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# Should Terrorism Be Subject to Universal Jurisdiction?

Luz E. Nagle\*

I appreciate the opportunity to read and comment upon Professor Naomi Norberg's examination of the relationship between terrorism and international criminal law.<sup>1</sup> The papers delivered at this symposium and the themes proffered show us just how expansive are the issues evolving in the realm of international criminal justice. At the same time, Professor Norberg's work and that of other presenters at this forum demonstrate how open discussion of specific topics of international criminal law compel thoughtful legal scholars to ruminate on how preserving the rule of law in the international arena remains a complicated and fragile proposition requiring international vigilance and cooperative stewardship.

Professor Norberg gives us much to consider in her discussion of whether terrorism should or can be subject to the jurisdiction of the International Criminal Court and other criminal tribunals having universal jurisdiction. She takes the position that it does not, arguing that terrorism fails to merit ICC jurisdiction because it is a crime yet to be defined due to politics. She furthers this argument by stating that the ICC "would be hard pressed to fulfill the goals of deterrence and justice for victims,"<sup>2</sup> and that in trying to do so some nations might respond to internal and external terrorist threats by erecting barriers to suppress fundamental rights "in the name of combating what seems to have become the 'crime of crimes'

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1. Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11 (2009).
2. *Id.* at 14.

of the 21<sup>st</sup> century.”<sup>3</sup> Professor Norberg reaches these conclusions by looking at the differences between international and transnational crimes, by examining various definitions, at times tainted by politics, that give terrorism an unpredictable and unforeseeable application of ICC norms, and by considering responses from the United States and that United Nations Security Council. The responses instead of fulfilling the goals of international criminal law, are counter to the principles of the ICC because they have resulted in violations of human rights. She also includes a very interesting discussion of how an “international state of emergency” triggered by the events of September 11, 2001, has generated worldwide extensive, severe legislation internationalizing a crime that is mainly “set deep within national borders.”<sup>4</sup>

My comments address the following points of Professor Norberg’s paper: 1) the distinctions between international and transnational crimes; 2) how terrorism should be defined for purposes of universal adjudication; 3) how governments with totalitarian leanings have used the occurrence of terrorist acts to promulgate legislation that could be construed as oppressive and in violation of human rights, and; 4) how terrorism is being fought with immigration law.

Professor Norberg’s differentiation between international crimes and transnational crimes is vital to the theme of her paper, but in my opinion, invites more in-depth treatment. She bases the differences on precise definitions of the conducts prohibited and international consensus as to what constitutes crimes against humanity as recognized under international law. While I think that the differences addressed by Professor Norberg are very well presented, there are some other points worthy of her attention.

Professor Norberg asserts that societies’ essential values compel designating a conduct as a crime, and therefore, criminal law is a barometer of values that applies in both domestic and international criminal law. Applying the barometer to the events of World War II, she submits that genocide, crimes against humanity and war crimes became international crimes by consensus of the international community “as to the values protected by those prohibitions.”<sup>5</sup> In this regard, I would suggest that it is not a consensus, but rather, a shared understanding of

3. *Id.*

4. *Id.* at 12-13.

5. *Id.* at 15.

patterns of expectations that compel nations to delineate what constitutes international crimes.<sup>6</sup>

Customary international law,<sup>7</sup> embodies “inherent values and interests of the community of nations”<sup>8</sup>. It dictates that conduct violating basic human rights in ways that “deeply shock the conscience of humanity”<sup>9</sup> constitutes international crimes “of concern to the ‘international community as a whole’.”<sup>10</sup> International expectation to criminalize such behavior is then reached by virtue of the values protected and the interests threatened. The values and interests transcend individual goals, national borders, and sovereignty limitations because they are common to and affect all nations equally. Even if they occur in a few nations, the immediate and direct effect of international crimes endangers the well being, peace, and security of all mankind.<sup>11</sup>

In such events, the international community, through the authority of the United Nations Security Council,<sup>12</sup> acquires a legitimate right to intrude in the sacrosanct

6. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 107 (Cambridge Univ. Press 1999) (“It may be that all rules of international law involve legitimate expectations. Apart from the role played by acquiescence, rules of customary international law involve legitimate expectations because any change from a voluntary pattern of behavior to a customary rule involves the transformation and legitimiz[ation] of patterns of behavior, around which expectations of a legal character necessarily develop.”).
7. See Jordan J. Paust, *The Importance of Customary International Law during Armed Conflict*, 12 *ILSA J. INT’L & COMP. L.* 601, 602 (2006) (noting that “Customary international law is based in general and dynamic patterns of opinio juris and practice, but when a customary norm comes into existence it is universally applicable.”) (emphasis omitted).
8. Otto Triffterer, *Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus ‘Protection of National Security Information’, Article 72 Rome Statute*, in *NATIONAL SECURITY AND INTERNATIONAL CRIMINAL JUSTICE* 63 (Herwig Roggemann and Petar Sarcevic, eds., 2002).
9. Rome Statute of the International Criminal Court pmb., July 15, 1998, 2187 U.N.T.S. 3, available at [http://www1.umn.edu/humanrts/instree/Rome\\_Statute\\_ICC/Rome\\_ICC\\_preamble.html](http://www1.umn.edu/humanrts/instree/Rome_Statute_ICC/Rome_ICC_preamble.html), (“[D]uring this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”).
10. Triffterer, *supra* note 8, at 63.
11. Rome Statute, *supra* note 9, at 3; See also Triffterer, *supra* note 8, at 63. The ICC preamble reads: “Recognizing that such grave crimes threaten the peace, security and well-being of the world.”
12. Under the United Nations Charter, the Security Council is charged with maintaining the international peace and security by establishing peacekeepers, imposing economic sanctions, authorizing military action under UN Charter Article 16, and issuing resolutions establishing ad-hoc tribunals for international prosecutors to investigate international crimes. See Anne-Marie Slaughter, *Use Courts, Not Combat, to Get the Bad Guys: Pre-emptive Justice*, *INT’L HERALD TRIBUNE*, Nov. 20, 2003, at 9, available at

sovereignty of a nation, and may take such punitive measures as economic sanctions, use of force, establishing an ad-hoc tribunal, or authorizing a national or international force to arrest an indicted suspect.<sup>13</sup>

International law provides for universality in order to prevent damage to the international community and to avoid impunity for those committing core crimes.<sup>14</sup> This, in turn, triggers an international duty to prosecute those accused of committing serious crimes, regardless of whether they are in violation of the *domestic* law of the country wherein the crimes are perpetrated. This duty is well illustrated in the case of Klaus Barbie, in which the French Court of Appeals dismissed the defendant's argument that his extradition to France rendered his detention and indictment null on the basis of the manner in which he was transferred. According to the Court the *international crime* with which Barbie had been charged rendered him subject to an international legal order to which notions of frontiers and extradition rules arising there from were completely foreign.<sup>15</sup>

On the other hand, the criminalization of conduct as transnational crimes emerges from the concerns of individual states regarding their "political, social and economic interests . . . and assertions about the harm caused to these interests . . ." <sup>16</sup> For instance, money laundering is seen as a crime that erodes financial institutions, depresses economic growth, facilitates corruption, and increases economic instability;<sup>17</sup> while drug trafficking threatens public safety, economic productivity, public health, professional advancement and education, and public institutions.<sup>18</sup>

<http://www.princeton.edu/~slaughtr/Commentary/CourtsNotCombat.pdf> (noting that the Security Council also has the power to create ad-hoc tribunals for those nations that have yet to be part of the ICC).

13. *See generally Id.*
14. *See generally* Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S 279 [hereinafter Nuremberg Charter] (describing crimes derived from Nuremberg as crimes against peace, war crimes, and crimes against humanity).
15. Au Nom Du Peuple Francais, Cour de Cassation, Chambre Criminelle, (Fr.), No. 85-95166, (Dec. 20, 1985) *available at* [http://www.trial-ch.org/fileadmin/user\\_upload/documents/trialwatch/barbie1985.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/barbie1985.pdf) (last visited Feb. 26, 2009).
16. Neil Boister, 'Transnational Criminal Law?' 14 EUR. J. INT'L L. 953, 957 (2003).
17. *See* Brent L. Barlett, *The Negative Effects of Money Laundering on Economic Development* (May 2002) (unpublished article, on file at International Economics Groups webpage) *available at* [http://www.adb.org/documents/others/ogc-toolkits/anti-money-laundering/documents/money\\_laundering\\_neg\\_effects.pdf](http://www.adb.org/documents/others/ogc-toolkits/anti-money-laundering/documents/money_laundering_neg_effects.pdf) (last visited Mar. 4, 2009).
18. *See* Zarina Othman, *Myanmar, Illicit Drug Trafficking and Security Implications*, 65 AKADEMIKA 27, 31 (2004), *available at*

The interests protected by the criminalization of terrorism include human rights, legitimately formed governments, political processes of the State, and international peace and security.<sup>19</sup> The questions here are: Are these interests regarding conduct violating basic human rights in a manner that “deeply shocks the conscience of humanity” interests of the international community as a whole,<sup>20</sup> as is understood for the core crimes? Are these interests generally recognized by all nations and acknowledged and applied in a consistent fashion? In other words, has terrorism reached the level of customary international law so as to claim that it is an international crime and not a transnational crime? Professor Norberg thinks not, and I tend to agree with her.

As stated clearly in the United States’ Supreme Court case of *The Paquete Habana*,<sup>21</sup> through the passage of time, “what originally may have rested in . . . comity, courtesy or concession, [eventually grew into] general assent of civilized nations, into a settled rule of international law.”<sup>22</sup> The practices and customs of states regarding terrorism are inconsistent, and the rules applied to terrorism are yet to be settled through the “general assent” of nations. Yes, various events at different times in history have driven the international community to criminalize diverse expressions of terrorism<sup>23</sup> and to disapprove terrorism as a human rights

<http://pkukmweb.ukm.my/~penerbit/akademika/ACROBATAKADEMIKA65/akademika65%5B02%5D.pdf> (discussing how drug trafficking threatens civil society) (Malay).

19. See BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 10, 27, 37 (2006). According to Saul, the international community disapproves of terrorism on several grounds beyond it being a serious human rights violation. *Id.* at 27. Terrorism undermines the State and peaceful political processes, and threatens international peace and security. *Id.* Saul affirms that even if several United Nations’ resolutions implied that self determination movements were excluded from the notion of terrorism, today the international community agrees, “that all ‘acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whoever committed,’ are both criminal and unjustifiable.” *Id.* at 37.
20. Rome Statute, *supra* note 9, at 3.
21. *The Paquete Habana*, 20 S. Ct. 290, 297 (1900). See also GREGORY E. MAGGS, *TERRORISM AND THE LAW* 41 (West 2005).
22. *Paquete Habana*, 20 S. Ct. at 297.
23. See INTERNATIONAL COOPERATION IN COUNTER-TERRORISM 33-35 (Giuseppe Nesi ed., Ashgate Pub. Ltd. 2006); see also RONALD C. SLYE & BETH VAN SCHAACK, *INTERNATIONAL CRIMINAL LAW: ESSENTIALS* 186-187 (2009). The first attempt to criminalize diverse expressions of terrorism was by the League of Nations following the 1934 assassination of King Alexander of Yugoslavia by Croatian separatists. Nesi, at 34. India is the only nation to ratify the 1937 Convention for the Prevention and Punishment of Terrorism. The Convention paved the way for later instruments addressing terrorist offenses such as acts committed aboard aircraft, crimes against internationally protected persons, hostage-taking, crimes involving maritime navigation, crimes involving nuclear material,

violation, and as a threat to peace and security.<sup>24</sup> However, there is no international expectation as to what constitutes a terrorist act,<sup>25</sup> or what “terrorist acts” concern the international community and violate human rights such as to deeply shock the conscience of humanity. Will bombings in Colombia of a fitness club in Bogotá and the detonation of two hundred kilograms of explosives near a bullring in Medellín qualify as terrorist acts? Will bombings by the Basque separatist group ETA of the *Guardia Civil* police barracks in Barcelona qualify, or will an armed attack by illegal armed groups on Indonesian village?<sup>26</sup> Will the restaurant bombing in Spain that killed eighteen U.S. servicemen and injured eighty-three people<sup>27</sup> or the 1995 bombing of the Murrah Federal Building in Oklahoma City qualify? Lack of agreement as to what constitutes terrorism is demonstrated by the failure of numerous nations to ratify many terrorist conventions, by the diverse definitions of terrorism, by the wide gap in the several definitions,<sup>28</sup> and by continuing disagreement over whether certain conduct can be construed as

and the financing of terrorism. INTERNATIONAL COOPERATION IN COUNTER-TERRORISM, at 33-34.

24. See SAUL, *supra* note 19, at 28-30 nn.135-150 for a comprehensive compilation of instruments considering terrorism as a threat to human rights and to peace and security.
25. There are numerous documents and databases with lists of terrorist incidents. Yet, there is no uniformity in the methodology used to determine if an act was/is terrorism or some other form of political violence. See, e.g., NATIONAL COUNTERTERRORISM CENTER, A CHRONOLOGY OF SIGNIFICANT INTERNATIONAL TERRORISM FOR 2004, at vii (2005), <http://wits.nctc.gov/reports/2004nctcchronology.pdf> (last visited Mar. 6, 2009) (stating that the United States includes an incident as terrorist if it “was premeditated, perpetrated by a subnational or clandestine agent, politically motivated, potentially including religious, philosophical, or culturally symbolic motivations, violent, and perpetrated against a noncombatant target.” It is international if the incident involves citizens or territory of more than one country.). Comparing the information offered one can see that some documents/databases contain incidents that others ignore. See, e.g. Worldwide Incidents Tracking System, <http://wits.nctc.gov> (follow “Central and South America” hyperlink; then follow “Columbia” hyperlink) (showing a total of 2,293 incidents in Colombia between 2004 and 2008) (last visited Sep. 20, 2009).
26. Looking at several diverse lists of worldwide terrorists’ acts, one can see how many acts are labeled as terrorism that perhaps should not be labeled as such. See Wm. Robert Johnston, *Selected Terrorist Incidents Worldwide through September 2000*, <http://www.johnstonsarchive.net/terrorism/wrjp255b.html> (last visited Mar. 6, 2009). See also TripAtlas.com, *List of Terrorist Attacks*, [http://tripatlas.com/Terrorist\\_attack](http://tripatlas.com/Terrorist_attack) (last visited Mar. 6, 2009).
27. See U.S. DEP’T of State, SIGNIFICANT TERRORISTS INCIDENTS, 1961-2003: A BRIEF CHRONOLOGY, <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm> (2004) (stating that a restaurant near a U.S. Air Force Base in Torrejon, Spain was bombed on April 12, 1984).
28. See, e.g., INTERNATIONAL COOPERATION IN COUNTER-TERRORISM, *supra* note 23, at 33-35 (noting that the OAS Convention only refers to the crimes against internationally protected persons, while the Islamic Convention includes certain intents as an element of the crime).

terrorist.<sup>29</sup> Information on terrorist acts is frequently deficient, because time “fact patterns are open to interpretation, and perpetrators’ intent is rarely clear.”<sup>30</sup> As such, unsettled, ambiguous and subjective definitions continue to evolve resulting in the proliferation of definitions.<sup>31</sup> This struggle is also expressed in court decisions,<sup>32</sup> United Nations resolutions,<sup>33</sup> and even within domestic legislation.<sup>34</sup>

I agree with Professor Norberg’s assessment that definitions based on the notion that terrorists intimidate or terrorize the masses are counterproductive, and that terrorism is more analogous to random acts of violence subject to domestic criminal law. This makes deciding what constitutes a terrorist act “more art than science.”<sup>35</sup> I will add to Professor Norberg’s section on the definition of terrorism is “a tactic, used on many fronts, by diverse perpetrators in different circumstances and with different aims.”<sup>36</sup>

I do not, however, entirely agree with Professor Norberg’s statement that terrorism is of a war-like character with the capacity for immediate mass

29. See, e.g., Organization of the Islamic Conference, *Convention of the Organization of the Islamic Conference on Combating Terrorism*, Annex, Res. No. 59/26-P (Jul. 1, 1999), available at <http://www.unhcr.org/refworld/docid/3de5e6646.html> (last visited Mar. 7, 2009) (“Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered as a terrorism crime.”).
30. National Counterterrorism Center, Methodology Utilized to Compile NCTC’s Database of Terrorist Incidents, <http://wits.nctc.gov/Methodology.do> [hereinafter Methodology](last visited Sep. 20, 2009).
31. See generally HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 17-46* (2005) (offering an excellent compendium and in depth analysis of the many definitions by the League of Nations, the United Nations, and regional organizations).
32. See, e.g., *United States v. Yousef*, 327 F.3d 56, 107 (2d Cir. 2004) (“Confusion on the definition of ‘terrorism’ abounds” because [t]errorism is defined variously by the perpetrators’ motives, methods, targets, and victims.”). See also MAGGS, *supra* note 21, at 1.
33. See, e.g., *The Declaration on Principles of International Law Concerning Friendly Relations Among Co-operating States in Accordance with the Charter of United Nations*, G.A. Res. 2625 (XXV), 21, U.N. GAOR, Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970), reprinted in 9 I.L.M. 1292 (1970) (stating that armed and violent acts do not constitute terrorism if they are committed when seeking self-determination in opposition to violently enforced occupation).
34. See MAGGS, *supra* note 21, at 1 (citing to Nicholas J. Perry’s findings of twenty-two different definitions of terrorism just in the U.S. federal law).
35. Methodology, *supra* note 30.
36. See SLYE & VAN SCHAACK, *supra* note 23, at 185 (noting that to some, terrorism is a “concept with a colloquial meaning”); JONATHAN R. WHITE, *TERRORISM IN TRANSITION 66* (Philip Reichel ed., Sage 2005) (noting that terrorism is a “political activity involving crime” that changes “with historical circumstances and the political environment”).

destruction,<sup>37</sup> because not every war-like event with immediate capacity for mass destruction constitutes terrorism. Terrorism is something of a two-step phenomenon. The first step concerns the commission of the violent act and the second step involves determining if the goal for resorting to terrorism is *primarily* to influence a government or to attain some other objective.<sup>38</sup> Here we find great discrepancy and disagreement. For some analysts, the extent of the psychological impact of violence committed determines if the act is terrorism.<sup>39</sup> For others, such as former United Nations Secretary General Kofi Anan, terrorism is determined by the extent of the physical damages caused:

Any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any.<sup>40</sup>

Even if both criminals and terrorists use violence on a level we perceive as being “terrorism,” their motivation and the reach of the effects caused are dissimilar. The criminals’ *primary and direct* motivation is egocentric and personal and is often a matter of obtaining or protecting material gain, while the *primary and direct* aim of the terrorists’ violence is political or ideological and intended to influence public opinion and eventually change “the system.”<sup>41</sup> Many terrorist acts are within one nation’s borders and the psychological fear and primary aim effects are limited. A review of the various reports on terrorist acts shows that many incidents reported as terrorist in character, while being highly violent, are more criminal in intent than terrorist, and this leads to some confusion over the primary and direct motivation of the group using violent acts.<sup>42</sup>

37. Norberg, *supra* note 1, at 20.

38. See generally Press Release, National Counterterrorism Center, NCTC Fact Sheet and Observations Related to 2005 Terrorist Incidents 4, available at [http://wits.nctc.gov/reports/nctcfactsheetandpressslides\\_2005.pdf](http://wits.nctc.gov/reports/nctcfactsheetandpressslides_2005.pdf) (last visited Mar. 9, 2009) (stating that the United States defines terrorism as politically motivated acts against non-combatants).

39. See for example, Kevin J. Greene, *Terrorism As Impermissible Political Violence: An International Framework*, 16 VT. L. REV. 461, 476 (1992), noting that “Terrorist violence is intended to inflict psychological trauma and to subvert government, if not democratic capitalism itself.”

40. *Secretary-General Offers Global Strategy for Fighting Terrorism, in Address to Madrid Summit, Press Release*, U.N. Doc. SG/SM/9757 (Mar. 10, 2005). See also Alex Schmid, *Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 419 (2004).

41. BRUCE HOFFMAN, *INSIDE TERRORISM* 41-42 (Colum. U. Press 1998).

42. Colombian drug lord Pablo Escobar primarily used violence to defend his wealth and desire to remain in Colombia, even though his acts were termed narcoterrorism. For a popular, comprehensive, though not particularly accurate, depiction of the life and times of Pablo

The infamous drug lord Pablo Escobar committed extreme violence, terrorized innocent citizens, and caused widespread destruction in an effort to break the will of the Colombian government to extradite him to the United States to face justice.<sup>43</sup> His wanton attacks bore all the hallmarks of what we think of as being terrorism, and established the term, narcoterrorism, and the popular lexicon.<sup>44</sup> Yet, it was not terrorism *per se* because Escobar's immediate aim was not to terrorize for political reasons or convictions, but to protect his wealth and freedom.<sup>45</sup> Certainly his form of violence had a war-like character that caused the nation to act in self-defense,<sup>46</sup> but his reign of terror could not be truly labeled terrorism.

I also do not agree with Professor Norberg's statement that "terrorism tends to be an indirect and impersonal crime."<sup>47</sup> Terrorism is the embodiment of evil and a

Escobar, see generally MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW* (Atlantic Monthly Press, 2001). Some analysts also claim that Latin America's oldest insurgent group, Colombia's notorious FARC guerrillas, is nothing more than a criminal organization using violent tactics to hold onto its vast wealth acquired through traditional criminal conducts, and that any political ideology or goals the group may have once had were abandoned long ago. See Michael Radu, *The Perilous Appeasement of Guerrillas*, *ORBIS* 44:3:362-379 (2000), and also Luz E. Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War against Illegal Armed Groups*, 15 *TRANSNAT'L L. & CONTEMP. PROBS.* 5, 85-86 (2005), and Luz E. Nagle, *Colombian Asylum Seekers: What Practitioners Should Know about the Colombian Crisis*, 18 *GEO. IMMGR. L.J.* 441, 454 (2004).

43. See generally MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD'S GREATEST OUTLAW* (Atlantic Monthly Press, 2001).

44. The term is attributed to former Peruvian President Belaunde Terry. See G. Davidson Smith, *Commentary No. 13: Terrorism and the Rule of Law: Dangerous Compromise in Colombia*, *CANADIAN SECURITY INTELLIGENCE SERVICE*, Oct. 1991, at 1.

45. See HOFFMAN, *supra* note 41, at 37.

46. See Terry D. Gill, *The Eleventh of September and Right of Self-Defense, in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 23-27 (Wybo P. Heere, ed., TMC Asser 2003).

47. This quotation is from the earlier draft of Naomi Norberg's article, which stated:

Terrorism, however, tends to be an indirect, impersonal crime. Targets may of course be chosen on the basis of nationality (the American embassies simultaneously bombed in Kenya and Tanzania, the tourists asked if they were British or American during the 2008 Mumbai hotel attacks), or presumed nationality (the World Trade Center or a London bus). But among the victims may be persons of other nationalities, and the purpose of the attack may in fact not be to destroy the group, but to express political or other ideological disagreement with a particular state. Victims are thus merely symbols. In fact, the first post-Reign of Terror definition of terrorism reflects this anti-state character.

Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together* 9 (Feb 3, 2009) (unpublished manuscript, on file with the Santa Clara Journal of International Law).

direct and personal crime because terrorists target individuals, groups, and property that will yield the most far-reaching psychological repercussions well beyond the immediate target. This is precisely why Timothy McVeigh targeted the Murrah Federal Building, Islamic terrorists targeted the New York World Trade Center and the Pentagon in Washington, D.C., and the Mumbai terrorists targeted a well-known and historic hotel serving international business travelers. Like Professor Norberg, I see a difference between transnational crimes (drug trafficking and laundering), and terrorism, however, to me the difference is rooted in the primary goal that individuals have in committing specific crime. In transnational crimes, the motivation is personal aggrandizement, while the terrorist's motivation is fundamentally altruistic, whether real or imagined.<sup>48</sup> "A terrorist without a cause is not a terrorist."<sup>49</sup>

I am also quite drawn to Professor Norberg's very interesting discussion of how some nations cloak totalitarian tendencies in the guise of cooperating with other states to fight both domestic and international terrorism, and would very much like to have seen her expand on this in greater detail. It occurs to me, especially in the aftermath of September 11, that more nations are imposing state-of-emergency situations in order to implement forms of legislation that may be construed as oppressive and which curtail or threaten to curtail human rights. Perhaps Professor Norberg might consider a correlation made between pre-September 11 conditions when nations were criticized, even by the United States, for legislating repressive criminal sanctions, and post-September 11 conditions when states were praised for promulgating such legislation in the name of being strong on terrorism. The Security Council, in 2003, took note of the sea change in the attitudes of nations toward international terrorism following September 11 when the simple truth that "no country could prevent terrorism in isolation" became abundantly clear.<sup>50</sup> In the

*See also* Norberg, *supra* note 1, at 21 ("Terrorism, particularly transnational, politically or ideologically motivated terrorism, however, often has a more indirect quality.").

48. *See* HOFFMAN, *supra* note 41, at 43 ("The terrorist is fundamentally an *altruist*; he believes that he is serving a 'good' cause designed to achieve a greater good for a wider constituency—whether real or imagined—that the terrorist and his organization purport to represent. The criminal, by comparison, serves no cause at all, just his own personal aggrandizement and material satiation.").

49. *Id.*

50. *See* Press Release, Security Council, Outgoing Chair of Security Council's Counter-Terrorism Committee Says United Nations Now Centre of Global Anti-Terrorism Network, U.N. Doc. SC/7718, (April 4, 2003), *available at* <http://www.un.org/News/Press/docs/2003/sc7718.doc.htm> (last visited Mar. 12, 2009)

words of, then Chairman of the Counter-Terrorism Committee, Jeremy Greenstock, “It took a horrific terrorist act less than five miles from the Security Council Chamber to shake the international community into adopting [Security Council Resolution 1373’s] legally binding, global standards.”<sup>51</sup> National legislation on fighting terrorism became a two-fold global effort, first, to align national counter terrorism legislation with requirements set out in Resolution 1373; and second, to identify ways to close gaps in national legislation while “strengthening the law enforcement capacities of the State.”<sup>52</sup>

Moreover, the overall sentiment of members of the Security Council at that time was that any Member State needing assistance to upgrade national legislation and strengthen law enforcement capabilities should be able to have full access to international resources.

Following September 11, a host of nations declared states of emergency.

While some used such measures as a consequence to implementing terrorist-specific legislation, one could suggest that for a few nations, invoking a state of emergency was little more than a pretext for oppressive regimes to exert themselves, particularly by labeling groups as terrorists that would otherwise have been nothing more than dissident groups. Chile is a current case in point. There, the government is using its Anti-Terrorist Law,<sup>53</sup> first enacted during the Pinochet dictatorship, to suppress a long-running indigenous autonomy movement by trying a Mapuche dissident for arson on a private estate and for an alleged attack on a Public Defender’s office.<sup>54</sup> In announcing the charges, Chile’s Interior Minister stressed that the alleged acts show all the hallmarks of terrorism and warrant invoking the Anti-Terrorist Law.<sup>55</sup> The Observatory on the Rights of Indigenous Peoples, a human rights organization monitoring the developments in Chile, countered that the Anti-Terrorist Law is being applied inappropriately. “The Mapuche people’s struggle in support of their demands is not an act of

(referring to the U.N. Security Council Resolution 1373, which sets out steps and strategies to combat terrorism and prevent and suppress the financing of terrorism).

51. *Id.*

52. *See Id.* (remarks by Security Council member Aleg Ivanou of Belarus).

53. Determina conductas terroristas y fija su penalidad, Ley N° 18.314 de 1984, modificada por Ley N° 19.241 del 28/08/1993 (1984) (Chile), *available at* <http://www.unhcr.org/refworld/docid/3db95a3a4.html> (last visited Mar. 3, 2009).

54. For a report on the pending trial of Miguel Tapia Huenulef, see Pamela Sepúlveda, *Chile: Indigenous Activist Arrested Under Anti-Terrorist Law*, INTER PRESS SERVICE (Latin America), Feb. 24, 2009.

55. *Id.*

terrorism . . . In actual fact, there is no organization for the purpose of sowing fear among the population, there is no organization that would commit those crimes defined in law as terrorist crimes.”<sup>56</sup>

One point Professor Norberg makes regarding measures taken by oppressive governments for which I would like to see greater discussion concerns the application of immigration laws to fight terrorism.<sup>57</sup> I do not see that as a bad thing, but rather as a “soft” alternative to employing use of force (while reducing the risk associated with use of force of trampling on human rights) to fight terrorism. Immigration policy changes cannot prevent terrorism. However, they are key ingredients of the effort to combat terrorism. In the War on Terror, migrants constitute little more than collateral damage. In order to differentiate real threats from perceived threats, nations need to review their immigration policies and implement comprehensive changes, considering in the process of doing so their duty to protect the rights of immigrants and refugees. Immigration policies are the checkpoint to: 1) facilitate the entry of foreigners whose presence is desired; and 2) to identify and deter the entry of unwanted foreigners.

Carefully drafted policies could help deter future domestic terrorist attacks without damaging other values. Such policies would address improving the processing and issuing of visas, curbing unauthorized entries, and increasing enforcement. As Professor Norberg put it so well, today, the immigration-terrorism link, reinforced by post-2001 Security Council Resolutions, condones conflict between the two, and is in sharp contrast to the world’s response to the core crimes.<sup>58</sup> Therefore, the ICC should not have jurisdiction over terrorism, because doing so would not only condone, but exacerbate, the struggle between immigration and terrorism.

In my view, terrorism has been fought with tools of law enforcement and not with tools of administrative procedures. Many nations have used police forces to locate and arrest suspected or perceived terrorists and have used their domestic courts to try them. It is true that to some extent, there is greater vigilance at points of entry, although one may argue that international borders are now more porous than in the past. However, my own take is that we see nations trying to look more carefully at who is violating immigration laws already established rather than implementing new procedures to combat terrorism.

56. *Id.*

57. Norberg, *supra* note 1, at 39, 44-45.

58. Norberg, *supra* note 1, at 44-45.

In the aftermath of September 11, several nations discovered that existing immigration laws were not enforced and that the laws contained several loopholes that could compromise a state's ability to secure its territory from illegal entries by terrorists. In partial response to the breakdown in immigration enforcement in the United States that contributed to the September 11 attacks, extensive measures were undertaken in many nations to identify weaknesses in the laws that allowed some of the terrorists to live and plot largely unnoticed on their soil.<sup>59</sup>

For instance, in the United States, prior to September 11, the INS failed on many occasions to register and track immigrants as required by law. This kept the government in the dark as to the time aliens entered the United States, their place of residence, or their time of exiting the country.<sup>60</sup> Such a "lack of enforcement was dangerous and ripe for abuse by aliens wishing to stay below the radar, including terrorists."<sup>61</sup>

Germany also experienced a wake-up call when it realized that the 9/11 terrorists hatched their plot on German soil, and were able to do so largely by taking advantage of Germany's "liberal asylum policies and the low levels of surveillance by authorities."<sup>62</sup> In fact, the 9/11 hijackers enjoyed freedom of movement in Germany for several years.

The fact that all of the terrorist hijackers who attacked the United States on September 11 were aliens does not, of course, make all immigrants terrorists. But it does, however, reveal that those terrorists exploited existing weaknesses in

59. According to Michael J. Garcia, head of U.S. Homeland Security's Immigration and Customs Enforcement (ICE) immigration law is "an incredibly important piece of the terrorism response." See Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, June 13, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html> (last visited Apr. 18, 2009).

60. See *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary H. of Rep.*, 100th Cong. 1 (2003) [hereinafter *Hearing*] (Statement of Sen. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Security, and Claims) ("Since the implementation of NSEERS in September 2002, more than 138,000 aliens from over 151 countries have been registered. NSEERS has resulted in the identification of 11 aliens linked to terrorism, the arrests of more than 120 criminal aliens and the issuance of more than 12,000 charging documents placing deportable aliens in deportation proceedings. This program is now run in DHS."), [http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_of.htm) (last visited Apr. 18, 2009).

61. *Id.* at 8 (statement of Sen. John N. Hostettler).

62. See FRANCIS T. MIKO & CHRISTIAN FROEHLICH, *GERMANY'S ROLE IN FIGHTING TERRORISM: IMPLICATIONS FOR U.S. POLICY*, CONG. RES. SERV. REP. NO. RL32710, at 442-4 (2004), <http://fas.org/irp/crs/RL32710.pdf> (last visited Apr. 18, 2009).

immigration laws and procedures,<sup>63</sup> and demonstrated an urgent need for changes in policy and changes in the implementation of policy.

Some observers suggest that “terrorism has been fought largely with immigration law,”<sup>64</sup> and that doing so stigmatizes innocent individuals caught up in the war on terrorism.<sup>65</sup> Yet, one must acknowledge that immigration policies are key ingredients in the efforts to combat terrorism and are effective if the implementation of such policies is evenhanded, if the laws are carefully drafted to avoid further erosion on civil liberties, and if detentions solely based on someone looking “Arab or Middle Eastern or Latino or other” can be avoided.<sup>66</sup>

Immigration policy changes alone cannot prevent terrorism. But, perhaps immigration policy can be an effective “soft” alternative to employing use of force while reducing the risk associated with use of force of trampling on human rights.

Overall, Professor Norberg raises several provocative topics warranting further and more in-depth discussion. If she did not delve too deeply into some of the subjects she covered due to time or page limitations, I would encourage her to revisit those topics in greater detail, as I think doing so will attract a significant amount of interest and lively debate.

63. Five of the 9/11 hijackers had “clear immigration violations,” and one had a possible violation. See STAFF OF THE NAT. COMMON TERRORIST ATTACKS ON THE U.S., 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), [http://www.9-11commission.gov/staff\\_statements/911\\_TerrTrav\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf) (last visited Apr. 20, 2009).

64. Norberg, *supra* note 1, at 39.

65. For example, “Ali Alubeidy was caught up in an investigation of fraudulent Pennsylvania commercial driver’s licenses. It wasn’t until after the attacks on New York and the Pentagon that the FBI pursued his case as having a possible link to terrorism. Although the connection soon unraveled, Alubeidy, an Iraqi immigrant, lives with the stigma.” See Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, June 13, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html> (last visited Apr. 18, 2009).

66. *Hearing*, *supra* note 60, at 8.