructions and argument of counsel. The jury would then make a recommendation as to whether the appropriate punishment is death or life imprisonment without the possibility of parole.[124]

The Alabama Supreme Court further stated that the jury was informed that if it returned a verdict of "guilty" of capital murder, Bohannon would be eligible for a sentence of death.[125] Bohannon continued to reason that "the jury's finding of the existence of the aggravating circumstance during the guilt phase of his trial was not an 'appropriate finding' for use during the penalty phase" of his trial.[126]

It was improper for the Alabama Court to presume that Bohannon's conviction at the guilt phase sufficed to prevent a jury from engaging in the fact-finding that was required at the penalty phase of his trial.[127] Due process protections that go to a defendant's sentence may not be circumvented by "redefining the elements that constitute" a crime.[128] Although the jury may have been aware that Bohannon would be eligible for death, it does not follow that he would certainly be sentenced to death. Supreme Court precedent requires consideration of mitigating factors and for those factors to be weighed against the aggravating factors at the penalty phase.[129] "[F]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[130] There must be "an individualized determination on the basis of the character of the individual and the circumstances of the crime."[131] Bohannon's argument therefore has merit. The jury in his case could not conscientiously apply the law if they were not adequately informed of the law. The jury should have been informed of the consequences of its findings at the guilt phase and required to make the appropriate fact-findings at the penalty phase of his trial. Without this knowledge

123 *Ex parte* Bohannon, 222 So. 3d 529, 533-34 (Ala. 2016).
124 *Id.* at 534.
125 *Id.*
126 *Id.* at 533.
127 *See Apprendi*, 530 U.S. at 484 (quoting Mullaney v. Wilbur, 421 U.S. 684 (1881)) (invalidating a Maine statute that presumed that the defendant who acted with intent to kill, likewise possessed the "malice aforethought" that was necessary to increase his sentence); *see also* Ring v. Arizona, 536 U.S. 584, 589 (2002) (requiring fact-finding to be done by the jury).
128 *Apprendi*, 530 U.S. at 484-85 ("due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'") (citing *In re* Winship, 397 U.S. 358, 364 (1970)).
129 Jeffrey Wermer, *The Jury Requirement in Death Sentencing After Hurst v. Florida,* 94 DENV. L. REV. 385, 404 (2017).
130 Gregg v. Georgia, 428 U.S. 153, 189 (1976) (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937).
131 *Tuilaepa*, 512 U.S. 967, 972 (1994) ("That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.").

the jury could not engage in an individualized determination that was specific to Bohannon's case and his sentencing determination. The jury was therefore prohibited from recommending a death sentence to the judge.

At the penalty phase of the trial, the pattern jury instructions require the jury to find beyond a reasonable doubt, that at least one or more aggravating circumstances exist.[132] The instructions go on to state that "before you can consider recommending death, each and every one of you must be convinced beyond a reasonable doubt, based on the evidence, that at least one or more of the aggravating circumstances exist."[133]

The jury instructions therefore, provide that the aggravating circumstance is to be found *unanimously*, before death can be on the table. Under Alabama law, this determination is made at the guilt phase.[134] Despite finding the aggravating circumstance at the guilt phase, the jury must engage in the necessary fact-finding at the penalty phase. To permit otherwise would be to violate a defendant's right to due process. Supreme Court precedent requires the fact finder to aptly consider and give effect to the evidence against the defendant *before* deciding that he is eligible for the death penalty.[135] Any evidence that "is of such a character that may serve as a basis for a sentence less than death" must be considered by the jury.[136]

Alabama's contention that the jury does the fact-finding necessary to impose a death sentence is merely a distraction from the fact that the jury does not do the fact-finding necessary to place the death penalty on the table.[137] The law requires that a jury do all of the fact-finding necessary to impose a death sentence.[138] Under current Alabama law, the death penalty is on the table before those considerations are made. [139] Therefore, Alabama's system of double-counting affects the jury's role as fact finder, and subsequently affects the defendants right to an impartial jury under the Sixth Amendment.[140]

The Alabama Supreme Court upheld their sentencing scheme on the basis that its statute was different from Florida's statute.[141] As shown, this argument fails because in both instances the judge is making a sentencing decision on an inadequate or

[132] Moody v. Thomas, 89 F. Supp. 3d 1167, 1237 (N.D. Ala. 2015).

[133] *Id.* (holding that these instructions "were materially identical to those set out in the *Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried Under Act No.* 81-178").

[134] AMERICAN BAR ASS'N, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006), https://www.prisonpolicy.org/scans/aba/AL_report_%20authcheckdam.pdf.

[135] *See Tennard v. Dretke*, 542 U.S. 274, 275 (2004) (holding that "Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence").

[136] *Id.* at 287.

[137] *Ex parte* Bohannon, 222 So. 3d 525, 528 (Ala. 2016).

[138] *Hurst v. Florida*, 577 U.S. 92, 94 (2015).

[139] *See e.g.*, *Ex parte* Bohannon, 222 So. 3d at 529.

[140] An impartial jury requires a jury to impartially apply the law and the facts. *See supra* note 112-15. Without a jury's proper fact-finding at the penalty phase, the most a defendant may be sentenced to is life imprisonment. Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117, 151-152 (2004).

[141] *Ex parte* Bohannon, 222 So. 3d at 532 (distinguishing Alabama's statute from Florida's because Alabama law requires the jury to make "the critical finding necessary to impose the death penalty," whereas the Florida statute permitted a judge to do the fact-finding).

insufficient jury recommendation that has a propensity to violate the Constitution. Therefore, because the jury in *Ex parte* Bohannon was unable to do the requisite fact-finding necessary to impose a sentence of death, any subsequent recommendation made to the judge could not have been constitutional.

PART IV

EVOLVING STANDARDS OF DECENCY WARRANT A UNANIMOUS JURY VERDICT BEFORE IMPOSITION OF THE DEATH PENALTY

In addition to being inconsistent with prior Supreme Court precedent, Alabama's capital sentencing statute is unconstitutional as it fails to comport with evolving standards of decency.

The nonunanimous jury requirement under Alabama law violates the Eighth Amendment's prohibition against cruel and unusual punishment.[142] The Eighth Amendment is a flexible standard evaluated under "evolving standards of decency."[143] "Evolving standards of decency" is not a static test, rather, it "mark[s] the progress of a maturing society" and allows the court to reevaluate whether a punishment that was once acceptable continues to comport with standards of human dignity.[144] "While the state has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards."[145] To evaluate evolving standards of decency, courts should be informed by objective factors, looking to legislative acts and sentencing juries,[146] with "the clearest and most reliable objective evidence" being "legislation enacted by the country's legislatures."[147] However, objective evidence does not "wholly determine the controversy," the judgment of the court is "'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[148]

Legislative Acts

A majority of states are trending towards abolishing the death penalty, and of the states that have death penalty statutes, only two of those states permit the death penalty to be imposed by a non-unanimous jury verdict.[149]

---

142 "Cruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII.

143 *Gregg v. Georgia,* 428 U.S. 153, 154 (1976).

144 *Weems v. United States*, 217 U.S. 349, 378 (1910); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

145 *Trop*, 356 U.S. at 100.

146 *Thompson v. Oklahoma*, 487 U.S. 815, 821-22 Fn. 7 (1988) (explaining how "Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is cruel and unusual.").

147 *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

148 *Id.* at 312-13 (citing *Coker v. Georgia*, 433 U.S. 584, 593-596 (1977)).

149 *See* Death Penalty Information Center, FLORIDA SUPREME COURT RETRACTS UNANIMITY REQUIREMENT, REINSTATES NON-UNANIMOUS DEATH SENTENCE (last visited Jan. 24, 2020), https://deathpenaltyinfo.org/news/florida-supreme-court-retracts-jury-unanimity-requirement-reinstates-non-unanimous-death-sentence (citing the Supreme Court decision in *State v. Poole* where the court overruled prior precedent and held that a unanimous jury is not

Currently, twenty-seven states have death penalty statutes and twenty-three states do not.[150] Although more states currently have the death penalty than those that do not, "it is not so much the number of these states that is significant, but the consistency of the direction of change."[151] Of the states that currently have the death penalty, fifteen of those states currently have bills to abolish the death penalty,[152] and the majority of those states and the federal government, "mandate an automatic life sentence if a jury cannot reach a unanimous sentencing verdict."[153] Additionally, in 2019, of the states that did have the death penalty, only "seven [of those] states accounted for all of the country's executions."[154] The decline in the support for the death penalty is illustrated by the growing trend of state's legislatures abolishing the death penalty and the sheer number of states considering legislative action to abolish the death penalty.[155] Of all these states, Alabama and Florida are the only states that permit trial judges to impose death sentences based upon a jury's non-unanimous sentencing recommendation.[156]

The large number of states that mandate a mandatory life sentence upon a nonunanimous jury verdict is powerful evidence that our society and its leaders believe that a jury must be unanimous in its decision to sentence a defendant to death.[157] The evidence is afforded even greater weight when it is noted that legislatures have addressed this issue and overwhelmingly voted in favor of having a unanimous jury before a death sentence may be imposed.[158] The laws in Alabama and Florida therefore show a sharp dissent from the majority of states that have death penalty statutes.[159] The legislature, through enacted legislation and pending legislation has shown that evolving standards of decency only permits imposition of a death sentence by a unanimous jury.

required to sentence a defendant to death). Florida now joins Alabama in permitting a death sentence upon a nonunanimous jury verdict at the penalty phase.

150 Death Penalty Information Center, STATE BY STATE, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 17, 2020).

151 *Atkins*, 536 U.S. at 304.

152 Death Penalty Information Center, RECENT LEGISLATIVE ACTIVITY, https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity (last visited Dec. 15, 2020).

153 Death Penalty Information Center, LIFE VERDICT OR HUNG JURY? (Jan. 17, 2018), https://deathpenaltyinfo.org/stories/life-verdict-or-hung-jury-how-states-treat-non-unanimous-jury-votes-in-capital-sentencing-proceedings.

154 Death Penalty Information Center, NEW RESOURCES: CAPITAL PUNISHMENT AND THE STATE OF CRIMINAL JUSTICE 2020 (Aug. 12, 2020), https://deathpenaltyinfo.org/news/new-resources-capital-punishment-and-the-state-of-criminal-justice-2020.

155 *See e.g.*, STATE BY STATE *supra* note 150; RECENT LEGISLATIVE ACTIVITY *supra* note 152.

156 Death Penalty Information Center, FLORIDA SUPREME COURT RETRACTS UNANIMITY REQUIREMENT, REINSTATES NON-UNANIMOUS DEATH SENTENCE (last visited Jan. 24, 2020), https://deathpenaltyinfo.org/news/florida-supreme-court-retracts-jury-unanimity-requirement-reinstates-non-unanimous-death-sentence; Ala. Code § 13A-5-46(f).

157 *Atkins*, 536 U.S. at 315-16 (holding that the large number of States prohibiting the execution of mentally retarded persons and the absence of States passing legislation reinstating the power to conduct such executions provides powerful evidence that society views mentally retarded offenders as categorically less culpable than the average criminal.).

158 *Id.* (holding that evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition).

159 *See supra* note 154-58 and accompanying text.

Sentencing Juries

When jurors vote for life imprisonment instead of the death penalty it is likely due to the residual doubt that remains after the prosecution has presented their case. In such instances, the acts of jurors present credible evidence that a death sentence should require a unanimous jury sentence to reduce the possibility of wrongful convictions.

Allowing the imposition of the death penalty on a nonunanimous jury verdict is "abhorrent to the conscience of the community."[160] Of the twenty-seven states that have the death penalty, twenty-six of those states mandate a life sentence if the jury does not unanimously convict.[161] "[T]he near uniform judgment of the nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."[162] When a juror votes for a life sentence instead of a death sentence, it is likely due to the residual doubt that still lingers in their mind.[163] This residual doubt is due to weaker evidence and doubts about whether the government has proved their case beyond a reasonable doubt.[164] This thought has proven to be true when compared to other death penalty cases; evidence has shown that executing defendants on nonunanimous jury verdicts increases the risk of wrongful convictions.[165] Jury unanimity also produces more in depth jury deliberation; decreasing the likelihood of a wrongful conviction.[166] In cases where a nonunanimous jury verdict is permitted, jurors take less time to reach a verdict and "dissenters" are singled out for coercion to join the majority before much deliberation takes place.[167] Requiring jury unanimity at sentencing will align Alabama with the majority of states that have the death penalty, and with the conscience of the community; thereby alleviating concerns of wrongful convictions and encouraging desirable jury deliberation in capital cases.

160 *Thompson*, 487 U.S. at 832 (stating that the imposition of the death penalty on a 15-year-old is abhorrent to the conscience of the community because "[the] whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions.").

161 *See supra* note 149 (removing Florida from that count makes the number twenty-six).

162 Burch v. Louisiana, 441 U.S. 130, 138 (1979).

163 Death Penalty Information Center, WRONGFUL CAPITAL CONVICTIONS MAY BE MORE LIKELY IN CASES OF JUDICIAL OVERRIDE, NON-UNANIMOUS DEATH VERDICTS (Sep. 09, 2016), https://deathpenaltyinfo.org/news/wrongful-capital-convictions-may-be-more-likely-in-cases-of-judicial-override-non-unanimous-death-verdicts.

164 Patrick Mulvaney & Katherine Chamblee, *Innocence and Override*, 126 Yale L.J. Forum 118, 119-20 (2016).

165 *See supra* note 154. For an interesting case study see the case of Nathaniel Woods in Woods v. Alabama. Nathaniel Woods was sentenced to death by an Alabama court despite two jurors voting to spare his life, and numerous questions about his culpability. Rick Rojas, *N.Y. Times* (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/nathaniel-woods-alabama.html%20https://eji.org/news/nathaniel-woods-alabama-execution/.

166 Wang, *supra* note 105 at 395-96 (discussing how jury unanimity produces more accurate results).

167 *Id.* at 395 (citing Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 Geo. L.J. 251, 267 (2008)).

Judgment of the Court

The evolving standards of decency analysis provide that the judgment of the court, shall come to bear.[168] The judgment of the court asks whether there is reason to disagree with the reasoning of the legislature or of the citizenry.[169] The Supreme Court held that in a noncapital case, the Sixth Amendment requires a unanimous jury to convict a defendant of a crime.

The Supreme Court has recognized that the Sixth Amendment right to a jury trial undeniably includes the right to a unanimous jury verdict.[170] In *Ramos v. Louisiana*, the U.S. Supreme Court held that a conviction by a nonunanimous jury is an unconstitutional denial of the Sixth Amendment right to a jury trial.[171] The Court, in ruling that the Sixth Amendment required a unanimous jury verdict, held that the Fourteenth Amendment applied that requirement to the states.[172] The Court further held that juror unanimity emerged in fourteenth century England and was soon accepted as a vital right protected by the common law. "[N]o person could be found guilty of a serious crime unless 'the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. A 'verdict, taken from eleven, was no verdict' at all."[173] Although the holding in *Ramos v. Louisiana*, applied to noncapital defendants at trial, the same should apply to capital defendants at sentencing. The Supreme Court recognizes that the requirements of due process are heightened at capital sentencing.[174] The Court, however, has also recognized that due process, at capital sentencing, does not implicate all of the criminal trial procedural rights.[175] Although a capital defendant enjoys Sixth Amendment protection at the trial phase, the Court has not addressed whether all Sixth Amendment rights, apply equally to capital defendants at the sentencing phase.[176]

> [T]he Court has never articulated a coherent theory for identifying which of the rights in the Sixth Amendment "panoply" apply at capital sentencing and which do not…the Court has never answered the basic textual question whether the Sixth Amendment—which applies "in all criminal prosecutions"—applies to capital sentencing at all. . . . Rather, through an approach best described as fragmentary, the Court has ruled some trial rights "in" and some rights "out" at capital sentencing.[177]

---

168 *Atkins*, 536 U.S. at 312-13.
169 *Id.* at 304.
170 *Ramos*, 140 S. Ct. 1390.
171 *Id.* at 1391.
172 *Id.* at 1390.
173 *Id.* at 1396.
174 *Woodson*, 428 U.S. at 305 (holding that there is a greater need for reliability in the determination that death is the appropriate punishment in a specific case).
175 Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977).
176 Douglass, *supra* note 110 at 1969. Confronting death: As our tour through the world of capital sentencing demonstrates, there is no single, comprehensive answer as to whether the Sixth Amendment governs capital sentencing.
177 *Id.* at 1969-70.

The Court has held that the right to counsel applies at capital sentencing, but everything else has been left to lower courts to decide.[178] This lack of finality has caused wide variation in capital sentencing amongst the states.[179] Although the Supreme Court has given no official guidance on whether a unanimous jury verdict is required at capital sentencing, *Ramos v. Louisiana* makes clear that a criminal defendant can only be convicted of a serious crime if the jury is unanimous.[180] The rights of a noncapital defendant at the trial phase should apply with equal force to a capital defendant at the sentencing. If the Constitution does not permit a defendant to be sentenced to *prison* on anything less than a unanimous jury, a defendant should not be permitted to be sentenced to *death* on anything less than a unanimous jury. To permit otherwise would be to take away a defendant's constitutional right to "demand that his liberty not be taken away from him except by the . . . unanimous verdict of a jury of twelve persons."[181] There is no other situation in which the rights of a defendant are more at stake than where his life is on the line.

Because a defendant in a criminal case has a constitutional right to a unanimous jury verdict, a defendant in a capital case similarly has a constitutional right to a unanimous jury sentence, as his rights are just as much, if not more, at stake than the former.[182] Therefore, the judgment of the court is aligned with that of the legislature and the citizenry. The evolving standards of decency, as evidenced by the judgment of the courts, require the death penalty only be imposed by a unanimous jury sentence.

PART V

A defendant in Alabama is more likely to face the death penalty than a defendant in any other state.[183] The practical effect of this is two-fold. First, prosecutors in Alabama are permitted more discretion in deciding whether to seek the death penalty. Second, a capital case in Alabama forces criminal defense attorneys to think more critically about racial considerations than any other states' defense attorneys when mounting their capital defense.

178 *Id.*

179 *Id.*

180 *Ramos*, 140 S. Ct. at 1395.

181 *Id.* at 1396-97 (quoting Thompson v. Utah, 170 U.S. 343, 351 (1898).

182 *Id.*; *See also* Thompson v. Utah, 170 U.S. 343, 351 (1859); Ring at 605-606 ("[T]here is no doubt that '[d]eath is different."; Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.")

183 Death Penalty Information Center, *Death Sentencing Rates by State*, https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentencing-rates (last visited July 22, 2021).

PROSECUTORIAL DISCRETION

It is well known that prosecutors are given broad discretion in determining who to charge and what charges to bring in any given case.[184] While prosecutorial discretion is ubiquitous in the United States, Alabama's death penalty law gives more discretion to prosecutors than do the laws of other states.[185] Consider the fact that most states have outlawed the death penalty.[186] Consider also, that of those states that do permit the death penalty, a jury sentence must be unanimous.[187] Then take Alabama, where the death penalty is permitted without requiring a unanimous jury sentence. Prosecutors must factor in the law and the violations of the defendant before bringing a charge. When compared to prosecutors in other states, a prosecutor in Alabama can conclude that they are more likely to succeed in bringing a death penalty case as they know a final jury decision need not be unanimous. This is a powerful driving force in seeking the death penalty.

This level of prosecutorial discretion is not without repercussions. "As of May 31, 2017, the [National Registry of Exonerations] reports that official misconduct was a contributing factor in 571 of 836 homicide exonerations 68.3%, very often in combination with perjury or false accusation, which also was a contributing factor in 68.3% of homicide exonerations."[188] A holistic approach to reforming Alabama's death penalty law is therefore needed because the law permits prosecutors unbridled discretion that fails to comport with the Constitution and Supreme Court precedent, particularly as compared to the laws of other states. Where official misconduct has been the leading contributing cause of wrongful conviction in death penalty cases,[189] this data is also notably relevant as it only accounts for the number of cases in which misconduct was revealed or found. Studies have shown that "official findings of misconduct represent only a fraction of the misconduct that actually occurs."[190] The actual percentage of official misconduct therefore is even higher, making it even more important in the era of progressive prosecution to reign in the discretion of prosecutors, particularly in the arena of capital sentencing. One prominent way to achieve this is for Alabama to reform their capital sentencing laws.

---

184 "Each decision to seek the death penalty is made by a single county district attorney, who is answerable only to the voters of that county." Death Penalty Information Center, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (Oct. 01, 2013), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-2-death-penalty-how-a-minority-of-counties-produce-most-death-cases-at-enormous-costs-to-all.

185 *See supra* note 149-57.

186 *Id.*

187 *Id.*

188 *Death Penalty Information Center, DPIC ANALYSIS: CAUSES OF WRONGFUL CONVICTIONS (last visited July 27, 2021), https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions.*

189 Death Penalty Information Center, THE MOST COMMON CAUSES OF WRONGFUL DEATH PENALTY CONVICTIONS: OFFICIAL MISCONDUCT AND PERJURY OR FALSE ACCUSATION (May 31, 2017), https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions (showing official misconduct being the leading cause of death-row exonerations at 82.4%).

190 Emma Zack, WHY HOLDING PROSECUTORS ACCOUNTABLE IS SO DIFFICULT, INNOCENCE PROJECT (Apr. 23, 2020), https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/.

RACIAL DISPARITIES PLAGUE CAPITAL SENTENCING

Where criminal defense attorneys in other states can focus on mounting a strong defense based on the merits of the case and weaknesses in the prosecution's argument, a criminal defense attorney in Alabama must also consider whether the prosecution has presented their case through a racial lens or evidenced significant racial undertones either in their case or in jury selection. While race-based considerations are always relevant in criminal cases, the significance of racial bias is more prevalent where a defendant's life is at stake and where Alabama permits a defendant to be sentenced to death on a non-unanimous jury sentence. Historically, black defendants have been more likely to be sentenced to death than white defendants,[191] and where a white victim is involved the conviction rate shoots up.[192] Recent studies on race have also shown the prevalence of race-based bias in capital sentencing.[193] In light of this well-known racial bias, particularly against black defendants, a criminal defense attorney in Alabama should take care to ensure to elicit any implicit or explicit bias potential jurors may harbor and exclude them during voir dire. Criminal defense attorneys should also be sure to elicit the same from any witnesses, or experts the prosecution may put on, and attempt to find and bring to the attention of the court any racial bias that may be present in the case. As previously mentioned,[194] although race-based bias is not limited to Alabama, or capital cases, with the prevalence of prosecutorial discretion and racial bias, there is even more reason for Alabama to rectify its capital sentencing laws.

[191] "The death penalty has long come under scrutiny for being racially biased. Earlier in the twentieth century when it was applied for the crime of rape, 89 percent of the executions involved black defendants, most for the rape of a white woman. In the modern era, when executions have been carried out exclusively for murder, 75 percent of the cases involve the murder of white victims, even though blacks and whites are about equally likely to be victims of murder." Death Penalty Information Center, RACE , https://deathpenaltyinfo.org/policy-issues/race (last visited June 28, 2021).

[192] *Id. See also* Death Penalty Information Center, RACE OF VICTIMS IN DEATH PENALTY CASES (citing that more than 75% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder victims are generally white), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited June 28, 2021).

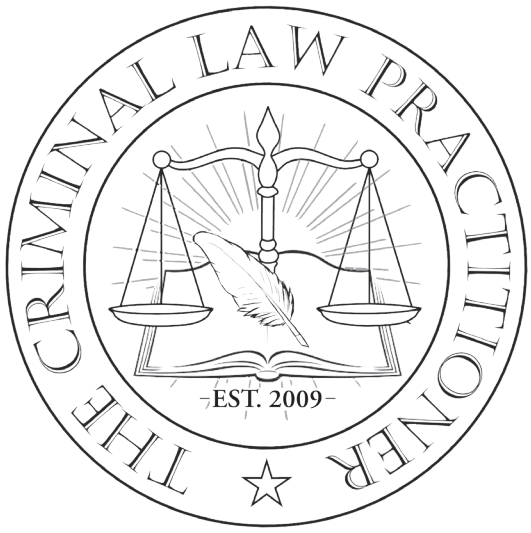
[193] Death Penalty Information Center, RECENT STUDIES ON RACE (citing that "Jurors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case. (Prof. K. Beckett, Univ. of Wash., 2014)." "In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black. (Pierce & Radelet, LA. L. REV. 2011)." "A study in California found that those convicted of killing whites were more than 3 times as likely to be sentenced to death as those convicted of killing blacks and more than 4 times more likely as those convicted of killing Latinos. (Pierce & Radelet, SANTA CLARA LAW REVIEW, 2005)." https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited June 28, 2021).

[194] *See* supra note 198-200. See also Furman, 408 U.S. at 255.

CONCLUSION

A defendant at capital sentencing has a constitutional right to a unanimous jury sentence. Supreme Court precedent, and the Sixth and Eighth Amendments demand no less.[195] Alabama cannot uphold the constitutionality of its law while knowingly denying a defendant their constitutional rights. Currently, capital defendants in Alabama are at a far greater risk of having their constitutional rights violated than in any other state in the United States. Alabama must take the steps necessary to ensure that their laws comply with constitutional standards as articulated by Supreme Court precedent. Alabama must establish a bifurcated trial system that serves to protect defendants as was implicated in *Gregg v. Georgia*.[196] If Alabama does not wish to eliminate the double-counting that places the death penalty on the table prior to the penalty phase, they must put in place safeguards to ensure that each capital defendant who has committed a crime is not subjected to the death penalty. Alabama must also require the jury to engage in adequate fact-finding, by informing jurors of all ingredients and elements that will affect a defendant's sentence.[197] *Hurst*, forbids the jury from recommending a death sentence without sufficient fact-finding.[198] Finally, to avoid arbitrary and capricious application of the death penalty, and comport with the Eighth Amendment and evolving standards of decency, Alabama must require jury unanimity at the penalty phase before a death sentence can be imposed.[199] Making these changes will permit Alabama to comport with Supreme Court precedent and the Constitution. The changes will also help reduce the onslaught of prosecutorial misconduct in capital cases, particularly where racial bias continues to be a pre-eminent problem.

[195] See discussion supra Part IV-3.
[196] *See* discussion *supra* Part III-A.
[197] *See* discussion *supra* Part III-B.
[198] *See supra* note 119-24.
[199] *See* discussion *supra* Part IV.


THE CRIMINAL LAW PRACTITIONER
EST. 2009

PROSECUTION OF TERRORISM: UTILIZING DOMESTIC COURT SYSTEMS TO ADDRESS THE SHORTCOMINGS OF INTERNATIONAL CRIMINAL LAW

LENA RAXTER

ABSTRACT

Without first agreeing to a universal definition of terrorism, it is difficult for the international community to develop a consistent system through which States may prosecute terrorism. However, from 1936 to 1981, the international community proposed, and rejected, at least 109 definitions of terrorism. Moreover, no proposed definition complies with the principle of legality and avoids inadvertently including national liberation movements. Consequently, because of this failure to create a universal definition of terrorism, the international community cannot consistently and extensively prosecute acts of terrorism.

This article first argues that, without a universal definition of terrorism, neither prosecution of terrorism within the International Criminal Court nor prosecution within domestic courts using universal jurisdiction are tenable solutions for consistent, widespread prosecution. The article then argues that, to guarantee prompt and consistent prosecution, States should prosecute the underlying *acts* of terrorism under existing, well-known, and commonly accepted criminal law—i.e., murder, kidnapping, hijacking, and so forth. States should then consider the intent of the perpetrator to commit an act of terrorism as an aggravating factor during sentencing, which would increase the punishment for the defendant. Through this system, the international community would avoid violating the principle of legality and inadvertently including national liberation movements in a definition of terrorism. As a result, scholars could retire the cliché phrase "one man's terrorist is another man's freedom fighter" as States would instead be consistent in prosecuting anyone who has violated criminal law.

TABLE OF CONTENTS

INTRODUCTION

According to United States Ambassador Francis X. Taylor, "small cells of terrorists have become true *transnational* threats—thriving around the world without a single state sponsor or home base."[1] However, the inability of States, or even academics, to agree on a universal definition of terrorism has severely impaired the international community's efforts to develop international rules addressing terrorism.[2] For some, the solution to this issue is to use an international criminal tribunal, such as the International Criminal Court, to prosecute the crime of terrorism. For others, the solution is to adopt national legislation allowing universal jurisdiction to prosecute individuals suspected of terrorism—regardless of whether there is a nexus between the crime, the perpetrator, and the prosecuting State.

This article argues that, because there is no universally accepted definition for terrorism, many of the proposed solutions—such as prosecution through international criminal tribunals or prosecution via domestic courts based on a domestic definition of terrorism—are ultimately untenable solutions for widespread prosecution of the crime of terrorism. In the interest of prompt prosecution, rather than creating different prosecutorial regimes based on State-specific definitions of terrorism, States should prosecute the *acts* of terrorism under existing, commonly accepted criminal law—such as murder, kidnapping, hijacking, etc.—and consider the intent of the perpetrator to commit an act of terrorism as an aggravating factor during sentencing.

Lastly, considering that terrorism within the context of armed conflict is governed by the rules of international humanitarian law, this article will focus on analyzing terrorism outside of the context of armed conflict within the meaning of the Geneva Conventions.[3]

[1] Ambassador Francis X. Taylor, Coordinator for Counterterrorism, Address to the Institute for National Strategic Studies, National Defense University: The Global War Against Terrorism: The Way Ahead (Oct. 23, 2002).

[2] Richard G. Stearns, *An Appropriate Legal Framework for Dealing with Modern Terrorism and WMD*, *in* INTEL. & HUM. RTS. IN THE ERA OF GLOB. TERRORISM 78, 86 (Steve Tsang ed., 2006).

[3] *See generally* Daniel O'Donnell, *International treaties against terrorism and the use of terrorism during armed conflict and by armed forces*, 88 INT'L REV. RED CROSS 853, 853-80 (2006).

BACKGROUND

DEFINITION OF TERRORISM

The task of creating a universal definition for terrorism is so elusive that it has been described as "resembl[ing] the Quest for the Holy Grail."[4] Between 1936 and 1981, the international community proposed, and subsequently rejected, at least 109 possible definitions of terrorism.[5] The oft-quoted cliché "one man's terrorist is another man's freedom fighter"[6] is, unfortunately, a fairly accurate description for the issues faced by the international community when attempting to adopt a universally accepted definition of terrorism.

International legal instruments pre-9/11

One of the earliest attempts to produce a general definition of terrorism occurred in 1937 when the League of Nations created the Convention for the Prevention and Punishment of Terrorism ("1937 Convention"), after a Macedonian nationalist assassinated Alexander I of Yugoslavia.[7] Under this convention, terrorism was defined as: "[a]ll criminal acts directed against a State and intended or calculated to create [a] state of terror in the minds of particular persons or a group of persons or the general public."[8] However, despite successfully formulating a definition of terrorism,[9] the 1937 Convention never entered into force.[10]

The next significant attempt to define terrorism occurred in 1972 when an *ad hoc* committee of the United Nations (UN) General Assembly was tasked with creating a Draft Comprehensive Convention that would include a universal definition of

4 Geoffery Levitt, *Is terrorism Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986). *But see* Gilbert Ramsay, *Why terrorism can, but should not be defined*, 8 CRITICAL STUD. TERRORISM 211, 211 (2015) (concluding that the debate regarding the definition of terrorism is obscuring the real issue, which is what exactly comprises an act of terrorism—"in other words, how is it that we continue to know terrorism when we see it?").

5 Kalliopi K. Koufa (Special Rapporteur), *Terrorism and Human Rights: Progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2001/31, ¶ 24 n15 (June 27, 2001).

6 For a discussion on the issues with this phrase, *see*, *e.g.*, Conor Friedersdorf, *Is One Man's Terrorist Another Man's Freedom Fighter?*, ATLANTIC (May 16, 2012), https://www.theatlantic.com/politics/archive/2012/05/is-one-mans-terrorist-another-mans-freedom-fighter/257245/ (concluding that a more accurate description would be: "As a descriptor, terrorist is almost never applied rigorously and consistently to describe the tactics a group is using–rather, it is invoked as a pejorative to vilify the actions only of groups one wishes to discredit. People who agree with the ends of the very same groups often don't think of them as terrorists, the negative connotation of which causes them to focus on what they regard as the noble ends of allies they're more likely to dub freedom fighters"); *cf.* Stearns, *supra* note 2, at 79-81 (concluding that grouping all "terrorists" into one category is a faulty solution because motivations behind different "terrorist" groups vary significantly).

7 James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 179-80 (2002).

8 Convention for the Prevention and Punishment of Terrorism art. 2 ¶ 1, League of Nations Doc. C.546M.383 1937 V. (1937) (never entered into force).

9 Later scholars have suggested that the reason the 1937 Convention never entered into force may actually have been *because* of the difficulty in getting States to ratify a document which included an explicit definition of terrorism. *See* HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 19 (2005).

10 Convention for the Prevention and Punishment of Terrorism, *supra* note 8.

terrorism.[11] However, the committee was ultimately unable to complete this task, and instead produced a report that highlights the significant issues involved in drafting a universal definition.[12] The most controversial of these issues was whether "national liberation movements" ("NLMs")[13] would be included within the universal definition of terrorism.[14] Consequently, instead of producing a definition, the committee opted for creating a framework of conventions addressing specific forms of terrorism on which international consensus could be reached.[15]

With the end of the Cold War and Apartheid in the 1990s, the resulting shift in global politics led to a breakthrough in the quest to create a universal definition of terrorism: the 1994 Declaration on Measures to Eliminate International Terrorism ("1994 Declaration").[16] Though non-binding, the resolution strongly condemns terrorism and reiterates that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."[17] Scholars have subsequently interpreted this language as defining terrorism in a manner that "divorc[es] the condemnation of terrorism from the value judgment about the reasons that may underpin it."[18]

Considering this breakthrough, the UN General Assembly once again established an *ad hoc* committee tasked with creating a Draft Comprehensive Convention.[19] Nevertheless, the committee again failed to fulfill this mandate; however, it indirectly

11 Duffy, *supra* note 9, at 19.

12 MEASURES TO ELIMINATE INTERNATIONAL TERRORISM (AGENDA ITEM 108), https://www.un.org/en/ga/sixth/70/int_terrorism.shtml (last visited Feb. 5, 2021).

13 *Cf.* Martin Wälisch, *Liberation and Resistance Movements*, OXFORD BIBLIOGRAPHIES (May 29, 2019), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0186.xml (providing a background on liberation and resistance movements). *See generally* Lucia Aleni, *Distinguishing Terrorism from Wars of National Liberation in the Light of International Law: A View from Italian Courts*, 6 J. INT'L CRIM. JUST., 525, 525-39 (2008) (explaining the difference between NLMs and terrorist organizations).

14 Duffy, *supra* note 9, at 19; *see* Jonathan Hafetz, *Terrorism as an International Crime?: Mediating between Justice and Legality*, 109 AM. SOC'Y INT'L L. PROC. 158, 159 (2015) ("The definitional impasse has traditionally centered on the application of a crime of terrorism to two situations: first, to NLMs resisting foreign occupation and seeking self-determination; and second, to violence committed by state officials against their own citizens."); *see also* Stearns, *supra* note 2, at 83-84, 86-87 (explaining that the issue of NLMs continues to be a problem today. For instance, in response to the Belsan school massacre in 2004, Russia proposed a draft resolution which defined terrorism as "any act intended to cause death or serious injury to civilians or taking of hostages with the purpose to provoke a state of terror, intimidate a population, or compel a government or an international organization to do or abstain from doing an act." However, similar to other proposals, the definition was criticized for not defining what "any act" meant, and for potentially encompassing the actions of NLMs.).

15 Duffy, *supra* note 9, at 19, 23-25 (explaining that, rather than defining terrorism, such conventions address specific conduct that may fall under the purview of what would commonly be referred to as "terrorist activity" and subsequently provide a framework of obligations for State Parties based on these activities); G.A. Res. 50/53, at 1-2 (Dec. 11, 1995); G.A. Res. 51/210, at 2-7 (Feb. 20, 1997).

16 Duffy, *supra* note 9, at 19.

17 G.A. Res. 51/210, *supra* note 15, at ¶ 2.

18 Duffy, *supra* note 9, at 20.

19 G.A. Res. 51/210, *supra* note 15, at ¶ 9.

led to the creation of the 1999 Convention for the Suppression of Financing of Terrorism ("1999 Financing Convention").[20]

International legal instruments post-9/11

The events of 9/11 spurred an unparalleled consensus in the condemnation of international terrorism, which resulted in the adoption of a series of significant regulatory documents. For instance, the UN Security Council passed resolution 1373 (2001), which calls upon Member States to cooperate to prevent and suppress the financing, preparation, and commission of "terrorist acts"; however, it provides no definition or clarification regarding what would be classified as a "terrorist act."[21] The Security Council also passed resolution 1566 (2004), which recalls that:

> [C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.[22]

Despite the unparalleled international consensus, the efforts to create a universal definition for the UN Draft Comprehensive Convention were fraught with the same divisions that impeded prior efforts. The Convention includes an informal definition: "unlawful and intentionally causing (a) death or serious bodily injury to any person; (b) serious damage to public and private property, including a State or government facility; or (c) other such damage where it is likely to result in major economic loss" provided that "the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do

[20] Duffy, *supra* note 9, at 20. The 1999 Financing Convention also contains a generic definition of terrorism: "any other act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act." Additionally, terrorism under the convention is the conduct covered by specific conventions addressing particular forms of terrorism. International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

[21] The resolution was adopted under the Ch. VII power of the UN Security Council and is binding upon States. States are also obligated to prevent terrorism or terrorist safe havens on their territory; to share information with other governments regarding potential terrorist activities; to refrain from actively or passively encouraging terrorism; and to become States Party to existing international legal instruments related to terrorism, if they have not already done so. S.C. Res. 1373, ¶ 3 (Sept. 28, 2001).

[22] S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

or abstain from doing any act."[23] Even so, this definition has been criticized for its "breadth and vagueness of terms,"[24] as well as its potential application to NLMs.[25]

CUSTOMARY ELEMENTS OF TERRORISM

Nevertheless, while there is no State consensus on a universal definition of terrorism, various international legal documents have addressed specific types of terrorism or created general legal tools that can be used to address conduct that would commonly be classified as "acts of terrorism."[26] Further, in 2011, the Appeal Chamber decision of the Special Tribunal for Lebanon ("STL")[27] controversially concluded that there is, in fact, a definition of terrorism under customary international law.[28] However, scholars and legal experts widely disagree with this conclusion.[29]

Despite the lack of consensus, elements for the crime of terrorism can be identified through various sources. For example, since 1994, various resolutions of the UN General Assembly have defined terrorism as "*criminal* acts intended or calculated *to provoke a state of terror* in the general public, a group of persons or particular persons for political purposes are *in any circumstances* unjustifiable."[30] Consequently, the elements that can be identified are: (1) the conduct of the accused; (2) the purpose or motive of the act; (3) who or what is targeted by the conduct; (4) a transnational element to the conduct; and (5) classification of the accused.

Conduct

The conduct of the accused, also known as the *actus reus* or material element of the offense, varies widely.[31] In the above General Assembly definition, this is

---

23 Rohan Perera, *Measures to Eliminate International Terrorism: Report of the Working Group*, 16, U.N. Doc. A/C.6/56/L.9 (Oct. 29, 2001) [hereinafter "Measures to Eliminate International Terrorism"].

24 Duffy, *supra* note 9, at 21.

25 Measures to Eliminate International Terrorism, *supra* note 23, at 34.

26 Duffy, *supra* note 9, at 18.

27 *See* BETH VAN SCHAACK & RONALD C. SLYE, INT'L CRIM. LAW AND ITS ENFORCEMENT 761-63 (4th ed. 2020) (providing a background on the creation of the STL, and the subsequent prosecution within the STL).

28 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, Decision of the Appeals Chamber, ¶ 85 (Feb. 16, 2011)

> [A] number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in lime of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.

29 *See* Matthew Gillett & Matthias Schuster, *Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism*, 9 J. INT'L CRIM. JUST. 989, 1005-08 (2011) (addressing the controversy of the Court's conclusion, and noting that the presiding judge, Antonio Cassese, had previously written a paper concluding that a customary rule of international terrorism had evolved); *see also* Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 935 (2006).

30 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, at ¶ 88.

31 *See* Duffy, *supra* note 9, at 32.

encompassed within the provision, "*criminal* acts." The UN Security Council further elaborated on this element in resolution 1566, which adds within its limits those acts "which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism."[32] In some treaties—such as the 1994 Declaration—any "criminal act" is sufficient to fulfil this element.[33] Further, other treaties—such as the European Council Framework Decision on Combating Terrorism[34]—"inchoate" offenses[35] are considered sufficient to fulfill this element.[36] However, in another subset of treaties—such as the 1999 Financing Convention—this element is very restrictive: only acts that cause death or serious bodily injury are sufficient for the element to be fulfilled.[37]

Purpose or motive

Unlike other crimes, terrorism generally involves at least two subjective layers, meaning it is a *dolus specialis* crime.[38] First, the accused must have the intent to commit the underlying act—i.e., intent to bomb, intent to hijack, or intent to cause death or serious bodily harm.[39] Second, the accused must intend that his or her actions will cause broader effects, such as creating a state of terror in a population or compelling a government or organization to act—or refrain from acting—in a specific manner.[40] In compliance with the general principles of criminal law, personal motive is irrelevant.[41] In the above General Assembly definition, this element is encompassed within the provision, "intended or calculated *to provoke a state of terror.*" Further, the double intent is embodied in UN Security Council resolution 1566, which defines this element as acts "committed with the intent to cause death or serious bodily injury, or taking of hostages, with the *purpose to provoke a state of terror*,

32 S.C. Res. 1566, *supra* note 22, at ¶ 3.

33 G.A. Res. 49/60, Measures to Eliminate International Terrorism (Dec. 9, 1994).

34 It should be noted that this treaty is no longer in force. It was implicitly repealed in 2017 by Directive (EU) 2017/541. Directive 2017/541, of the European Parliament and of the Council of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6, ¶ 6.

35 "Inchoate offenses" are acts in which no actual result occurs. Examples include threats of action, or failed action. *See* Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 971-73 (2007) (analyzing inchoate crimes in the international criminal law system); CRAIG FORCESE, NATIONAL SECURITY LAW: CANADIAN PRACTICE IN INTERNATIONAL PERSPECTIVE 281-82 (2007) (explaining section 2 of the Canadian Criminal Code, which includes criminalization of the offense of attempt, conspiracy, counselling, and accessory to a crime—all of which are "inchoate" offenses).

36 Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism, 2008 O.J. (L 330) 21, ¶ 10, art. 4.

37 International Convention for the Suppression of the Financing of Terrorism, *supra* note 20.

38 Duffy, *supra* note 9, at 32-34 ("Beyond the normal requirement of intent in respect of the conduct (e.g., the bombing, murder, etc.) the person responsible will usually intend his or her acts to produce broader effects, namely spreading a state or terror and/or compelling a government or organization to take certain steps towards an ultimate goal."); Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 109 (Feb. 16, 2011) ("[T]he subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority.").

39 Duffy, *supra* note 9, at 32.

40 *Id.*

41 *Id.* at 34.

… intimidate a population or compel a government or an international organization to do or to abstain from doing an act."[42]

Targeted "victims" of the conduct

In the above General Assembly definition, this element is encompassed within the provision, "in the general public, a group of persons, or particular persons for political purposes."[43] However, depending on which source is referenced, definitions will differ on who, or what, must be the target of the conduct. According to the 1937 Convention, the conduct must target a State.[44] However, according to the 1999 Financing Convention, any conduct targeting civilians or other persons not directly participating in armed conflict is sufficient.[45] An even broader scope of activities is sufficient according to the failed UN Draft Comprehensive Convention, wherein any injury or damage occur to any person or property, whether public or private, is sufficient.[46] One criticism of the definition provided by the Appeals Chamber of the STL is that it did not include this element, and therefore applied a similarly broad definition as was included in the failed UN Draft Comprehensive Convention.[47]

Transnational element

As noted by the Appeals Chamber of the STL, the transnational element "will typically be a connection of perpetrators, victims, or means used across two or more countries" but it may also involve "a terrorist attack that is planned and executed in one country" which "threaten[s] peace and security, at least for neighboring countries."[48] However, the exception to this requirement is non-international conflict—which may be a war crime under international law—and "international terrorism" as defined in regional terrorism instruments—which do not normally require this element be met.[49] The above General Assembly definition does not include a provision that encompasses this element.

Classification of the accused

This is the most contentious element.[50] As the Special Rapporteur for Terrorism and Human Rights explained, "the term 'terrorism' carried almost always the flavour [*sic*] of some (subjective) moral judgment: some classes of political violence are justified whereas others are not."[51] In reviewing the action of the General Assembly and the Commission on Human Rights, as well as various other documents, the Special

42 S.C. Res. 1566, *supra* note 22, at ¶ 3.
43 G.A. Res. 49/60, *supra* note 33, at ¶ 3.
44 Convention for the Prevention and Punishment of Terrorism, *supra* note 8.
45 International Convention for the Suppression of the Financing of Terrorism, *supra* note 20.
46 G.A. Res. 51/210, *supra* note 15, at ¶ 9.
47 Gillett & Schuster, *supra* note 29, at 1008-09.
48 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 90 (Feb. 16, 2011).
49 Duffy, *supra* note 9, at 34.
50 *See* Koufa, *supra* note 5, at ¶¶ 32-33 (finding that there is no degree of consensus regarding who can be considered an author of terrorism).
51 *Id.* at ¶ 32.

Rapporteur concluded that "as this issue has progressed, [the discussions] reveal that a certain degree of consensus has been obtained on some of the elements of conduct that comprise terrorism, but not on who can use terrorism."[52] Specifically, the international instruments differ in their inclusion of (a) State-sponsored terrorism;[53] (b) State conduct as constituting terrorism;[54] and (c) conduct of NLMs as constituting terrorism.[55]

Because of the contentious nature of the above three categories, States and scholars alike have found it almost impossible to agree on which should be included or excluded from the scope of a universal definition of terrorism. Nevertheless, because the above General Assembly definition contains the provision "for political purposes," it could be argued that this element is addressed by outlawing any political justification for terrorism—no matter who commits it. This element was not, however, included in the customary definition provided by the Appeals Chamber of the STL.[56]

STATE-SPECIFIC DEFINITIONS OF TERRORISM

Particularly after 9/11, multiple States outlawed "terrorist acts" within their domestic criminal code.[57] Most of the definitions use in these domestic criminal codes include a majority of the identified customary elements of terrorism. For example, under current United States (US) domestic law, "international terrorism" is defined as:

> activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the [US] or of any State, or that would be a criminal violation if committed within the jurisdiction of the [US] or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the [US].[58]

---

52 *Id.* at ¶ 33.

53 *Id.* at ¶¶ 51-61.

54 Duffy, *supra* note 9, at 35-37.

55 *Id.* at 36; *see also* Robert A. Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 CASE W. RES. J. INT'L L. 281 (1981) (analyzing whether the acts of NLMs should be excluded from a definition of terrorism).

56 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 85 (Feb. 16, 2011).

57 *But see* Stearns, *supra* note 2, at 88-89 (arguing that inherent difficulties in treating terrorism as a purely domestic criminal matter have led to "the collapse of several significant terrorism prosecutions in Europe and the United States" because prosecutors failed to adequately "satisfy courts with the quality of evidence gathered through confidential intelligence sources").

58 18 U.S.C. § 2331(1) (2018); *see also* § 2331(5) (providing a definition for domestic terrorism).

In another example, under current domestic law in the United Kingdom (UK), terrorism is defined as:

> the use or threat of action where—(a) the action [involves serious violence against a person; involves serious damage to property; endangers a person's life, other than that of the person committing the action; creates a serious risk to the health or safety of the public or a section of the public; or is designed seriously to interfere with or to seriously disrupt an electronic system], (b) the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial, or ideological cause."[59]

The most significant issue with the above definitions, as well as the definitions used by other States, is the potential applicability to peaceful protestors or other NLMs.[60] For example, in China, under the guise of combatting terrorism, the Chinese government has repressed and imprisoned peaceful Xinjiang Uighur separatists.[61] Similar exploitation has occurred in Russia with the Chechnian separatists; in Uzbekistan with the independent Islamic congregations and followers, who the government claims are part of the Islamic Movement of Uzbekistan; and in Malaysia with political dissidents.[62]

Indeed, the issue is so dangerous that the International Commission of Jurists recommended that "States should not use the fight against terrorism as a pretext to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion and belief, nor the rights of minorities."[63] Moreover, any anti-terrorist laws which have the potential to infringe upon "human rights and civil liberties should be considered carefully by legislative bodies," taking account of

---

[59] Terrorism Act 2000, c. 11, § 1 (UK), https://www.legislation.gov.uk/ukpga/2000/11/section/1. It is important to note that the learned experiences during the conflict in Northern Ireland with the Irish Republic Army (IRA)—a NLM—most likely affected how this crime was formulated. *See* Jessie Blackbourn, *The evolving definition of terrorism in UK law*, 3 BEHAV. SCI. TERRORISM POL. AGGRESSION 131 (2010) (analyzing the evolution of the definition of terrorism in the UK, in order to advance the academic understanding of the debate over a universally accepted definition of terrorism).

[60] *See supra* note 11 to 15 and accompanying text.

[61] *People's Republic of China: China's Anti-Terrorism Legislation and Repression in the Xinjiang Uighur Autonomous Region*, AMNESTY INT'L (Mar. 22, 2002); Lindsay Maizland, *China's Repression of Uighurs in Xinjiang*, COUNCIL FOREIGN RELATIONS (June 30, 2020), https://www.cfr.org/backgrounder/chinas-repression-uighurs-xinjiang ("Following the 9/11 attacks, the Chinese government started justifying its actions toward Uighurs as part of the Global War on Terrorism.").

[62] *Central Asia: No Excuse for Escalating Human Rights Violations*, AMNESTY INT'L (Oct. 11, 2001); *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, HUM. RTS. WATCH (Mar. 25, 2003); *Malaysia's International Security Act and Suppression of Political Dissident*, HUM. RTS. WATCH (May 13, 2002); *Malaysia: Human Rights under Threat – the Internal Security Act (ISA) and other restrictive laws*, AMNESTY INT'L (Oct. 24, 2001).

[63] INTERNATIONAL BAR ASSOCIATION, INT'L TERRORISM: LEGAL CHALLENGES AND RESPONSES: A REPORT FROM THE INT'L BAR ASS'N TASK FORCE ON INT'L TERRORISM, at xxiii (2003).

the relevant requirements established by international human rights law and the relevant jurisprudence.[64]

THE PRINCIPLE OF LEGALITY

Another vital consideration for the prosecution of terrorism is the principle of *nullum crimen sine lege*—"no crime without law"—also known as the principle of legality. This principle is codified in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which reads "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[65] The purpose of this general principle is to "prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission."[66] Stated differently, the principle prevents a person from being prosecuted for an act which was not criminal at the time the act was committed, or which was ambiguously criminalized.[67]

In practice, the principle of legality requires that "penal statutes must be strictly construed," and clarifies that the "paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object."[68] Moreover, when a criminal statute contains an ambiguous provision, the benefit of the doubt is given to the subject—and against the legislature, which has failed to properly explain itself.[69]

In the context of prosecution for terrorist activity, the principle of legality complicates the prosecution of individuals due to ambiguity in the definition of terrorism.[70] Consequently, while many States and international documents outline the elements of terrorism, it is possible that many of these definitions may not comply with the principle of legality, effectively rendering them null and void.[71]

---

64 *Id.*; *cf.* UNITED NATIONS OFF. ON DRUGS & CRIME, HANDBOOK ON CRIM. JUST. RESPONSES TO TERRORISM (2009) (providing a best practice guide for the prosecution of acts of terrorism within a domestic criminal justice system).

65 *See* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 132 (Feb. 16, 2011) (under this article of the ICCPR, "no breach of the *nullum crimen* principle exists when the act was criminal 'under national or *international* law, at the time when it was committed'").

66 Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶ 93 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

67 Matija Kovač, *International Criminalisation of Terrorism*, 14 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU 267, 269 (2007).

68 Prosecutor v. Delalić, Case No IT-96-21-A, Appeal Judgment, ¶ 413 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

69 *Prosecutor v. Galić*, at ¶ 93.

70 *Cf.* Keiran Hardy & George Williams, *What is Terrorism – assessing domestic legal definitions*, 16 UCLA J. INT'L L. & FOREIGN AFF. 77 (2011) (using the principle of legality to analyze the legal definitions of terrorism in Australia, Canada, India, New Zealand, South Africa, the UK, and the US).

71 Duffy, *supra* note 9, at 40.

ANALYSIS

PROSECUTION VIA AN INTERNATIONAL CRIMINAL TRIBUNAL

Within international criminal law, there are two ways to prosecute terrorism outside of domestic courts: (1) create an *ad hoc* international criminal tribunal with the mandate of prosecuting terrorism; or (2) utilize the existing International Criminal Court (ICC) to prosecute terrorism. However, for several reasons outlined below, neither of these options are feasible for the widespread prosecution of acts of terrorism.

Prosecution using a new ad hoc international criminal tribunal

International criminal tribunals are responsible for prosecuting crimes which qualify as a grave breach of international law, meaning the crime is so heinous and repugnant that all States may exercise jurisdiction to punish the perpetrators.[72] However, international criminal tribunals have rarely addressed the crime of terrorism, or inciting terror against a civilian population, outside of the context of armed conflict.[73] Of the many *ad hoc* tribunals, only one—the STL[74]—had the jurisdiction to try the crime of terrorism, and this was due to the incorporation of the domestic Lebanese crime of terrorism as found in the Lebanese Criminal Code.[75] This is largely because there is no universal definition for terrorism.[76]

---

[72] Joshua Ruby, Comment, *An Evolutionary Theory of Universal Jurisdiction*, 14 UCLA J. INT'L L. & FOREIGN AFF. 567, 583-85 (2009); *see also* Prosecutor v. Erdemović, IT-96-22-T, Sentencing Judgement, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) ("[T]he International Tribunal sees public reprobation and stigmatization by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity."); Att. Gen. of Israel v. Eichmann, 56 AM. J. INT'L L. 805, 814 (Dist. Ct. Jerusalem 1961) (it is "the moral duty of every sovereign state . . . to enforce the natural right to punish, possessed by the victims of the crime, whoever they may be, against criminals whose acts have 'violated in extreme form the law of nature or the law of nations'").

[73] In Prosecutor v. Galić, the International Criminal Tribunal for Yugoslavia (ICTY) addressed whether the court had jurisdiction over crime of "terror against the civilian population as a violation of the laws or customs of war." However, the Court explicitly limited its determination to whether an offense of terror in a specific sense—meaning the killing and wounding of civilians, *during a time of armed conflict*, with the intent to inflict terror on the civilian population—falls within the jurisdiction of the Tribunal. The ultimate holding of the Court is therefore outside of the scope of this discussion. *Prosecutor v. Galić*, at ¶ 87 n150.

[74] *See supra* note 27 (providing more information on the STL).

[75] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, 29-30 (Feb. 16, 2011); Gillett & Schuster, *supra* note 29, at 1000. However, the above authors also note that the STL Appeals Chamber did "not *apply*[] international law on the crime of terrorism" but rather "us[ed] international law to *interpret* (and broaden) the established Lebanese definition of the crime of terrorism." *Id.* at 998-1002.

[76] *See* UNITED NATIONS OFF. ON DRUGS & CRIME, MANUAL ON INT'L COOP. IN CRIM. MATTERS RELATED TO TERRORISM 13-23 (2009) (providing an list of the many regional and international instruments, each of which define elements of terrorism rather than providing a singular definition of terrorism); *cf.* Duffy, *supra* note 9, at 45 ("[W]ithout reaching an acceptable international definition of the term terrorism one can sign any declaration or agreement against terrorism without having to fulfil one's obligations as per the agreement.").

In order to create an *ad hoc* international criminal tribunal, the UN Security Council would need to pass a resolution under its Chapter VII powers.[77] This would require two things: (1) the existence of a threat to international peace and security;[78] (2) the cooperation of all five of the permanent members in the Security Council.[79] With respect to the first element, it is likely that the Security Council will consider terrorism a threat to peace and security.[80] However, in respect to the second element, it is improbable that all five permanent members will either vote "for" or "abstain" on a resolution creating a new *ad hoc* tribunal because there is no universal definition and existing definitions are highly contentious.[81] As a result, it is unlikely that the permanent five members will agree on either the creation of an *ad hoc* tribunal to prosecute terrorism, or a universal definition that the tribunal would apply when prosecuting accused terrorists. Consequently, this is an infeasible option for prosecuting terrorism.

Prosecution within the International Criminal Court

In order to prosecute a case in front of the ICC, a series of different criteria must be met,[82] out of which two are most important when determining whether the Court may prosecute an act of terrorism. First, the Court must be able to exercise jurisdiction over the perpetrator. Second, the crime must qualify as at least one of the four crimes for which the Court has substantive jurisdiction.

In order to exercise jurisdiction over a perpetrator, at least one of the following pre-conditions to jurisdiction must be met: (1) the accused is a national of a State Party to the Rome Statute—i.e., the nationality principle, (2) the crime occurred on the territory of a State Party to the Rome Statute—i.e., the territorial principle; (3)

77 Van Schaack & Slye, *supra* note 27, at 68.

78 Without a threat to international peace and security, the issue would not be within the mandate of the Security Council. *See* U.N. Charter art. 39, 41-42 (providing the scope of the Security Council's jurisdiction).

79 When voting on a resolution, each member of the Security Council may either vote "for," "against," or "abstain." The permanent five members of the Security Council are China, France, Russia, the UK, and the US. These five members maintain veto power within the Security Council, meaning if any of the five vote "against" on a resolution, it will not pass. However, veto power does not apply when these members vote "abstain" on a resolution. U.N. Charter arts. 27, 30; PROVISIONAL RULES OF PROC., https://www.un.org/securitycouncil/content/rop/chapter-7 (last visited Feb. 7, 2021).

80 *See* S.C. Res. 1373, *supra* note 23, at preamble ¶ 3 ("Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security").

81 David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q. 840, 842-55 (2012); *see* Security Council draft resolution 562, U.N. Doc. S/2015/562 (2015) (proposing an *ad hoc* tribunal to investigate and try those responsible for the downing of Malaysia Airlines Flight 17; Russia vetoed the resolution); U.N. SCOR, 70th Sess., 7498th mtg., U.N. Doc. S/PV.7498 (July 29, 2015) (providing the comments by various council members criticizing Russia's veto of the resolution as denying justice to the victims of the crime for political reasons); Michael Ramsden, *"Uniting for Peace" in the Age of International Justice*, 42 YALE J. INT'L L. ONLINE 1 (2016) (proposing the motivation of Russia's veto of resolution 562 was the allegation that Russian separatists shot down the aircraft); *cf.* Jennifer Trahan, *Legal Limits to the Veto Power in the Face of Atrocity Crimes*, INT'L CTR. TRANSITIONAL JUST. (Apr. 11, 2019), https://www.ictj.org/news/legal-limits-veto-power-face-atrocity-crimes (arguing that the UN General Assembly should seek an advisory opinion from the International Court of Justice regarding whether "unrestrained veto use while genocide, crimes against humanity, and/or war crimes are ongoing [is] consistent with international law").

82 *See* INT'L CRIM. CT.: HOW THE CT. WORKS, https://www.icc-cpi.int/about/how-the-court-works (last visited Feb. 7, 2021) (explaining the different stages that must be fulfilled before a case may be heard in front of the Court).

the case is referred to the ICC by the UN Security Council, which allows the Court to investigate a non-State Party without first obtaining their consent; (4) a non-State Party accepts the jurisdiction of the Court via an *ad hoc* declaration permitting the ICC to exercise jurisdiction over their territory for a certain period of time.[83]

Should the above criteria be fulfilled, the international community faces a second hurdle: the ICC only has substantive jurisdiction over four crimes—crimes against humanity, war crimes, genocide, and crimes of aggression.[84] Consequently, in order to use the ICC to prosecute the crime of terrorism, the Assembly of States Party would need to amend the constitutive document of the Court—the Rome Statute—to include the crime of terrorism,[85] or the Office of the Prosecutor would need to prosecute an act of terrorism as one of the existing crimes for which the Court has jurisdiction. Unfortunately, each of these methods has significant drawbacks which make their widespread application unlikely.[86]

(i) Amending the Rome Statute to include the crime of terrorism

During the Rome Conference, in which 160 States met to create the ICC, the drafters considered adding terrorism as a crime for which the ICC would have jurisdiction.[87] Regrettably, "no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court."[88] Nevertheless, scholars have continued to debate the merits of extending the Court's mandate to include the prosecution of terrorism.[89]

As noted above, there are identifiable elements to the crime of terrorism within customary international law. However, despite the existence of these elements—and their repeated recognition by scholars—States have continued to disagree on the proper permutation of the elements that would form a universal definition. Consequently, it is improbable that States can draft a non-contentious article providing the criteria for the prosecution of terrorism.[90] More importantly, once

---

83 Rome Statute of the International Criminal Court art. 12, 2187 U.N.T.S. 3 (July 17, 1998) (entered into force July 1, 2002) (hereinafter "Rome Statute"); *cf.* Cóman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 UTRECHT J. INT'L EUR. L. 120, 122-30 (2017) (analyzing the jurisdictional methods through which the Islamic State may be prosecuted at the ICC, and concluding that referral from the UN Security Council is most likely the best method to exercise jurisdiction).

84 Rome Statute, *supra* note 83, at arts. 6-8*bis*.

85 *See* Aviv Cohen, *Prosecuting Terrorist at the International Criminal Court: Reevaluating an Unused Legal tool to Combat Terrorism*, 20 MICH. ST. INT'L L. REV. 219, 236-37 (2012) (explaining the amendment procedure for the Rome Statute).

86 *Contra* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: possibilities and Problems*, 34 RUTGERS L.J. 1 (2002) (arguing that the ICC is capable of prosecuting some acts of terrorism as a war crime or crime against humanity, as long as the elements of the crime are met).

87 United Nations Office on Drugs & Crime, *supra* note 76, at 41.

88 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, annex 1 ¶ E, U.N. Doc. A/CONF.183/10 (July 17, 1998).

89 *Compare* Cohen, *supra* note 85, at 219 (providing an extensive examination of the benefits and detriments to including terrorism within the mandate of the ICC), *with* Hafetz, *supra* note 14, at 160-61 (concluding that prosecuting terrorism as an international crime would weaken international criminal law's "capacity to fulfill its commitments to legality").

90 *Contra* Cohen, *supra* note 85, at 239 (proposing an "Article 8*ter*: Crime of Terrorism," which adopts a similar definition as that included in the 1999 Financing Convention).

the article is drafted, it must then be adopted by the Assembly of States Party, which has already failed to find an agreed upon definition, and then ratified by a sufficient number of States Party. It is therefore unlikely that terrorism will be added to the Rome Statute as a crime for which the Court has jurisdiction.

(ii) Prosecuting terrorism as a Crime Against Humanity

Depending on jurisdiction and context, international criminal tribunals have defined a crime against humanity differently.[91] However, under article 7 of the Rome Statute, a crime against humanity is the commission of one of the enumerated acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[92] Further, while a crime against humanity should be in furtherance of a State or organization policy to attack a civilian population, it does not have to be attributable to a State.[93] Consequently, the act of terrorism's degree of scale is the determinative factor for whether or not the act will qualify as a crime against humanity.[94] This would be established through evidence that the act, or series of acts, are committed as part of an identifiable plan or policy.[95] For instance, if the act of terrorism is sporadic or random—such as the 2019 London Bridge stabbing[96]—it is unlikely to meet the required element of "sufficiently widespread or systematic."[97] Nevertheless, a single act of immense magnitude—such as the 9/11 attacks—may qualify as a crime against humanity due to its mass scale.[98]

Considering the above, it is possible that an act of terrorism may fulfill the substantive criteria necessary to be prosecuted in the ICC as a crime against humanity.[99] However, such prosecution would be highly situation and fact dependent. As a result, while it may be a supplemental means for prosecution in special circumstances, this is not a practical method for the international community to rely on for the widespread prosecution of terrorism.

91 United Nations Office on Drugs & Crime, *supra* note 76, at 42.
92 Rome Statute, *supra* note 83, at art. 7.
93 United Nations Office on Drugs & Crime, *supra* note 76, at 43; Fry, *supra* note 7, at 187.
94 *Id.*
95 *Id.*
96 Megan Specia, *Police Shoot Man on London Bridge, Calling Case a 'Terrorism Incident'*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/world/europe/london-bridge-shooting.html?searchResultPosition=1.
97 United Nations Office on Drugs & Crime, *supra* note 76, at 43.
98 *Id.*; Vincent-Joël Proulx, *Rethinking the Jurisdiction of the Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1058-83 (2003) (applying the requirements of a crime against humanity under the Rome Statute to the facts of the 9/11 attack).
99 *Id.*

(iii) Prosecuting terrorism as a War Crime

Both the International Criminal Tribunal for Yugoslavia and the STL have found that acts of terrorism may constitute war crimes.[100] However, in order for an act to constitute a war crime within the ICC, an international or non-international armed conflict must exist.[101] As a result, the rules of international humanitarian law apply.[102] Analyzing the applicability of prosecution under this offense is therefore outside of the scope of this article.[103]

(iv) Prosecuting terrorism as a crime of Genocide

Under the Convention on the Prevention and Punishment of Genocide, the crime of genocide requires the commission of one of the enumerated acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[104] The enumerated acts are limited to (a) the killing of members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicted on the group conditions of life calculated to bring about its physical destruction, in whole or in part; (d) imposing measures intended to prevent births within the group; or (e) forcibly transferring children of the group to another group.[105] This formulation was adopted in article 6 of the Rome Statute.[106]

Consequently, while it is theoretically possible that an act of terrorism could be prosecuted as an act of genocide, two fundamental conditions must first be satisfied. First, the terrorist act must qualify under one of the five categories of enumerated acts. Second, the prosecution would have to prove that the perpetrator committed the enumerated act with the intent to destroy a national, ethnical, racial, or religious group.[107] As a result, similar to prosecuting an act of terrorism as a crime against humanity, prosecution as an act of genocide would be highly situation and fact dependent. It should therefore be considered a supplemental method to be used in special circumstances, rather than as a common method to prosecute terrorism.[108]

---

100 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 104 (Feb. 16, 2011); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶¶ 91-138 (Int'l Crim. Tri. for the Former Yugoslavia Dec. 5, 2003); Prosecutor v. Galič, Case No. IT-98-29-T, Appeals Chamber Judgement, ¶¶ 81-104 (Int'l Crim. Tri. for the Former Yugoslavia Nov. 30, 2006).

101 Rome Statute, *supra* note 83, at art. 8.

102 Cohen, *supra* note 85, at 246.

103 *See generally id.* at 246-49 (analyzing the applicability of prosecuting an act of terrorism as a war crime within the ICC); Kenny, *supra* note 83, at 131-32 (analyzing the likelihood of prosecuting the Islamic State for war crimes within the ICC).

104 Convention on the Prevention and Punishment of the Crime of Genocide art. 2, 78 U.N.T.S. 277 (Dec. 9, 1948) (entered into force Jan. 12, 1951).

105 *Id.*

106 Rome Statute, *supra* note 83, at art. 6.

107 United Nations Office on Drugs & Crime, *supra* note 76, at 43.

108 *But see* Fry, *supra* note 7, at 190 (concluding that terrorism should be prosecuted within the ICC as either a crime against humanity or an act of genocide. Moreover, the author argues it would be easier to prove genocide because it has fewer elements).

(v) Prosecuting terrorism as a Crime of Aggression

The crime of aggression was added to the jurisdiction of the ICC during the 2010 Review Conference, and it did not come into force until July 17, 2018.[109] However, scholars doubt whether the crime of aggression will be prosecuted soon because of how narrow it is defined.[110] Article 8*bis* defines the crime of aggression as

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[111]

Consequently, to prosecute an individual for the crime of aggression: (1) the perpetrator must be a member of the senior leadership; (2) the crime must be a manifest violation of the UN Charter, as determined by its character, gravity, and scale; (3) the crime must be committed by one State Party against another State Party, unless the crime was referred to the ICC by a UN Security Council resolution; and (4) the States involved must both have ratified the amendment adding article 8*bis*.[112] The only acts of terrorism which would fall under the jurisdiction of the crime of aggression would therefore be those acts committed by a State against another State, provided that both have ratified the amendment.[113] That would exclude all acts of terrorism by non-State actors, which constitute a majority of terrorist acts.[114] Further, the only individuals who could be prosecuted would be those in senior leadership. As a result, this is not a practical method through which the international community could pursue the widespread prosecution of terrorism.

PROSECUTION WITHIN DOMESTIC COURTS

While international criminal law allows for the prosecution of terrorism through international criminal tribunals, States may also prosecute terrorism within domestic courts.[115] States may do so in several circumstances, the most common of which are: (1) when the State is party to a treaty outlawing the acts committed by the accused

[109] International Criminal Court Assembly of States Parties, *Review Conference of the Rome Statute of the International Criminal Court*, U.N. Doc. RC/11, 18 (May 31-June 11, 2010); Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SECURITY (Dec. 19, 2017), https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/.

[110] Whiting, *supra* note 109.

[111] Rome Statute, *supra* note 83, at art. 8*bis*.

[112] MALCOLM N. SHAW, INT'L LAW 326-27 (8th ed. 2017); Whiting, *supra* note 109.

[113] As of February 7, 2021, only 40 States have ratified the Amendment adding the crime of aggression to the jurisdiction of the ICC. AMENDMENTS ON THE CRIME OF AGGRESSION TO THE ROME STATUTE OF THE INT'L CRIM. CT., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (last visited Feb. 7., 2021).

[114] Martinez, *supra* note 86, at 50.

[115] *See* Madeline Morris, *Terrorism and Unilateralism: Criminal Jurisdictions and International Relations*, 36 CORNELL INT'L L.J. 473, 489 (2004) (arguing that the preferrable method to prosecute acts of terrorism is prosecution within domestic courts).

terrorists; (2) when the State invokes one of the five justifications for jurisdiction—territorial, passive personality, active personality, the protective principle, or the universal principle; or (3) when the State prosecutes the perpetrator based on the violation of common domestic criminal law, such as murder, assault, etc.[116] While the first two circumstances are viable options for prosecution, both involve serious issues in their implementation—most importantly, violations of the principle of legality, and inconsistent implementation because there is no universal definition for "terrorism." The third circumstance, on the other hand, circumvents these serious issues. Through the third circumstance, States may implement domestic legislation in which the domestic court treats the second layer of intent for terrorism—"intent to cause broader effects"—as an aggravating factor during sentencing.

Prosecution under existing treaties

A subset of treaties allows for the exercise of jurisdiction based on customary grounds[117]—meaning, if the crime falls within the prescribed conditions, the State is capable of exercising jurisdiction.[118] Under another subset of treaties, the State is required to "prosecute or extradite" (*aut dedere aut judicare*)—meaning, whether or not the State has jurisdiction under customary grounds, the State must either prosecute the accused or extradite the accused to a State that will prosecute.[119]

However, two significant issues make widespread reliance on prosecution using the law established in existing treaties untenable. First, if a State is party to a treaty that prohibits the conduct committed, the State is required to implement laws which can be used to prosecute the offender.[120] However, if the State is not party to the

[116] *See* Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38 DEPAUL L. REV. 923 (1989) (examining the overlap between international criminal law and US domestic criminal law).

[117] The customary grounds for jurisdiction are explained further *infra*, "Exercising jurisdiction over an act of terrorism."

[118] The following treaties each provide for the exercise of jurisdiction based on customary grounds and are nearly identical in their substance: the International Convention for the Suppression of Terrorist Bombings, art. 6; the 1999 Financing Convention, art. 7; the European Convention on the Suppression of Terrorism, art. 13; and the 1994 Convention on Nuclear Safety, art. 9. *See* Hafetz, *supra* note 14, at 159 ("Rather than providing for universal jurisdiction, anti-terrorism treaties generally require States to criminalize conduct, establish extraterritorial jurisdiction over it, and cooperate either by prosecuting or extraditing offenders.").

[119] Examples of such treaties include the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4, 7, and 8; the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, 7, and 8; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, art. 3, 7, and 8. *See* ALEXANDER ORAKHELASHVILI, AKEHURT'S MOD. INTRODUCTION TO INT'L LAW 222 (8th ed. 2019) (providing more examples, including the 1949 Geneva Convention on the Laws of War; the 1973 International Convention on the Suppression and Punishment of the Crime of "Apartheid," and the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment); *see also* LORI FISLER DAMROSCH & SEAN D. MURPHY, INT'L LAW: CASES AND MATERIALS 790-92 (6th ed. 2014) (providing a basic overview of the concept of *aut dedere aut judicare*). *See generally* Int'l Law Comm'n, The obligation to extradite or prosecute (*aut dedere aut judicare*) U.N. Doc. A/68/10, at 108-10 (2014); Int'l Law Comm'n, *The Obligation to Extradite or Prosecute (aut dedere aut judicare)*, U.N. Doc. A/CN.4/612 (Mar. 26, 2009) (providing government comments and observations on the obligation to extradite or prosecute); *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v Sen.),* Judgment, 2012 I.C.J. 422, ¶¶ 94-95 (July 20) (analyzing the concept of *aut dedere aut judicare*).

[120] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176*bis*, ¶ 71 (Feb. 16, 2011) ("States are duty bound by international law to adopt the

treaty, the State is not bound to do so.[121] This results in inconsistent application of treaty provisions within the international community as a whole. Second, because there is no universal definition of terrorism, most international legal instruments either address a component of terrorism[122] or include a variation on the definition of terrorism.[123] This results in inconsistent application of the rules regarding prosecution for acts of terrorism, dependent not on the acts but rather on the treaty to which the State is party, and further impedes consistent application of criminal law within the international community. Consequently, this is not the best method through which the international community should pursue the widespread prosecution of terrorism.

Exercising jurisdiction over an act of terrorism

For a State to bring a criminal case against an individual, the State must have jurisdiction over the crime.[124] There are three categories of jurisdiction: (1) jurisdiction to prescribe, meaning the ability of the State "to make its laws applicable to persons, conduct, relations, or interests;" (2) jurisdiction to adjudicate, meaning the ability of the State "to subject persons or things to the process of its courts or administrative tribunals;" and (3) jurisdiction to enforce, meaning the ability of the State "to induce or compel compliance or to punish noncompliance with its laws or regulations."[125] Under customary international law, a State must have the jurisdiction to prescribe in order to bring a case against an individual.[126] Such jurisdiction would exist provided one of the following customary grounds for jurisdiction applies: (1) territorial principle; (2) the active personality principle; (3) the passive personality principle; (4) the protective principle; or (5) the universality principle.[127]

(i) Territorial Principle

Under the territorial principle, a State may exercise jurisdiction to prosecute a crime if the act was wholly or partially committed on the territory of the State; had a substantial effect on the State's territory; or was intended to have a substantial

necessary implementing legislation once they become parties to international treaties (that is, when such legislation is needed to give effect to international rules at the domestic level).").

121 UNITED NATIONS OFF. ON DRUGS & CRIME, FREQUENTLY ASKED QUESTIONS ON INT'L LAW ASPECTS OF COUNTERING TERRORISM 26-30 (2009).

122 Examples include hijacking, hostage taking, violence against internationally protected persons, terrorist bombing, and financing terrorism.

123 *See supra* notes 7 to 25 and accompanying text (explaining how international conventions often contain different variations of a definition of terrorism).

124 The State is responsible for setting rules that identify the persons and property over which the State maintains jurisdiction and the procedures through which the State may enforce its laws. Shane Sibbel, *Universal Jurisdiction and the Terrorism Acts*, 3 CAMBRIDGE STUDENT L. REV. 13, 13 (2007).

125 Am. Soc'y Int'l L., *Jurisdictional, Preliminary, and Procedural Concerns*, *in* BENCHBOOK INT'L L. § II.A, IIA.1 (Diane Marie Amann ed., 2014), www.asil.org/benchbook/jurisdiction.pdf.

126 *Id.* at IIA-2.

127 *Id.*

effect on the State.[128] This is the most common basis for jurisdiction.[129] For example, the territorial principle is one of the four methods through which the ICC may exercise jurisdiction.[130] Consequently, States will often use this basis for jurisdiction to prosecute those accused of terrorism within their domestic courts.

(ii) Active Personality Principle

The active personality principle, also known as the "nationality principle," permits jurisdiction when the perpetrator is a national of the State prescribing or prosecuting undesirable conduct.[131] It is one of two justifications that are *ratione personae*, meaning the jurisdiction is exercised "by reason of the personality involved."[132] As with the territorial principle, this form of jurisdiction is commonly accepted; for example, the active personality principle is the second of the four methods through which the ICC may exercise jurisdiction.[133]

This principle relies on the concept of nationality—i.e., by virtue of an individual's nationality, he or she is entitled to a series of rights granted by the State,[134] as well as being subject to a series of obligations[135].[136] However, because international law does not prescribe the conditions through which nationality may be granted, it is up to the State to determine how to grant nationality.[137] There are three generally accepted situations where a State will grant nationality: (a) the individual's parents are nationals of the State (*jus sanguinis*); (b) the individual was born within the territory of the State (*jus soli*); or (c) the individual completed a naturalization process to become a national of the State.[138]

While many States will exercise jurisdiction over their nationals for crimes committed on foreign territory, many others restrict such jurisdiction to only the most serious crimes.[139] Nevertheless, due to the heinous nature of acts of terrorism, a domestic court would likely be able to prosecute a national of their State perpetrates such acts. Consequently, this basis of jurisdiction may be used to prosecute acts of terrorism within domestic courts.

---

128 Shaw, *supra* note 112, at 488-93; Sompong Sucharitkul, *Terrorism and International Law*, GOLDEN GATE U. DIG. COMMONS 33-34 (1987), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1527&context=pubs.

129 Shaw, *supra* note 112, at 488-90; *cf.* Sucharitkul, *supra* note 128, at 31-32 (arguing that the territorial principle is the "most cogent and solid foundation for the exercise of jurisdiction" and therefore should take precedence over the other bases of jurisdiction).

130 *See supra* note 83 and accompanying text.

131 In some States, residence within the State or the assertion of a claim of nationality may be sufficient to assert grounds for jurisdiction. Shaw, *supra* note 112, at 493-94, 494 n61, 498; *see* Sibbel, *supra* note 124, at 17 (describing the UK law on active personality jurisdiction, which allows for jurisdiction based on the above conditions).

132 Sucharitkul, *supra* note 128, at 34.

133 *See supra* note 83 and accompanying text.

134 For example, the ability to vote; the ability to obtain a passport; and the diplomatic protection of the State.

135 For example, the obligation to comply with the laws of the State, the obligation to vote (for some States), or the obligation to participate in the military (for some States).

136 Shaw, *supra* note 112, at 493-94.

137 *Id.* at 494.

138 *Id.* at 495-96.

139 *Id.* at 496.

(iii) Passive Personality Principle

Under the passive personality principle, a State may prosecute the perpetrator of a crime committed on foreign territory when the crime has, or will, affect nationals of the State.[140] It is the second of the five justifications that is *ratione personae.*[141] However, this is a controversial basis for jurisdiction.[142]

The passive personality principle was first used by Mexico in the *Cutting Case* (1887), where a Mexican national sued a US citizen for allegedly libeling the Mexican national in the US.[143] Later, it was used in the *S.S. Lotus* (1927) case, when Turkey prosecuted a French national for the collision of a French and Turkish vessel on the high seas which resulted in the death of Turkish nationals.[144] In both cases, the States of the accused strongly protested the exercise of jurisdiction over their nationals; however, neither case resolved the issue of whether passive personality jurisdiction is valid.[145] There is continued controversy over the principle, with the Restatement (Third) of Foreign Relations Law claiming that the passive personality principle has not been generally accepted for ordinary torts or crimes.[146]

All this being said, the passive personality principle "is increasingly accepted as applied to terrorist . . . attacks on a State's nationals by reason of their nationality, or to assassinations of a State's diplomatic representatives or other officials."[147] Under the International Convention against the Taking of Hostages, jurisdiction may be established based on the nationality of the hostage "if [the State of nationality] considered it appropriate."[148] A similar approach is taken in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons[149] and the Convention against Torture.[150]

Further, following the 1986 *Achille Lauro* terrorist attack, the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act, which allowed for jurisdiction over homicide or physical violence against a US national, regardless of whether the violence occurred in US territory.[151] More recently, in *United States v. Yunis (No. 2),*[152] the US federal court prosecuted a Lebanese national suspected of hijacking a Jordanian airline outside of the territorial US, based on the fact that the airplane had several American nationals onboard.

---

140 *Id.* at 497; *see* Sibbel, *supra* note 124, at 17 (describing the UK law allowing for passive personality jurisdiction).
141 Sucharitkul, *supra* note 128, at 34.
142 Sibbel, *supra* note 124, at 17.
143 John Bassett Moore, 1906 *Digest of International Law*, vol. II, at 228; Shaw, *supra* note 112, at 497.
144 1927 P.C.I.J. (ser. A) No. 10, at 92 (Sept. 7).
145 Shaw, *supra* note 112, at 497.
146 Restatement (Third) of Foreign Relations Law of the United States, § 402, comment g. (AM. L. INST. 1987).
147 *Id.*
148 International Convention against the Taking of Hostages art. 9, Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983) [hereinafter 1979 Hostages Convention].
149 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 3(1)(c), Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977).
150 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(1)(c), Dec. 10, 1984, 1465 U.N.T.S. 85.
151 Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, 896.
152 681 F. Supp. 869 (D.D.C. 1988).

As ICJ Judges Higgins, Koojimans, and Buergenthal noted in their joint separate opinion in the *Congo v. Belgium (Arrest Warrant)* case, while the passive personality principle was previously widely unaccepted, "today [it] meets with relatively little opposition."[153] As a consequence, States are likely to assert this means of jurisdiction in order to try perpetrators of terrorism within their domestic courts.

(iv) Protective Principle

This is another controversial base for jurisdiction.[154] Under the protective principle, a State may assert jurisdiction over the conduct of nationals and non-nationals, committed outside of the State's territory, due to the fact that the act was directed against critical State interests or functions and therefore affected—or was intended to affect—the prosecuting State's security or vital interests.[155] Such crimes may include currency counterfeiting, drug trafficking, and human trafficking.[156] The justification for this form of jurisdiction is the protection of a State's interests, considering that the crime committed may not be an offense under the laws of the perpetrator's nationality or of the territory in which the offense was committed.[157] Treaties which provide multiple grounds for jurisdiction over particular offenses will often include the protective principle.[158]

Considering the globalized nature and impact of terrorist attacks on the national security of States—and the international community as a whole—acts of terrorism will often fall within the category of applicable crimes.[159] Consequently, this basis of jurisdiction may be exercised to try the perpetrator of an act of terrorism who is not a national of a State and the act was not committed on the territory of the State, but the act did—or would have—affected the interests and security of the State.[160]

(v) Universal Jurisdiction

Under universal jurisdiction, also known as "the universal principle," when an accused commits acts which are particularly offensive and/or threaten the international community as a whole, any State may define and prescribe punishment for the conduct, whether or not there is a nexus between the perpetrator, the crime, or the prosecuting State.[161] Historically, universal jurisdiction was limited

153 Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. Rep. 3, 63, 76-77 (Feb. 14) (joint separate opinion by Higgins, J.; Koojimans, J.; & Buergenthal, J.)

154 Shaw, *supra* note 112, at 499.

155 *Id.*; Sibbel, *supra* note 124, at 17.

156 Sibbel, *supra* note 124, at 17 (describing the UK law allowing for active personality jurisdiction).

157 Shaw, *supra* note 112, at 499.

158 *See*, *e.g.*, 1979 Hostages Convention, supra note 147; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363.

159 *See* John F. Murphy, *The Impact of Terrorism on Globalization and Vice-Versa*, 36 INT'L L. 77 (2002) (describing the impact of globalization on terrorism in light of the expansion in global economic flows; political engagement and interest; and the mobility of people, information, and ideas).

160 *Contra* Sibbel, *supra* note 124, at 17 ("[I]t is unlikely that all or even most cases of terrorist bombing and financing in the world may be characterised as affecting the vital interests of the UK.").

161 Restatement (Third) of Foreign Relations Law of the United States, § 404; Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 324 (2001); *see also Polyukhovich v. Commonwealth*, (1991) 172 CLR 501, ¶ 24 (Austl.) (suggesting that universal jurisdiction "is based on the notion that certain acts are so universally

under customary international law to situations where crimes "(1) are universally condemned by the community of nations; and (2) occur either outside of a State, or where there is no State capable of punishing, or competent to punish, the crime (as in a time of war)."[162] However, the Restatement (Third) of Foreign Relations Law included "universal jurisdiction," defining it as the ability to "define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern."[163] The Restatement further provides examples of these offenses: piracy, slave trade, genocide, war crimes, attacks on or hijacking of aircraft, and possibly certain acts of terrorism when the State otherwise lacks the jurisdiction to prescribe.[164] Other crimes that may also fall into this category include torture and crimes against humanity.[165] Nevertheless, despite the inclusion of terrorism within the Restatement, the expansion of the classic understanding of universal jurisdiction to include terrorism is heavily debated.[166]

Courts in the UK, Spain, Belgium, Switzerland, France, and Germany have invoked universal jurisdiction as a means through which to try cases.[167] However, the ability to prosecute via universal jurisdiction is not automatic; States must enact national laws allowing for the regulation of conduct abroad by non-nationals against non-nationals.[168] Three conditions must be met for universal jurisdiction to apply: (1) there is specific grounds for universal jurisdiction; (2) there is a clear and precise

condemned that, regardless of the [location, for the purposes of determining jurisdiction,] of the offence[*sic*] and the nationality of the offender or the victim, each state has jurisdiction to deal with the perpetrators of those acts").

162 United States v. Yousef, 327 F.3d 56, 105 (2d Cir. 2003).

163 Restatement (Third) of Foreign Relations Law of the United States, § 404.

164 *Id.*

165 Orakhelashvili, *supra* note 119, at 221. *See generally* The Scope and Application of the Principle of Universal Jurisdiction (Agenda Item 85), GEN. ASSEMBLY OF THE UNITED NATIONS, https://www.un.org/en/ga/sixth/71/universal_jurisdiction.shtml (last visited Feb. 9, 2021) (providing details of the UN Sixth (Legal) Committee's work on clarifying the principle of universal jurisdiction).

166 *Compare* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (arguing in favor of the expansion of universal jurisdiction to include terrorist acts) *and* Pinochet v. Bartle, UKHL 17, ¶ 316 (1999) (noting the decision from *Eichmann* wherein universal jurisdiction was determined to have been "an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute"), *with* Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF. (July-Aug. 2001) (arguing that universal jurisdiction should be limited, not expanded) *and* Yousef, 327 F.3d at 106-08 (holding that—unlike piracy, war crimes, and crimes against humanity—universal jurisdiction does not apply to acts of terrorism under US law).

167 Cases include Att.-Gen. of Israel v. Eichmann, 56 AM. J. INT'L L. 805, 814 (Dist. Ct. Jerusalem 1961); Jorgic v. Germany, app. no. 74613/01, 13-20 (2007); Matter of Extradition of Demjanjuk, 612 F. Supp. 544, 555-58 (N.D. Ohio 1985); *Pinochet*, at 9, 55-57, 65. *See* Fry, *supra* note 7, at 177-78 (providing more examples of cases, and concluding "the principle of universality is a well-recognized basis for jurisdiction"); *see also* Bradley, *supra* note 161, at 325 (noting the "growing support for extending the universal jurisdiction theory to certain acts of terrorism").

168 The US Congress, for instance, has adopted various legislation authorizing jurisdiction on the basis of the universality principle. *See* 18 U.S.C. § 1651 (2006) (outlawing piracy under the law of nations); 18 U.S.C. § 1091 (2006) (outlawing genocide); 18 U.S.C. § 2340A (2006) (outlawing torture); and 18 U.S.C. § 2441 (2006) (outlawing war crimes). *See generally* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001) (providing a background on the application of universal jurisdiction); *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AMNESTY INT'L (2012), https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf (analyzing the universal jurisdiction statutes of different States); INT'L HUMANITARIAN LAW NAT'L IMPLEMENTATION DATABASE, https://ihl-databases.icrc.org/ihl-nat (last visited Feb. 7, 2021) (collection of the different national legislation allowing for universal jurisdiction);

definition of the crime and of its constitutive elements; and (3) there is a national mechanism through which the judiciary of the State may exercise jurisdiction over the crime.[169] Especially after the adoption of the Rome Statute, an increasing number of States have implemented universal jurisdiction legislation.[170] Further, in 2001, a group of international scholars and jurists attempted to clarify the principles of universal jurisdiction by developing the Princeton Principles on Universal Jurisdiction.[171] However, the Princeton Principles' practical effect is unclear.[172]

Crimes may also be subject to "universal jurisdiction" based on international treaties or agreements.[173] For instance, some treaties create a "prosecute or extradite" (*aut dedere aut judicare*) regime—essentially creating universal jurisdiction through provisions of the treaty.[174] However, under a "prosecute or extradite" regime, a State must have physical possession of the accused.[175] Consequently, such a regime is not the same as "pure" universal jurisdiction, which does not require that the prosecuting State have possession of—or any other nexus to—the accused.[176]

Universal jurisdiction has been vital in prosecuting crimes that would otherwise have gone unpunished.[177] However, universal jurisdiction is subject to several limitations, including the potential for abuse.[178] For example, the lack of a universal

STEPHEN MACEDO, UNIVERSAL JURISDICTION: NAT'L CTS. AND THE PROSECUTION OF SERIOUS CRIMES UNDER INT'L LAW (2004) (analyzing the implementation of universal jurisdiction in domestic courts).

169 Kesab Prasad Bastola, *Universal Jurisdiction and its Applicability,* 9 NJA L.J. 105, 110 (2015).

170 This may be due to the preamble of the Rome Statute, which—while not requiring that States adopt national legislation—"recalls" that it is "the duty of every State . . . to exercise criminal jurisdiction over those responsible for international crimes." Damrosch & Murphy, *supra* note 119, at 790-92.

171 PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001). *See generally* Bastola, *supra* note 169*,* at 111-13 (summarizing the Princeton Principles and their application to State jurisdiction).

172 *Compare* G. John Ikenberry, *Princeton Principles on Universal Jurisdiction,* FOREIGN AFF. (Jan/Feb 2002) (reviewing the Princeton Principles and concluding that, at a minimum, the principles have created a guideline for how to apply universal jurisdiction in order to prevent abuse) *and* Barbara Crossette, *Guide Proposed for Trial of Rouge Leaders*, N.Y. TIMES (July 23, 2001) (concluding that the principles provide necessary guidance on how to apply universal jurisdiction) *and* Laura Sector, *The Year in Ideas: A to Z: Justice Without Borders*, N.Y. TIMES (Dec. 9, 2001) (concluding that the principles may be vital in preventing abuse of universal jurisdiction), *with* Dephne Eviatar, *Debating Belgium's War-Crimes Jurisdiction*, N.Y. TIMES (Jan. 25, 2003) (concluding that, in practice, the Princeton Principles have been unhelpful in resolving judicial disputes regarding the application of universal jurisdiction).

173 Orakhelashvili, *supra* note 119, at 222.

174 *See supra* note 122 and accompanying text. *But see* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. Rep. 3, 63, ¶ 41 (Feb. 12) (joint separate opinion by Higgins, J.; Koojimans, J.; & Buergenthal, J.) (concluding that *aut dedere aut judicare* is "an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere," and is therefore not a form of universal jurisdiction).

175 Sibbel, *supra* note 124, at 18.

176 Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. Rep. 3, 35, 39-44 (Feb. 12) (separate opinion by Guillaume, Pres.) (concluding *aut dedere aut judicare* creates a "subsidiary universal jurisdiction" as opposed to "true universal jurisdiction").

177 For example, the US Alien Torts Claims Act of 1789 was used in *Filartiga v. Peña-Irala* to allow one Paraguayan to sue another for an alleged tort committed in Paraguay. The plaintiff would not have been able to seek relief had the US courts not been able to exercise jurisdiction. 630 F.2d 876 (2d Cir. 1980); *see also* Katherine Gallagher, *Universal Jurisdiction in Practice*, 7 J. INT'L CRIM. JUST. 1087, 1100-14 (2009) (examining the legal justifications for, and ultimate result of, prosecutions via universal jurisdiction in Spain, Germany, and France).

178 Bradley, *supra* note 161, at 325 ("There is . . . no assurance that the prosecuting nations will apply fair standards of criminal procedure in adjudicating these cases. And there is a danger that the prosecution of foreign citizens under this concept—especially foreign leaders—will undermine peaceful international relations.").

definition for terrorism means States with opposing interests to NLMs could attempt to prosecute foreign individuals for crimes committed during civil unrest in foreign States.[179] Further, after adopting legislation authorizing expansive universal jurisdiction, public pressure has caused some States to amend the legislation to limit jurisdiction.[180] Lastly, considering the backlash to "pure" universal jurisdiction statutes, it is unlikely that such jurisdiction could be used to prosecute a perpetrator unless some form of nexus exists between the perpetrator, the crime, and the prosecuting State.[181]

The issue of state-specific definitions

As seen above, there are a myriad of different methods through which a domestic court may exercise jurisdiction over a perpetrator. Nevertheless, as Judge Cassese says, "however imperfect and incomplete, a common working definition is necessary so all concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?"[182] Unfortunately, no such common definition exists.

Instead, each State adopts within its domestic legislation different definitions for terrorism, which each come with their own issues. For one, such definitions are subject to abuse.[183] For another, such definitions may inadvertently encompass peaceful protests and NLMs.[184] Lastly—and possibly most importantly—variations on the definition of terrorism have repeatedly been criticized for failing to fulfill the principle of legality.[185] Consequently, while States may exercise jurisdiction based on any of the above customary grounds, the lack of a universal definition for terrorism will cause inconsistent prosecution, depending upon which definition the specific State has adopted. Therefore, this is not a preferable method through which the international community should pursue the widespread prosecution of terrorism.

179 *See supra* note 11 to 15 and accompanying text.

180 For example, Belgium adopted an expansive universal jurisdiction law in 1993, which provided for the protection of victims of war crimes, genocide, and crimes against humanity. Unfortunately, however, the law was politicized and ultimately repealed in 2003. UNITED NATIONS, OBSERVATIONS BY BELGIUM ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION 13-14 (2010), https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf; *see also* Eviatar, *supra* note 172 (providing a history of the Belgian universal jurisdiction statute); *cf.* OSCAR SCHACHTER, INT'L LAW IN THEORY AND PRACTICE 268 (1991) (addressing whether the limitation of reasonableness has caused a movement towards limiting existing universal jurisdiction statutes).

181 *Contra* Douglass Cassel, *Universal Criminal Jurisdiction*, 31 HUM. RTS. 22, 22-23 (2004) (identifying the issues with universal jurisdiction, but concluding nevertheless that it is necessary for the prosecution of heinous crimes which would otherwise be left in impunity).

182 Cassese, *supra* note 29, at 934.

183 *See supra* note 61 to 64 and accompanying text.

184 *See supra* note 11 to 15 and accompanying text.

185 *See supra* note 65 to 71 and accompanying text.

PROSECUTION USING TERRORISM AS AN AGGRAVATING FACTOR

One solution to the problem of State-specific definitions for terrorism is the use of commonly existing domestic criminal statutes to prosecute the underlying *act* committed by an accused terrorist. Once a defendant is found guilty, the Court may then use the secondary layer of *intent* to commit a terrorist act as an aggravating factor during sentencing.

In regards to the *objective* element of terrorism under customary international law, the *act* or *conduct* that is often enumerated as illicit is conduct which is already criminalized under any domestic criminal law—such as murder, bombing, assault, money laundering, hijacking, and so forth.[186] Further, the illicit act is committed against *victims*, which may be private individuals, state or international officials, law enforcement officers, or even the civilian population as a whole.[187] In regards to the "transnational" element under customary international law, if an act of terrorism lacks a *transnational* component, it would fall exclusively within the jurisdiction of the domestic courts of the State.[188] Consequently, for virtually every act of terrorism, the domestic court of at least one State will maintain jurisdiction[189] to prosecute the act under their existing criminal law.

In regards to the *subjective* element of terrorism under customary international law, terrorism maintains two layers of intent—the intent to commit the underlying act; and the specific intent to compel an entity to act, or refrain from acting, in a specific way.[190] Consequently, rather than drafting a statute specifically criminalizing terrorism, States can prosecute the perpetrator of an act of terrorism for the underlying criminal act (murder, assault, hijacking, etc.) based on the first layer of intent—i.e., the intent to commit the underlying act. The State may then use the second layer of intent—i.e., the specific intent to compel an entity to act or refrain from acting—as an aggravating factor which increases the sentence of the perpetrator, should he or she be convicted.

Through this regime, States would avoid several issues implicated in the other options for prosecuting terrorism. First, because the courts would utilize existing criminal law, there would be no specific definition of terrorism that could inadvertently apply to peaceful protestors or NLMs. Second, prosecution through this regime would not require States to create or adopt an international treaty; instead, States would only be required to pass legislation which classifies "intent to commit a terrorist act" as an aggravating factor to be considered during sentencing. Third, the principle of legality would not be implicated as the criminal conduct with which individuals would be prosecuted is widely known to be illegal. Fourth,

186 Kovač, *supra* note 67, at 271.
187 *Id.*
188 *Id.*
189 This jurisdiction will most likely be based on the territoriality principle, though it may also be based on active personality, passive personality, or the protective principle. While universal jurisdiction could apply, considering the evolving nature of universal jurisdiction statutes, this article does not argue in favor of widely applying this basis for jurisdiction.
190 *Id.*

States would be on the same page as to what conduct is "the target of their repressive action"[191] as the States would prosecute conduct which is already outlawed in virtually all domestic criminal codes.

Practical Implications for Practitioners: Canada and the US

This regime is not theoretical; in fact, it is currently used in several countries. For example, under the Canadian Anti-Terrorism Act,[192] rather than creating a crime of "terrorist activity," the Canadian *Criminal Code* incorporates "terrorist activity" as an aggravating factor to be considered during the sentencing of regular crimes.[193] As a result, if an individual is convicted and found to have committed the act in pursuit of "terrorist activity," the individual may be sentenced to life imprisonment.[194] Consequently, prosecutors in Canada may utilize the regime proposed in this article, wherein defendant's sentences may be increased if the aggravating factor of "pursuing terrorist activity" is proven to the court.[195]

In contrast, the US combines a series of different approaches. The US Code both prohibits acts of terrorism[196] and defines the "federal crime of terrorism."[197] Additionally, the Federal Sentencing Guidelines add the "federal crime of terrorism" as an aggravating factor to be considered at sentencing.[198] The US therefore utilizes both the regime proposed within this article—i.e., treating the pursuit of "terrorist activity" as an aggravating factor—and the regime rejected by this article—i.e., specifically defining and outlawing an act of "terrorism" within the State's criminal code.[199] Thus, in order for practitioners in the US to best utilize the system proposed by this article, the US Code would need to be amended[200] to focus on the underlying

191 Cassese, *supra* note 29 and accompanying quote by Antonio Cassese.

192 See ABOUT THE ANTI-TERRORISM ACT, https://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html (last visited Feb. 5, 2021).

193 Canadian Criminal Code, R.S.C. 1985, c. C-46, § 718.2(a)(v) ("[A] sentence should be increased or reduced for any relevant aggravating or mitigating circumstances relating to the offense or the offender," including the aggravating factor of "evidence that the offense was a terrorism offense"); Forcese, *supra* note 35, at 282-83 (explaining section 2 of the Canadian *Criminal Code* which includes the offense of attempt, conspiracy, counselling and accessory to a crime).

194 *Id.*

195 *See generally* Michael Nesbitt, Robert Oxoby & Meagan Potier, *An Empirical and Qualitative Assessment of Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases*, IZA DP NO. 12255 (Mar. 2019), http://ftp.iza.org/dp12255.pdf (conducting an in-depth analysis of terrorism sentencing decisions in Canada since September 2001, and how Criminal Code section 718.2(a)(v) has affected this sentencing).

196 18 U.S.C. § 2332b(a)(1) (2018).

197 § 2332b(g)(5).

198 Federal Sentencing Guidelines Manual § 3A1.4(a) (2018) ("If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism [as defined by 18 U.S.C. § 2332b(g)(5)], increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.").

199 *See, e.g.*, United States v. El-Mezain, 664 F.3d 467 (2011) (appealing defendant's conviction of conspiracy and substantive offenses for providing material aid and support to Hamas, a designated terrorist organization, and their sentencing using 18 U.S.C. § 2332(g)(5) and Federal Sentencing Guideline § 3A1.4).

200 *But see* Peugh v. United States, 569 U.S. 530, 533, 548-49 (2013) (holding that changes in sentencing guidelines that are advisory are not retroactive, and therefore the ex-post-facto non-retroactivity doctrine applies to both mandatory and advisory guidelines).

illicit act committed by the defendant—instead of providing an explicit definition of "terrorist act" under which a defendant can be prosecuted.[201]

Two other points are important to note for practitioners in the US—first, under US Constitutional law, any facts that increase the penalty for a crime beyond the statutory maximum, or cause the imposition of a mandatory minimum sentence, must be proven by a jury beyond a reasonable doubt.[202] Second, due to the above legal precedent, facts that are considered under both federal and state mandatory sentencing guidelines must be found by a jury beyond a reasonable doubt.[203] As a result, federal sentencing guidelines are now considered advisory; therefore, judges must give valid consideration to the federal sentencing guidelines but they are not bound to follow the guidelines directly.[204] Consequently, in order to increase a defendant's sentence using the regime proposed in this article, prosecutors in the US must prove to a jury beyond a reasonable doubt that the defendant committed an act in pursuit of "terrorist activity".

Practical Implications: Non-Compliant States

Because this regime is already in practice in various countries worldwide, States have a model on which they can base their legislation—and proof of the success of this regime. There is, however, a drawback to the regime. If the States with customary grounds to exercise jurisdiction are unwilling or unable to prosecute the perpetrators of a terrorist act, it may be difficult for practitioners to hold the accused accountable.

However, in such a case, practitioners could utilize the ICC to hold the perpetrator accountable. The ICC may be able to exercise jurisdiction as it may fall into the "special circumstances" in which the ICC should prosecute the perpetrators for the crime of genocide, or crimes against humanity. Consequently, while this proposed regime is not perfect, it could be applied widely, and the other methods

[201] However, such an amendment could be unconstitutional under the Due Process clause. *See* Johnson v. United States, 576 U.S. 591, 597, 605-06 (2015) (holding that void for vagueness and fair notice protections apply to criminal sentencing statutes). *But see* Beckles v. United States, 137 S. Ct. 886, 890, 892 (2017) ("[A]dvisory Guidelines are not subject to vagueness challenges under the Due Process Clause").

[202] Apprendi v. New Jersey, 120 S. Ct. 2348, 2355-60 (2000) (holding that any fact which increases the penalty for a crime beyond the statutory maximum becomes an element of the offense under the Due Process clause and the Sixth Amendment, and therefore must be submitted and found by a jury by proof beyond a reasonable doubt); Alleyne v. United States, 570 U.S. 99, 103 (2013) (extending the holding in *Apprendi* to apply to facts that cause the imposition of a mandatory minimum).

[203] Blakely v. Washington, 542 U.S. 296, 301-05, 313 (2004) (applying *Apprendi* to state sentencing guidelines; therefore, mandatory state sentencing guidelines that allow judges to enhance sentences beyond the prescribe statutory maximum based on facts not reviewed by a jury violate the Sixth Amendment right to a trial by jury); United States v. Booker, 543 U.S. 220, 233-34, 243-44 (2005) (extending *Blakely* to mandatory federal sentencing guidelines, thus invalidating the provision that made the federal sentencing guidelines mandatory and mandating that federal sentencing guidelines must be advisory).

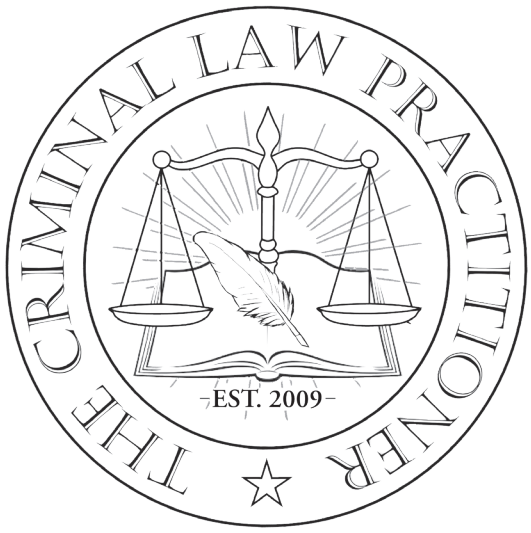
[204] Gall v. United States, 552 U.S. 38, 46-49 (2007) (holding that, in accordance with the precedent set in *Booker*, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . .. The Guidelines are not the only consideration, however. . . . [The judge] must make a reasonable individualized assessment based on the facts presented."). *See generally* FEDERAL SENTENCING GUIDELINES, https://www.law.cornell.edu/wex/federal_sentencing_guidelines (last visited June 24, 2021).

of prosecution could be utilized as supplemental means to redress those cases not encompassed within it.

CONCLUSION

As this article has demonstrated, it is difficult—perhaps even impossible—to make terrorism an international crime without first creating—and agreeing to—a universal definition. Further, prosecution within the ICC using the existing bases for substantive jurisdiction is possible, but not tenable for the widespread prosecution of acts of terrorism. Because there is no universal definition for terrorism, it is also difficult to adopt a universally accepted regime through which States may prosecute suspected terrorists within their domestic courts. Moreover, no existing definition can both comply with the principle of legality, and avoid inadvertently including peaceful protesters or other forms of protected speech.

Consequently, rather than expanding the use of universal jurisdiction, it would be better for States to prosecute the underlying acts of terrorism using the already existing, well-known, and commonly accepted domestic criminal law. States may then classify terrorism as an aggravating factor in their respective domestic criminal law regimes, in order to increase the sentence for individuals who commit other crimes in the pursuit of terrorism. In such a system, the international community would be able to avoid the issues raised by the other prosecutorial methods, while also addressing acts of terrorism in a widespread manner. As a result, scholars could retire the cliché phrase "one man's terrorist is another man's freedom fighter" as States would instead be consistent in prosecuting anyone who has violated criminal law.

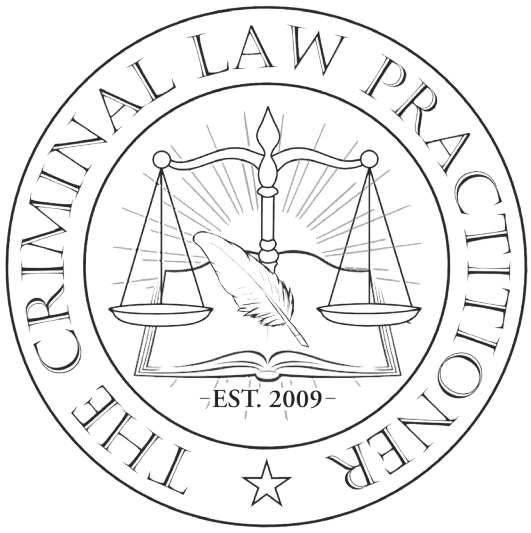

THE CRIMINAL LAW PRACTITIONER
EST. 2009

SEPHORA GREY

Sephora Grey is a 3L at Georgetown University Law Center. At Georgetown she is the Editor-in-Chief of the American Criminal Law Review; the nation's premier journal of criminal law. She is also a member of the trial advocacy division of barristers' council, involved in Georgetown's Black Law Students Association, and is a writing fellow for RISE (Georgetown's pre-orientation program for underrepresented law students). During her 1L year, she served as a Georgetown student ambassador, was an intake volunteer for the Washington Lawyers Committee for Civil Rights and Urban Affairs, and was a summer associate at a big law firm in New York. During her 2L year, she was a RISE teaching fellow and mentor, served as the trial advocacy assistant director, and externed for the Department of Justice. During Sephora's 2L summer, she was a summer associate at a big law firm in Washington, D.C.. After graduation, she will be clerking on the federal district court. Finally, Sephora is also the founder, and host, of Topping the Curve, a law school podcast created to give advice to incoming and current law students to help them succeed in law school and in their chosen career path.

LENA RAXTER

Lena Raxter is a Dual-Degree J.D. Candidate at American University, Washington College of Law, and the University of Ottawa, Faculty of Law (Common Law Section). Born and raised in Raleigh, North Carolina, Lena attended the University of British Columbia in Vancouver, Canada, where she graduated with a B.S. in Biology and a minor in International Relations. Before law school, Lena worked with the United Nations MY World 2030 Campaign to help implement the Sustainable Development Goals by mobilizing civil society. Lena has since worked on a series of projects focusing on public international law, including the Kovler Project Against Torture and the War Crimes Research Office. She currently works as a legal assistant for the Inter-American Court on Human Rights, and a research assistant for Washington College of Law, Dean Emeritus Claudio Grossman.


THE CRIMINAL LAW PRACTITIONER
EST. 2009