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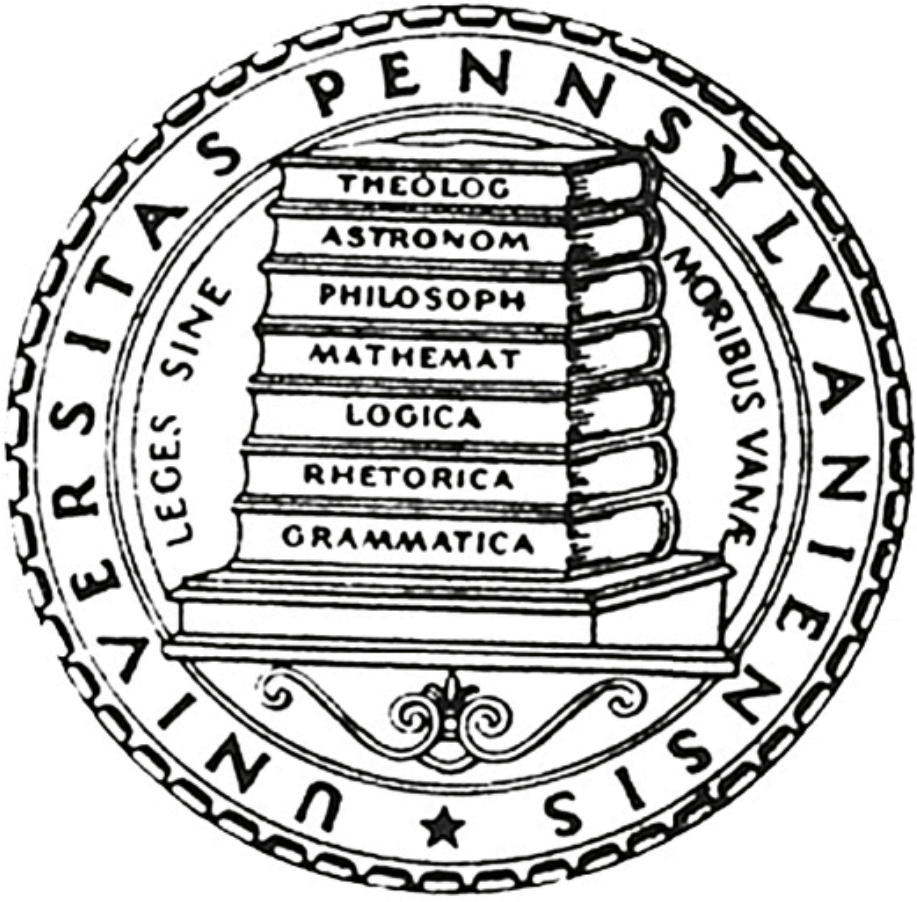
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ARTICLE

BODILY INTEGRITY OR FREE EXERCISE: WILL FEMALE GENITAL CUTTING BE PROTECTED IN FEDERAL COURT?

Jared Kelly, University of California, Berkeley

Background

A small Indian Muslim sect in Michigan, the Dawoodi Bohra, has recently come under fire for engaging in the practice of female circumcision, or female genital cutting (FGC). Jumana Nagarwala, MD of Northville, Michigan is facing charges for successfully performing FGC on minors. Nagarwala and her associates are believed to have performed the procedure on over 100 girls in the preceding twelve years across the United States, including metropolitan cities such as Chicago and Los Angeles.[1] The case has begun trial as of June 2018 by the United States District Court for the Eastern District of Michigan as United States v. Nagarwala et al.[2] In January 2018, presiding Judge Bernard Friedman dismissed what many considered to be the most serious charges levied against Nagarwala and her associate Fakhruddin Attar, MD, whose clinic the procedures were performed in. The dropped charges include 18 U.S.C. § 2423: the interstate transportation of minors with the intent to engage in a criminal sexual act. According to Freidman, the doctors' conduct toward the minors did not qualify as sexual activity, as the doctors did not make contact with the girls' genitalia for purposes of abuse, sexual gratification, or to humiliate/degrade them.[3] This case is significant because it is the first time an individual has been prosecuted under USC § 116 charges since the statute was codified in 1996.[4] While this is a landmark case, it represents a dilemma for the District Court for the Eastern District of Michigan, as all possible resulting outcomes from the charges will leave the government in a precarious situation. If Nagarwala is convicted, it will

1 Trevor Bach, Michigan FGM case could test bounds of religious liberty, The Christian Science Monitor. July 27, 2017, https://www.csmonitor.com/USA/Justice/2017/0727/Michigan-FGM-case-could-test-bounds-of-religious-liberty.

2 The United States District Attorney's Office Eastern District of Michigan, Detroit Emergency Room Doctor Arrested and Charged with Performing Female Genital Mutilation, April 13, 2017, https://www.justice.gov/usao-edmi/pr/detroit-emergency-room-doctor-arrested-and-charged-performing-female-genital-mutilation.

3 Bhargavi Kulkarnim, Judge dismisses most serious charge in Detroit genital mutilation case. India Abroad, January 18, 2018, https://www.indiaabroad.com/indian-americans/judge-dismisses-most-serious-charge-in-detroit-genital-mutilation-case/article_d4457e92-fcc1-11e7-9832-8342cad0fcd5.html.

4 The United States District Attorney's Office Eastern District of Michigan, Detroit Emergency Room Doctor Arrested and Charged with Performing Female Genital Mutilation, April 13, 2017, https://www.justice.gov/usao-edmi/pr/detroit-emergency-room-doctor-arrested-and-charged-performing-female-genital-mutilation.

likely do little to stop FGC because it is a deeply-ingrained cultural practice. This outcome may endanger more girls than it protects, as their parents will either entrust individuals with no formal medical training to carry out the procedure or travel internationally to countries where there are little to no regulations in place to have the procedure performed. On the other hand, if the Court decides to acquit Nagarwala of § 116, the Court will have effectively sanctioned what many consider to be an international human rights violation.

Additionally, this case is unique because FGC shares many commonalities with male circumcision. Both are motivated by religion, customs, and are questioned for their human rights implications because they result in the permanent alteration of an unconsenting minor's genitals. Currently, male circumcision is legal in the United States, and there is little oversight over the procedure. However, a successful prosecution could establish grounds to challenge this custom. This case serves as a classic catch-22 scenario; the court can either condone a human rights violation or it can create an atmosphere that allows for more unsafe, unregulated FGC practices and that lays down the groundwork for a future ban on male circumcision, which would disenfranchise millions of Muslim and Jewish Americans.

Overview of Female Genital Cutting

It is estimated that there are 200 million women globally who have undergone FGC. An estimated 3 million girls and women are at risk of having the procedure performed on them every year.[5] The practice of FGC is generally classified on a scale of severity from Type I to Type III, with an additional category of Type IV introduced by the World Health Organization (WHO). Type I represents the least invasive forms of the procedure which range from the removal of the clitoral hood to a partial or full removal of the clitoris to Type III which entails the complete removal of external genitalia with the suturing of the remains.[6] Today the practice is typically carried out by certain tribes of African Animist religions and Muslim groups in both the Middle East and Africa; additionally, the practice has historically been carried out by atheists,[7] certain

5 UNICEF, Female genital mutilation/cutting: a global concern, New York: UNICEF (2016). "At least 200 million girls and women in 30 countries have been subjected to the practice."

6 World Health Organization and UNICEF, Female genital mutilation: a joint WHO/UNICEF/UNFPA Statement, (1997). {Type I also referred to as clitoridectomy, Type II FGC constitutes removal of the clitoris and partial to full removal of the labia minora often referred to as excision. Type IV category includes anything not documented from Types I-III(clitoridectomy, excision, or infibulation) including cauterization, incising, piercing, pricking, and scraping}.

7 Alison Slack, Female Circumcision: A Critical Appraisal, Human Rights Quarterly 10, no. 4 (1988): 437-86. Supra see note 20 at 446.

sects of Christianity,[8] and Judaism.[9] In Islam, the practice of FGC is referred to as khafḍ and is in accordance with the Sunnah (the teachings of the prophet Muhammad).

The procedure of FGC can be radically different depending on the culture being evaluated. According to classical Islamic author Al-Mawardi, khafḍ typically involves cutting off skin in the shape of a kernel above the genitalia (typically Type I or Type IV).[10] However, more extreme practices are often used in place, such as 'pharaonic circumcision' (Type III) which is practiced throughout sub-Saharan Africa.[11] This practice involves the excision of all external genitalia including the clitoris, labia majora, labia minora, and the suturing of the remains, leaving only a small hole no larger in circumference than that of a matchstick to allow for the excretion of urine and menstrual fluid.[12] This will later be surgically altered—typically after marriage—to allow for intercourse and childbirth (de-infibulation)[13] but is resealed often following the birthing process (re-infibulation).[14] The practice is esteemed among certain Shia and Sunni Islamic sects which argue that the practice promotes chastity, female modesty, and preserves virginity, considered by many as the most precious possession of an unmarried Muslim woman.[15] Most forms of FGC practiced by Islamic sects serve as a means to preserve virginity and attenuate female sexuality "directing it to the desirable moderation."[16] Despite the procedure's role among certain Islamic sects, the procedure is rooted more in culture than in religious doctrine. Many African countries that do not have a Muslim majority still have very high rates of FGC, such as Liberia, a country with a Christian majority population and where 66% of women aged 15-49 are circumcised.[17] FGC has been condemned by many Islamic scholars. In 2007 in Cairo, the Al-Azhar Supreme Council of Islamic Research released a statement that FGC had

8 Id. See Supra see note 20 at 446 and Supra note 3 at 441; see also Gregory Kelson, Granting Political Asylum to Potential Victims of Female Circumcision, Mich. J. Gender & L. 3 257 (1995). See Supra Note 122 at 286.

9 Shaye Cohen, Why Aren't Jewish Women Circumcised?: Gender and Covenant in Judaism, Univ of California Press, 55-67 (2005).

10 Sami Abu-Sahlieh, Islamic Law and the Issue of Male and Female Circumcision, Third World Legal Stud., 74 (1994). https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1036&context=twls

11 Hanny Lightfoot-Klein, Pharaonic circumcision of females in the Sudan, Med. & L. 2 353 (1983).

12 Aldo Morrone, Jana Hercogova, et al., Stop female genital mutilation: appeal to the international dermatologic community. International journal of dermatology 41, no. 5 257 (2002). {process is also typically referred to as infibulation}.

13 Id.

14 Id at 262.

15 George Denniston, Frederick Hodges, and Marilyn Milos, eds. Male and female circumcision: medical, legal, and ethical considerations in pediatric practice. Springer Science & Business Media, 147-148 (2007).

16 Alison Slack, Female circumcision: A critical appraisal, Hum. Rts. Q. 10 447 (1987).

17 United Nations Children's Fund and Geeta Rao Gupta, Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change, Reproductive Health Matters 101 (2013).

"no basis in core Islamic law or any of its partial provisions."[18] Outside of Africa, only two countries have more than 1% of women aged 15-49 circumcised.[19]

The practice of FGC is in violation of Article 19(1)[20] Article 37(a)[21] of the UN Convention on the Rights of the Child (CRC). As a result, states have the responsibility to eliminate traditional practices prejudicial to the health of children (such as FGC) under Article 24(3) of the CRC.[22] In the prosecution of Nagarwala and her associates, the government hopes to establish a chilling effect and reduce the occurrence of FGC. The Centers for Disease Control (CDC) currently estimates that 513,000 girls and women are at risk for FGC procedures in the United States.[23]

The practice of FGC continues largely because of medical misconceptions and through the traditional, spiritual, societal, and cultural factors which hold the practice in high esteem, notably amongst the Rendille people of northern Kenya. In Rendille society the procedure occurs during wedding ceremonies, where it is performed on the bride who typically ranges in age from 18-20.[24] The ceremony is a rite of passage indicating the transition of a girl to a woman now ready for marriage.[25] Despite the knowledge of medical risks resulting from the procedure, most Rendille women still elect to have the procedure performed.[26] In other cases, medical misconceptions and societal pressure enable FGC to remain commonplace.

In Islamic Africa, three common medical misconceptions exist that justify the continuation of FGC: (1) if the clitoris is not removed, it will continue to grow to the size of a penis; (2) women are sterile until FGC is performed and

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18 UNICEF, Fresh Progress toward the Elimination of Female Genital Mutilation and Cutting in Egypt, July 02, 2007, https://www.unicef.org/media/media_40168.html.

19 United Nations Children's Fund and Geeta Rao Gupta, Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change, Reproductive Health Matters 101 (2013).

20 U.N. Convention on the Rights of the Child (1989). UN General Assembly Document A/RES/44/25. Article 19 (1), "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

21 Id, Article 37(a) " No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

22 Id, Article 24(3) "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.".

23 Howard Goldberg, Paul Stupp, et al, Female genital mutilation/cutting in the United States: Updated estimates of women and girls at risk, 2012, Public Health Reports 131, no. 2 4-6 (2016). ("Our best estimate is that, in 2012, about 513,000 women and girls in the United States were at risk for FGM/C or its consequences." At 4)

24 Bettina Shell-Duncan and Ylva Hernlund, "Female "circumcision" in Africa: Dimensions of the practice and debates, 146 (2000).

25 Frances Althaus, Female circumcision: rite of passage or violation of rights?, International Family Planning Perspectives 131 (1997).

26 Monica Antonazzo, Problems with criminalizing female genital cutting, Peace Review 15, no. 4 471-477 (2003).

the procedure is thought to promote fertility; and (3) the procedure promotes the aesthetics and cleanliness of the genitals because the clitoris produces an "offensive discharge" which is believed to be harmful.[27] These beliefs are deeply ingrained in Sudanese culture, where 90% of women are circumcised.[28] In Sudan, many hold the belief that women can be ready for marriage and childbirth only after the procedure of FGC which would cleanse them of their pollution. Ideals of cleanliness and pollution emanate from Muslim hygienical jurisprudence. For men in the Islamic regions of Africa, one of the worst insults that can be given is that one is the son of an uncircumcised mother.[29] According to local myths, the pollution and taint from uncircumcised women can be passed onto subsequent generations; in order to protect newborns, some cultures believe clitoral excision is necessary because "the clitoris is considered to be a dangerous organ which can cause symbolic or spiritual injury to the baby."[30] High social costs are often imposed on families in which the women are not circumcised, further reinforcing the importance of FGC; this praxis can be seen in both Côte d'Ivoire, and Kenya. In Côte d'Ivoire, Yacouba fathers are ostracized and unable to speak at village meetings if their daughters have not been cut.[31] Among the Samburu peoples of Kenya, women not circumcised are considered immature, unclean, and promiscuous, and as a result, any younger male siblings she has are prevented from being inducted into the warrior class.[32]

A Compelling Interest in Rejecting Female Genital Cutting

The Nagarwala defense plans to use a freedom of religion defense against § 116 charges, which has little feasibility in leading to exoneration.[33] Such a defense presents a challenge to the courts because it forces the decision to either protect the physical autonomy of female minors or to allow for parents to exercise their freedom of religion. The ability for parents to raise their children according to their traditions and customs without interference is a right protected

27 Alison Slack, Female circumcision: A critical appraisal, Hum. Rts. Q. 10 447 (1987).

28 Geeta Rao Gupta, et al., Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change, Reproductive Health Matters 186-187 (2013).

29 Erika Sussman, Contending with culture: an analysis of the female genital mutilation act of 1996, Cornell Int'l LJ 31 209 (1998).

30 Robert Myers, Francisca Omorodion, et al., Circumcision: its nature and practice among some ethnic groups in southern Nigeria, Social science & medicine 21, no. 5 584 (1985).

31 Celia W. Dugger ,"Genital Ritual Is Unyielding in Africa," New York Times, Oct. 5, 1996. A1 & A6. https://www.nytimes.com/1996/10/05/world/genital-ritual-is-unyielding-in-africa.html

32 Frances Althaus, Female circumcision: rite of passage or violation of rights?, International Family Planning Perspectives 131 (1997).

33 Tresa Baldas, Religious defense planned in landmark Detroit genital mutilation case, Detroit Free Press. May 21, 2017, http://www.freep.com/story/news/2017/05/21/female-genital-mutilation-religious-freedom/319911001/.

both domestically[34] and internationally.[35] Parents who allow for the genital cutting of minors do not necessarily have the action performed because they believed the procedure will bring harm to the child, but rather because they believe it is in the best interest of the child according to their belief paradigms. Most cultures would agree that it would be a bad policy to endanger the welfare of individuals by carrying out procedures upon someone with no capacity to consent. However, FGC persists because, under the auspices of the guardian's traditions, the procedure is believed to be in the best interest of the child. This brings forth the question the court must decide: whose right should be protected? Should the court protect children from health complications, permanent disfigurement, and death, or should they protect parents' rights to practice their traditions and raise their children in the best way they know to be possible?

The ability for parents to decide on religious matters is considered an essential civil liberty in American society, as seen in an ACLU brief submitted to the court against a San Francisco city ordinance which planned to ban the practice of male circumcision.[36] In the brief, the ACLU of Northern California stated: "Newborn male circumcision is a tenet of the Jewish and Islamic faiths. By criminalizing the circumcision of boys, the proposed ordinance would prevent parents from allowing their children to participate in an essential religious ritual, infringing upon the rights of the parents to guide the religious upbringing of their children."[37] The brief submitted by the ACLU is an equally applicable challenge to § 116, since the current ban on female circumcision interferes with individuals' rights to practice customs and rituals fundamental to their religion, limiting the application of the Free Exercise clause. Regardless, such an exemption on behalf of the defense is likely to fail when questioned under the tenets of the Sherbert test.

The Sherbert Test

The Sherbert test is a balancing test established in Sherbert v. Verner requiring the government to demonstrate a compelling interest in actions that limit Free Exercise.[38] § 116 likely serves as a substantial burden for the

34 See Wisconsin v. Yoder, 406 U.S. 205 (1972). Court held the parents' fundamental right to freedom of religion outweighed the state's interest in educating its children; See also Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Held parents have a fundamental liberty to direct the upbringing of their children how they see fit, primarily in regards to forgo public school education.

35 UN General Assembly, Universal declaration of human rights, UN General Assembly, Article 2 & 18 (1948).

36 Brief of Amicus Curiae American Civil Liberties Union of Northern California in Support of Verified Petition for Writ of Mandate and Complaint for Injunctive Relief, Jewish Community Relations Council of San Francisco, et al. v. Director of Elections of the City and County of San Francisco, et al. no. CPF-11-511370 (2011), 1-15.

37 Id at 11.

38 Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

evidentiary standard because the Nagarwala acted on a sincerely held religious belief. However, the government's actions are likely permissible under the third prong of the Sherbert test, as the actions to maintain FGC serve a "compelling state interest" since they protect the health and safety of girls and young women.[39] Constitutional law scholar Erwin Chemerinsky believes the court is likely to decide against a Free Exercise defense because of the significant harm caused by the procedure.[40] The government has historically exercised prior restraint in First Amendment cases due to a compelling interest in protecting the welfare of minors, most notably in cases involving sexual exploitation.[41] The government has a compelling interest in preventing substantial harm to children, and state courts have even prosecuted FGC as a harmful procedure. This can be seen in a 2006 case where an Ethiopian man was convicted under the State of Georgia's child battery statute following the excision of his two-year-old daughter.[42] According to Frank Ravitch, a professor of law at Michigan State University, the only way the defense could win a religious freedom argument would be by demonstrating that § 116 is not narrowly tailored enough to meet the government's interest.[43] However, such maneuvering by the defense would ultimately concede that the doctors willfully engaged in a practice the United States government has a compelling interest to prevent.

Permissible Abridgements of Free Exercise

The First Amendment right to Free Exercise is not absolute and has historically been limited by the government in many instances. In the case of Reynolds v. United States, the Supreme Court unanimously upheld the Morrill Anti-Bigamy Act because the Free Exercise clause of the First Amendment did not protect religious practices that were deemed to be criminal.[44] If this were to occur, there would be a dual system of justice that would allow religious groups such as Mormons to practice criminal acts such as bigamy while non-Mormons would be prosecuted for the same actions. According to the opinion written by Chief Justice Morrison R. Waite, the Free Exercise clause prevented the government from interfering with religious beliefs and opinions but allowed it to intervene in regards to religious practices.[45] This was further illustrated by his

39 Id at 403.

40 Beth Dalbey, Detroit Genital Mutilation Case New Territory For 1st Amendment, MI Patch. May 22, 2017, https://patch.com/michigan/detroit/detroit-genital-mutilation-case-new-territory-1st-amendment.

41 Prince v. Massachusetts, 321 U.S. 158 (1944); See also New York v. Ferber, 458 U.S. 747 (1982); Ginsburg v. New York, 390 U. S. 629 (1968), Id. at 390 U. S. 638-641.

42 Michelle A. McKinley, Cultural Culprits, 24 Berkeley Journal of Gender, Law & Justice91 (2009).

43 Trevor Bach, Michigan FGM Case Could Test Bounds of Religious Liberty, The Christian Science Monitor, 2017, https://www.csmonitor.com/USA/Justice/2017/0727/Michigan-FGM-case-could-test-bounds-of-religious-liberty (last visited Oct 24, 2017).

44 Reynolds v. United States, 98 U.S. 145 (1879).

45 Id at 166.

example that the government could intervene to prevent the actions of a group who held sincere religious beliefs pertaining to criminal actions such as human sacrifice.[46] As a result, the Dawoodi Bohra may maintain whatever beliefs and opinions they see fit, but their ability to engage in practices sanctioned by these beliefs can be abridged by the government. The case of Employment Division v. Smith (1990)[47] affirmed Reynolds as it precluded Native American religious ritual drug usage. The laws in place in both Reynolds and Smith were content-neutral and applicable to the general public as opposed to being codified to disenfranchise Mormon and Native American religious practices. According to Justice Antonin Scalia's opinion in Smith, the challenged ban applied to everyone equally and it would be unfair to grant religious exemptions, as they would ultimately undermine the law.[48] While the laws in question in these cases were applicable to all, statutes that have focused specifically on restricting religious practices have been declared permissible by courts. This is seen in 2013, when a male circumcision regulation decree regarding a New York City ordinance which required consent from both parents before a metzitzah b'peh circumcision ritual was performed on neonates[49] (in order to protect public health as multiple infants had died or suffered brain damage[50] as a result of the ritual[51]) was declared constitutional.

The Religious Freedom Restoration Act

The Sherbert test additionally serves as a double-edged sword in that it may acquit the Nagarwala Party. The Sherbert test was significantly curtailed following the case of Employment Division v. Smith, in which the Supreme Court held that an individual's beliefs cannot excuse them from complying with valid laws which prohibit some conduct. In response to the truncation of the Sherbert test, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 to establish the Sherbert test as a statutory right.[52] In 2000, Congress re-enacted RFRA's provisions via unanimous consent[53] following the 1997 case

46 Id.

47 Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).

48 Id at 878-879.

49 Central Rabbinical Congress of the USA and Canada v. New York City Department of Health & Mental Hygiene, (2013).

50 Alexandra Sifferlin, How 11 New York City Babies Contracted Herpes Through Circumcision, Time, 2012, http://healthland.time.com/2012/06/07/how-11-new-york-city-babies-contracted-herpes-through-circumcision/ (last visited Oct 26, 2017).

51 Central Rabbinical Congress of the USA and Canada v. New York City Department of Health & Mental Hygiene, (2013).

52 Zak Lutz, Limits of Religious Freedom, Harvard Political Review (2013), http://harvardpolitics.com/covers/limits-of-religious-freedom/ (last visited Apr 5, 2018).

53 Id.

of City of Boerne v. Flores[54] where the Supreme Court determined RFRA was an overreach of congressional power.[55] However, in the case of Gonzales v. O Centro Espírita Beneficente União do Vegetal,[56] the Supreme Court invoked the Sherbert test under the RFRA and found that the government did not have a compelling interest in limiting the usage of Peyote tea in Native American religious ceremonies in New Mexico.[57] UCLA Constitutional Law professor Eugene Volokh believes the RFRA allows for a framework that may allow an exemption for FGC.[58] This involves claims by the defense that the doctors only performed a ceremonial scrape or nick on the girl's genitals. If this claim proves credible, the actions may not constitute a substantial harm to children and result in an exemption.[59] Even if the procedure does result in some long-term harm, it may still be permissible as seen in the case of Wisconsin v. Yoder,[60] in which the government allowed Amish families to withdraw their students from school at 14 despite evidence of long-term harm resulting from a lack of education.[61] The court faces a conundrum as either decision has negative outcomes. If the court sides with the prosecution, the government will be seen as exercising a moralistic paternalism which assumes it knows what is in the best interests of a child and a better manner of raising children than child's parents do. If the court sides with the defense, they will be seen as neglecting child welfare in the favor of parents being allowed to practice traditionally harmful practices.

Overview of Male Circumcision

Though female genital cutting is different than male circumcision, they do share some commonalities. In FGC, a greater amount of healthy tissue is typically removed than in male circumcision, resulting in its higher rates of disfigurement, disability, and death. The process of male circumcision involves the amputation of erogenous tissues, notably the foreskin and frenulum. Both practices share similarities in that they have different degrees of invasiveness, are motivated by religious, cultural, and societal factors, and most of the procedures remove healthy tissue from neonates, infants, and children who may have not consented to the procedure. As with FGC, the ritual alteration of male genitals

54 City of Boerne v. Flores, 521 U.S. 507 (1997).

55 Lutz, Limits of Religious Freedom, Harvard Political Review (2013).

56 Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

57 Gonzales v. O Centro Espírita Beneficente União do Vegetal, Oyez, https://www.oyez.org/cases/2005/04-1084 (last visited Apr 5, 2018).

58 Eugene Volokh, Religious exemptions and the Detroit female genital mutilation prosecution, The Washington Post, May 23, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/23/religious-exemptions-and-the-detroit-female-genital-mutilation-prosecution/?noredirect=on&utm_term=.693fa4d8885c (last visited Apr 5, 2018).

59 Id.

60 Wisconsin v. Yoder, 406 U.S. 205 (1972)

61 Volokh, Religious exemptions, May 23, 2017.

can range from a minimally invasive procedure with a prick on the foreskin to a very invasive removal of the foreskin, frenulum, and excision of the urethra in circumcision practices that include penile subincision.[62] Male circumcision has religious roots in the Abrahamic religions; it is prescribed in both Islam and Judaism but has also been performed by other groups including Christian sects, animist religions, and many indigenous cultures. Circumcision is documented in the Torah where Abraham was instructed to circumcise himself, his sons, and his slaves to create an everlasting covenant in the flesh with God.[63]

In a similar fashion to FGC there are strong social motivators which encourage male circumcision. The most notable example of this is found in the United States[64] where, as an elective procedure, it is commonly performed on neonates for aesthetic reasons and from a perceived pollution or uncleanliness of the foreskin. Beliefs about the pollution of the foreskin emerged during the Victorian Era when the foreskin was thought to lead to masturbation, which again was thought to cause ailments such as epilepsy, clubfoot, impotence, eczema, gangrene, tuberculosis, infertility, paralysis, wounded conscience, nervous irritation, and death--to which the only cure was circumcision.[65] In 1891, physicians such as Peter Charles Remondino urged insurance companies to classify uncircumcised men as "hazardous risks"[66] and, in books for mothers, the foreskin was classified as the "mark of Satan" and often categorized those who did not circumcise their boys as "criminally negligent."[67] Later, circumcision became a symbol of social status, and even the British Royal Family had the procedure performed on its neonatal males.[68] Subsequently, the surgery became prominent in the Anglophonic countries of Australia, Canada, the United Kingdom, the United States, and New Zealand. Today the procedure is performed for its potential medical benefits in reducing urinary tract infections, sexually transmitted infections, and the contraction of penile cancer.[69]

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62 George C. Denniston, Frederick Mansfield. Hodges & Marilyn Fayre. Milos, Understanding circumcision: a multi-disciplinary approach to a multi-dimensional problem (2010), 212. Note: A male genital alteration practice typically practiced by aboriginal Australian tribes, a highly invasive form of male circumcision in Yemen known as penile flaying.

63 Genesis. 17: 9–14.

64 Centers for Disease Control and Prevention, United States, 1999--2010, Trends in In-Hospital Newborn Male Circumcision -- United States, 1999—2010 MMWR. Morbidity and mortality weekly report 60, no. 34 (2011): 1167.{2010 Neonatal Circumcision rate 54.7%}

65 Peter Aggleton, "Just a snip"?: A social history of male circumcision, 15 Reproductive Health Matters 18–19 (2007).

66 Peter Charles Remondino, History of circumcision from the earliest times to the present. Moral and physical reasons for its performance.(1900).

67 Robert Darby, A surgical temptation: the demonization of the foreskin and the rise of circumcision in Britain (2014), 351. {See reference: Henry, MRS. S. M. I. 1898. Confidential talks on home and child life. Edinburgh: Oliphant, Anderson and Ferrier.}

68 Robert Darby and John Cozijn, The British Royal Family's Circumcision Tradition, 3 SAGE Open (2013), 1.

69 "Circumcision (male) Why it's done." Mayo Clinic. February 20, 2015. Accessed October 26, 2017.

According to Professor Sarah Waldeck of Seton Hall Law, non-medical neonatal male circumcision remains a common practice in the United States due to social norm theory.[70] Under this lens, circumcision is a social norm and guides doctors and others to confirm the positive attributes of the procedure, declaring such information as relevant and reliable, while information which counters the positive attributes of the procedure is relegated as irrelevant and unreliable.[71] Still, non-religious male circumcision began to decline in the 1950s in the Western world.[72] Much of this is thought to be the result of a rise in national healthcare programs which did not cover the procedure. Religiously, there has been pushback against male circumcision, with notable challenges by Islamic Quranists[73] and Reformist Jews, some of whom practice a brit shalom (naming ceremony) in place of brit milah (covenant of circumcision).[74]

Different Perceptions of Female Genital Cutting and Male Circumcision in the West

Despite the large degree of similarities shared among FGC and male circumcision practices, the procedures carry very different connotations in the Western world. The process of male circumcision is one the most common surgical procedures performed in the United States and is sometimes covered by major insurance companies.[75] In contrast, FGC is seen as a human rights violation by a nearly-global consensus, and the US considers the offense a felony under § 116. In 2008, the WHO passed a resolution (WHA61.16) to eliminate the practice of female genital cutting stating: "It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions

https://www.mayoclinic.org/tests-procedures/circumcision/basics/why-its-done/prc-20013585.

70 Sarah E. Waldeck, Using male circumcision to understand social norms as multipliers, 72 University of Cincinnati Law Review 455–526.

71 Id.

72 Ronald Gray and Ronald Goldman, Do the Health Benefits of Neonatal Circumcision Outweigh the Risks?, The Wall Street Journal, June 16, 2013, https://www.wsj.com/articles/SB10001424127887324798904578531063301112102 (last visited Apr 5, 2018). See also "Snip Snap:Why More than Half of Newborn Boys in America Are Circumcised." The Economist. June 16, 2016. Accessed April 05, 2018. https://www.economist.com/news/international/21700632-why-more-half-newborn-boys-america-are-circumcised-snip-snap. (Highlights the decline in circumcision especially in Britain when at the time of publication [June 2016] an estimated 2-3% of males were circumcised.) Most of the decline occurred in the 1950s following the NHS declaring the procedure as not medically necessary and denying coverage to perform the procedure.- Cordelia Hebblethwaite "Circumcision, the Ultimate Parenting Dilemma." BBC News. August 21, 2012. Accessed April 06, 2018. http://www.bbc.com/news/magazine-19072761.

73 George C. Denniston, Frederick Mansfield Hodges, and Marilyn Fayre Milos, eds. Male and female circumcision: medical, legal, and ethical considerations in pediatric practice. Springer Science & Business Media, 2007: 142-144. (Demonstrates Islamic Quranism scholars rejecting the practice of male circumcision.])

74 Jonah Lowenfeld, Little-known non-cutting ritual appeals to some who oppose circumcision, Jewish Journal (2011), http://jewishjournal.com/news/los_angeles/community/94746/ (last visited Oct 25, 2017).

75 J. Steven Svoboda. "Circumcision of male infants as a human rights violation." Journal of Medica Etihcs 39, no. 7 (2013): 469.

of girls' and women's bodies…The practice violates a person's rights to health, security, and physical integrity, the right to be free from torture and cruel, inhuman, or degrading treatment, and the right to life when the procedure results in death."[76] International bodies have campaigned to eliminate all forms of FGC, while there is significantly less international concern over the human rights implications of male circumcision. Much of this lack of concern is attributed to the belief that the procedure may hold medical benefits.[77]

This reasoning is problematic through its justification of potentially harmful procedures based on the reduction of easily preventable conditions. Under this reasoning both excision (Type II) and infibulation (Type III) forms of FGC would be considered acceptable as the removal of the labia majora and minora could theoretically reduce instances of vulvar cancer, though both vulvar and penile cancers are very rare.[78] Two cancers with much higher rates of incidence are breast and testicular cancer, but it would be considered both medically and ethically inappropriate to perform mastectomies or castrate neonates for its potential medical benefits. Some, such as Kirsten Lee in the International Journal of Children's Rights, maintain that male circumcision is not similar to FGC because it may not cause long-term health consequences: "This procedure [male circumcision] cannot be considered an infringement upon the health or rights of boys and young men as it implies no permanent damage to health."[79] Regardless, the performance of irreversible medical procedures on non-consenting minors breaches Western medical ethical principles of respect for

76 World Health Organization, Sixty-First World Health Assembly, Female Genital Mutilation (resolution WHA61.16) , A/64/26 (24 May 2008), available from http://apps.who.int/iris/bitstream/10665/23532/1/A61_R16-en.pdf

77 J. Steven Svoboda. "Circumcision of male infants as a human rights violation." Journal of medical ethics 39, no. 7 (2013): 470. (In regards to the 2012 American Academy of Pediatrics Policy Statement: "The AAP policy statement candidly and repeatedly admits that data regarding complications of the procedure are unknown, yet inexplicably concludes that, 'Evaluation of current evidence indicates that the health benefits of newborn male circumcision outweigh the risks'.")

78 According to CDC both vaginal/ vulvar cancers (see first link) and penile (see second link) and are very rare. Furthermore a less invasive treatment than circumcision surgeries for prevention is the application of the HPV vaccine (see second link). See also: Gynecologic Cancers: Vaginal and Vulvar Cancers Statistics." Centers for Disease Control and Prevention. June 07, 2017. Accessed April 05, 2018. https://www.cdc.gov/cancer/vagvulv/statistics/index.htm. See also: "HPV and Cancer." Centers for Disease Control and Prevention. July 17, 2017. Accessed April 05, 2018. https://www.cdc.gov/cancer/hpv/statistics/race.htm.

79 Kirsten Lee, "Female Genital Mutilation - Medical aspects and the rights of children," International Journal of Children's Rights, Vol. 2, No. 1, 1994, 35. Lee follows by stating "Contrary to popular belief in various parts of the world, as for example in the United States, male circumcision has no health or sexual advantages either."

patient autonomy,[80] the Hippocratic Oath,[81] and that of non-maleficence.[82] From a legal standpoint, a California court held in 2006 that unnecessary surgeries are harmful to patients even if they are performed perfectly.[83] In the United States there is little to no regulation on male circumcision,[84] and as a result, anesthesia is not often used in clinical settings[85] and is almost nonexistent outside clinical settings.[86] The pain caused by the surgery and the common justifications for the procedure may constitute the procedure as a traditional practice prejudicial to the health of children. Furthermore, such a practice likely violates traditionally held human rights principles such as the prohibition of torture, the right to health, the child's rights to physical integrity, and the child's right to life.[87] These violations would indicate the need for governments to take measures to preclude circumcision such as that which is seen by FGC under CRC Article 24(3).

An international response against male circumcision has begun to emerge, although it has not approached the level of FGC. Medical groups have advocated making the procedure illegal even if religious justifications are given[88] because

80 Steven J. Svoboda. "Nontherapeutic Circumcision of Minors as an Ethically Problematic Form of Iatrogenic Injury." AMA Journal of Ethics 19, no. 8 (2017): 818. The procedure constitutes the removal of healthy body tissues the patient would have otherwise been likely to appreciate if they had been able to maintain bodily integrity and made the choice regarding the procedure in the future.

81 Primum non nocere" or "First, do no harm." Hippocrates (c. 460 BC - 377 BC) [Whenever a doctor cannot do good, he must be kept from doing harm.]

82 To either not harm or to accomplish a medical means by inflicting the least harm possible in order to reach a beneficial outcome.

83 Tortorella v. Castro, 140 Cal Rptr 3d 853 (2006). "it seems self-evident that unnecessary surgery is injurious and causes harm to a patient. Even if a surgery is executed flawlessly, if the surgery were unnecessary, the surgery in and of itself constitutes harm.", at 860.

84 No federal statutes that regulate circumcision procedures, however statues are in place for surgical operations on lab or veterinary animals which requires anesthetic for any painful procedure (7 USC § 2143). However, in 2014 the CDC released federal guidelines on the procedure recommending the use of anesthesia for pain management when the surgery is performed on minors. "4-B. Medically performed neonatal, pediatric, or adolescent male circumcision should be done by trained clinicians according to accepted standards of clinical care, with appropriate use of anesthesia." - Centers for Disease Control and Prevention. "Recommendations for providers counseling male patients and parents regarding male circumcision and the prevention of HIV infection, STIs, and other health outcomes." STIs, and other health outcomes. [http://arclaw.org/sites/default/files/CDC-2014-0012-0003.pdf] (2014).

85 Howard J. Stang, & Leonard W. Snellman. "Circumcision practice patterns in the United States." Pediatrics 101, no. 6 (1998): 2-3. (Obstetricians perform the most circumcisions [among classifications of practitioners surveyed [survey included pediatricians and family practitioners] at around 70% however only 25% use anesthesia in the procedure.)

86 Rabbi Yaakov Montrose. "Lech Lecha - No Pain, No Bris?" Halachic World - Volume 3: Contemporary Halachic topics based on the Parshah. Feldham Publishers 2011, pp. 29-32 (Under Jewish Law (acharonim) the tradition mitzvah of brit milah is grounded in the pain it causes so sedation, ointment, or anesthetic should not be used.)

87 World Health Organization, Eliminating female genital mutilation: an interagency statement, 2008, http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf, 1. (Work is in reference to FGC however such human rights principles are applicable to males under non-discrimination on the basis of sex.)

88 Vittorio Hernandez, Denmark, Sweden Ban Non-Medical Circumcision of Boys, Int'l. Bus. Times AU, January 28, 2014, http://www.ibtimes.com.au/denmark-sweden-ban-non-medical-circumcision-boys-1330592..

they see the procedure as non-therapeutic and heavily culturally-influenced.[89] Male circumcision has been condemned by international bodies including the United Nations General Assembly, which labelled the procedure as both a human rights violation and non-beneficial.[90] Additionally, the Council of Europe has urged its member countries to pass laws shielding minors from traditional practices not in the best interest of the child.[91]

Despite the potential harms and human rights implications of male circumcision, the procedure is still considered a very important practice in both Islam and Judaism. In Judaism, the practice has existed for over 3,000 years, and the Torah states that those who are not circumcised will be cut off from their peoples.[92] In Islam, the practice is known as Khitan and the hadith of Muhammad states that "the Earth becomes defiled from the urine of the uncircumcised for forty days" and "the Earth cries out to God in anguish because of the urine of the uncircumcised."[93] Social pressures reinforce the ritual of religious circumcision in Shia Islam. According to whom they see as the rightful successor Muhammad, Ali, men are to be prevented from going on the pilgrimage to Mecca if they are not circumcised.[94] Attempts to challenge the culture of circumcision would be difficult because it is hard to break customs, and 90 percent of circumcised fathers in the US chose to circumcise their sons in order to prevent their children from looking different than them.[95] Countries that have established regulations against male circumcision often include clauses that invoke a religious exception for the procedure to account for its religious importance.[96] However, these exceptions highlight a cultural relativism that exists within Western society where traditional Judeo-Christian customs are viewed as acceptable and normative while foreign customs and the FGC practices of minority religions are viewed as barbaric. In the West, debate about male circumcision regulation is virtually untouchable as it seen as both moral imperialism an irresponsible interference in an individual's culture, often bringing forth calls of anti-Semitism and

89 Eleanor LeBourdais. "Circumcision no longer a 'routine' surgical procedure." CMAJ: Canadian Medical Association Journal 152, no. 11 (1995): 1873.

90 Paul Jerome McLaughlin, Jr. "The Legal and Medical Ethical Entanglements of Infant Male Circumcision and International Law." Journal of Medical Law and Ethics 4, no. 1 (2016): See supra note 188 at 37.

91 Id.

92 (Genesis 16:14) ("Any uncircumcised male who is not circumcised in the flesh of his foreskin shall be cut off from his people; he has broken my covenant.")

93 George C. Denniston et al., Male and female circumcision: medical, legal, and ethical considerations in pediatric practice (2007), see supra note 85 at 147.

94 Id at 146.

95 World Health Organization. "Male circumcision: global trends and determinants of prevalence, safety and acceptability." (2008), 5.

96 Republic of South Africa. "Children's Act, No. 38 of 2005." Government Gazette 492, no. 28944 (2005). (see Chapter II: Article 12 Section 8 (a) and (b). Sections provide exemptions for religious and medical circumcisions to occur.

Islamophobia.[97] This highlights a double standard of ritual acceptance which allows for harms to be distributed to individuals on a racial and cultural basis effectively depriving them of rights. A practice that promotes racial and religious discrimination violates the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty the United States has signed and ratified[98].

The Juridical Framework for Limiting Male Circumcision in the United States

J. Steven Svoboda in the Journal of Medical Ethics believes there is a framework to regulate male circumcision in the United States under the precepts of both domestic and international law.[99] Domestically, the 1891 Supreme Court case of Union Pacific Railway Company v. Botsford,[100] established bodily integrity as a common law right. In the opinion delivered by Justice Horace Gray, he stated: "No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law."[101] Svoboda points to Christyne Neff's work in the Yale Journal of Law & Feminism where she highlights that courts have consistently upheld the principles of bodily integrity with support from the First, Fourth, Fifth, and Fourteenth Amendments of the Constitution.[102] Male circumcision is unique in that it is the only highly invasive medical procedure for a minor that is performed to prevent ailments that may never affect them in the future. Other highly invasive preventative surgeries performed on minors, such as appendectomies, hysterectomies, mastectomies, and castrations would be considered unnecessary and ridiculous. Even if male circumcision were justified for potential preventive medical benefits, such a justification would be problematic as it would provide justification for FGC as a preventive medical procedure. The United States has little to no regulation on male circumcision despite many forms of the procedure being more invasive than certain forms of FGC which are explicitly prohibited under federal law. As such, Svoboda considers the lack of protection against male circumcision, while the government

97 Harriet Sherwood. "Iceland Law to Outlaw Male Circumcision Sparks Row over Religious Freedom." The Observer. February 18, 2018. Accessed April 06, 2018. https://www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country.

98 Article 5 (b): "The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution ..." from the International Convention on the Elimination of All Forms of Racial Discrimination.

99 Svoboda, supra note 75, at 468-474.

100 Union Pacific Railway Company v. Botsford, 141 U.S. 250 (1891)

101 Id at 251.

102 Svoboda, supra note 75, see supra note 36 at 470 and 474.

outlaws FGC, to be in clear violation of the equal protection principles under Fourteenth Amendment jurisprudence.[103]

Svoboda also claims that the United States is beholden to international treaties under the Constitution's Supremacy Clause, which holds that both the Constitution and international law are the "law of the land."[104] Such a precedent occurred following the 1815 Nereide case which clarified that the United States is under the obligation of international law including customary law.[105] Such precedence was affirmed 85 years later in 1900 by The Paquete Habana case, in which the Supreme Court's holding integrated American law with customary international law.[106] As a result of this case the United States is beholden to international conventions which contain provisions that can be interpreted to enjoin both FGC and male circumcision including the CRC, the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention against Torture (CAT), and the Universal Declaration of Human Rights (UDHR)[107]. Male circumcision meets the threshold for a traditional practice prejudicial to the health of children because it violates human rights principles such as a child's right to physical integrity, his or her right to health, the prohibition of torture, and his or her right to life.[108]

According to Richard Bilder in the Houston Journal of International Law, the United States' lack of ratification of international conventions does not preclude citizens from receiving rights conferred upon them by treaties.[109]

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103 Id at 472.

104 Id at 471.

105 THE NEREIDE, BENNETT, MASTER, 13 U.S. 388, 3 L. Ed. 769, 3 L. Ed. 2d 769 (1815), at 423.

106 THE PAQUETE HABANA, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900).

107 J. Steven Svoboda. "Circumcision of male infants as a human rights violation." Journal of medical ethics 39, no. 7 (2013): 471.

108 International Conventions circumcision may violate.

Abbreviations: International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations' Universal Declaration of Human Rights (UDHR), United Nations Convention on the Rights of the Child (UNCRC), United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), United Nations Security Council (UNSC).

*Violation of the child's rights to physical integrity-Circumcision violates children's rights to self-determination as their physical integrity is not protected from violation and offenses against their bodies by others/ Threatens right to health (UDHR [Article 25]), ICESCR [Article 19]) -If one follows the belief that circumcision it is medically unnecessary to alter the natural anatomy and physiology of a child then consequently procedure carries risks of medical complications especially when undertaken in unhygienic conditions posing a threat to the child's health./Threatens children's Right to life (UDHR [Article 3], ICESCR [Article 12])- life is threatened because the operation can lead to medical consequences occasionally resulting in death./Violation of the prohibition of torture (UNCAT) - subjecting individuals typically neonates, infants, and children to cruel, inhuman, painful, or degrading treatment. Furthermore, the UN Commission on the former Yugoslavia defines practice of male circumcision as a sexual assault and a human rights violation. See UNSC Commission of Experts' Final Report [on the Former Yugoslavia] (S/1994/674, part IV, section F).

109 Richard B. Bilder, Integrating International Human Rights Law into Domestic Law--US Experience, Hous. J. Int'l L., 1981, at 2.

In turn, the United States is required to abide by provisions of the CEDAW and CRC despite a lack of ratification.[110] International conventions contain an inherent international legitimacy, with the CRC have international legitimacy as it is the "the most widely ratified human rights instrument in history."[111] As such, customary international law provisions are enforceable in federal courts. Because of the analogous nature of genital cutting for non-consenting minors, and the international prohibition against FGC, Svoboda believes a framework is in place to allow for the enjoinment of FGC and male circumcision, as they are practices prejudicial to the health of children and can be limited as the US is beholden to international and customary law.

Consequences If the Court Acquits § 116 Charges

If the Court decides in favor of the defense, it will grant legal standing for FGC to be protected under First Amendment grounds. This would force the state to sanction an act of violence and harm against young girls and women in consideration of parents' right to religious freedom. Exoneration of a human rights violation would likely result in a public opinion backlash throughout the United States. This backlash is virtually guaranteed to occur as the US is significantly opposed to FGC. The opposition to FGC can be seen in the public response to the 2010 American Academy of Pediatrics (AAP) Committee on Bioethics recommendations on FGC. The AAP recommended groups who practice FGC be allowed to perform a procedure leaving ritual nick on the clitoris or clitoral hood to draw blood (Type IV) in order to prevent groups that practice FGC from resorting to more unsafe and extreme measures.[112] This recommendation faced significant backlash from the public and resulted in the AAP Committee on Bioethics to retract their policy statement.[113] Furthermore, if the Court decided to drop § 116 charges, such an action could have the potential to further a perceived immunity among FGC practitioners from prosecution. If this occurs, it would further encourage the procedure to put more girls and women in harm's way.

110 Jordan J. Paust "Customary International Law: Its Nature, Sources and Status as Law of the United States." Mich. J. Int'l L. 12 (1990): 86-87. (Affirms Bilder's notions that lack of ratification does not prevent laws from being binding domestically.)

111 Svoboda, supra note 75, see supra note 57 at 472.

112 Committee on Bioethics. "Ritual genital cutting of female minors." Pediatrics 125, no. 5 (2010): 1088-1093.

113 Kathleen Louden. "AAP Retracts Controversial Policy on Female Genital Cutting." Medscape Medical News. June 02, 2002. Accessed April 06, 2018. https://www.medscape.com/viewarticle/722840.

Negative Externalities Associated with a Successful Prosecution § 116 Charges

Even if the prosecution is successful against Nagarwala and her associates, it will still likely not eliminate FGC in the US. The government hopes a successful prosecution will establish a chilling effect and prevent future practitioners from carrying out the procedure. This will likely not occur, as FGC is a deeply held societal and cultural belief making its eradication through statutes and legal decisions unlikely, and the decision may only further perception that non-Judeo-Christian practices are somehow negative or inferior to Western ones.[114] Additionally, a harsh penalty for Nagarwala and her associates may make the procedure more dangerous for girls who undergo it, as parents will choose highly unsafe alternatives to FGC or allow religious officials with little or no medical training to perform the risky procedure. This has been seen recently in the European Union and in the United States where harsh punitive sanctions against the practice have driven performance of the procedure further underground.[115]

Dr. Jumana Nagarwala's credentials are impressive. She is an emergency medicine specialist who graduated from Johns Hopkins University in 1998, was a faculty member of the Wayne State University's School of Medicine, served as the assistant director for the emergency medicine residency program at the Henry Ford Hospital, and has authored or coauthored large amounts of medical literature. If something went awry during an FGC procedure, Dr. Nagarwala had the expertise to correctly treat the receiving woman or girl. FGC procedures have been carried out "underground" in the United States for decades, but in some cases, they were performed in clinical settings by practitioners with advanced medical training, such as those performed by Dr. Nagarwala. If sanctions are harsh, a chilling effect could occur among medical practitioners who will opt out of performing the procedure. If this occurs, parents may entrust individuals with little to no formal medical training and practitioners who use crude instruments and carry out the procedure in unsanitary conditions.

Parents may also choose to travel internationally to countries where the procedure is common to subject their children to the procedure in what is known

114 Jacqueline Smith. "Male circumcision and the rights of the child." To Baehr in our minds: Essays in human rights from the heart of the Netherlands. Netherlands Institute of Human Rights (SIM), University of Utrecht 21 (1998): 465-498. "The problem with laws and regulations, particularly in the case of a deeply-rooted practice is that, without clear enforcement mechanisms and without the support of education, information and consciousness-raising, no clear effects can be expected from the law. Laws forbidding behaviour which is deeply rooted in a culture will neither receive extensive support nor bring about much change." See also Supra note 78.

115 E. Edouard, E. Olatunbosun, and L. Edouard. "International efforts on abandoning female genital mutilation." (2013): see supra note 15 at 152.

as "vacation cuttings."[116] Female circumcision is a socially normative practice to many cultures just as male circumcision is. Legislation alone will not affect meaningful change, and campaigns would need to be waged distributing effective information, increasing effective enforcement, and the changing the social norms behind the practice. It is a difficult proposition, but dangerous ingrained cultural practices have been successfully eliminated in the past, such as that of foot binding in China.[117] A decision handing a guilty judgement to the defense on § 116 charges would show the government engaging in an explicit form of viewpoint discrimination. In this case, the government would be condoning the genital cutting of males, a familiar custom in the Judeo-Christian tradition, while openly discriminating against and criminalizing the unfamiliar practices of non-Judeo-Christian and minority religions who engage in FGC. This is a harmful prospect for democratic legitimacy in the United States because it would be an explicit contradiction to a value-neutral state and further ethnocentric policies above those that guarantee egalitarian protections.

Male Circumcision

A successful prosecution would also call into question other traditional practices that may be prejudicial towards the health of children, notably the practice of male circumcision. The processes of both male and female circumcision are similar in that that they are often motivated by religious or cultural factors and have similar negative health externalities, such as higher risks of disease, disability, and death than those who are not circumcised for medical reasons. If Nargarwala is convicted despite factual claims that only a nick or scraping of the genitals occurred, the court would be making a judgment that any nonmedical alteration of a female's genitals is impermissible. This ruling in favor of bodily integrity has the potential to establish a greater degree of standing for males on top of Svoboda's framework to challenge circumcision under the guise of equal protection provided for both sexes under the Fourteenth Amendment. Such challenges may impair Jewish and Muslim groups from carrying out the rite in the future. If challenges place limits on male circumcision, the procedure would likely encounter the same risk encountered by harsh sanctions on FGC. Restrictions would likely drive the procedure underground outside the hands of medical professionals and subject the surgery's recipients to unsafe and unsanitary conditions to avoid potential legal consequences.

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116 Julie Turkewitz. "A Fight as U.S. Girls Face Genital Cutting Abroad." The New York Times. June 11, 2014. Accessed April 06, 2018. https://www.nytimes.com/2014/06/11/us/a-fight-as-us-girls-face-genital-cutting-abroad.html.

117 Gerry Mackie, Ending footbinding and infibulation: A convention account, Am Socio Rev, 1996, at 105-107 & 111-113.

Conclusion

The prosecution of Nagarwala and her associates under § 116 in United States v. Nagarwala et al. presents a tricky situation for the government. If the prosecution is successful, it may appear to be a victory for human rights. However, it highlights a contradictory approach to which groups are able to exercise their freedom of expression. In this situation, parents who practice familiar Judeo-Christian customs are able to continue traditionally harmful practices prejudicial to the health of children while those parents practicing unfamiliar minority religions are persecuted for similar actions. A decision based on cultural value judgements establishes both a cultural and religious hierarchy which favors familiar customs. This approach is counterintuitive and an antithesis to Western beliefs of universal human rights inalienable to all regardless of caste, class, creed, gender, ethnicity, or race. Furthermore, this outcome has the ability to push FGC further underground, leading the procedure to be performed in less safe conditions that would put the recipients in greater danger. A parallel consequence may be that this case would lead to Fourteenth Amendment legal challenges against male circumcision. If this occurs, it has the potential to disenfranchise millions of practicing Jewish and Muslim Americans who will no longer be able to perform their centuries-old religious rite of passage. A decision in favor of the defense would hold equally problematic, as a branch of the government will have condoned what is internationally considered a human rights abuse. This would harm the legitimacy of the United States' in its concern for international human rights issues, especially as mentioned its missions to end global FGC such as those advanced in the UN Declaration of Human Rights, which the United States helped draft.[118] This outcome could also lead to the opposite of a chilling effect, with practitioners feeling encouraged to carry out the procedure due to a perceived immunity from the court exonerating the defendants from § 116. This decision favors the absolute right of the parents to raise their children how they see fit, even if it endangers their child's well-being. The decision would condone the performance of body modifications on children who cannot consent to the practice and may have made an alternative decision regarding the procedure at a later age. Whatever the resulting outcome concerning the charges § 116, the Court will confront a dilemma to either protect children's physical integrity and ensure they are free from pain or to allow parents to maintain a tradition with harmful externalities they believe is in the best interest of their child. This brings about a broader question for society as to whether a community has the right to maintain harmful traditions simply because they are established traditions with longevity which are seen as in the best interest of participants.

118 Assembly, UN General. "Intensifying global efforts for the elimination of female genital mutilations." UN GA, A/C 3.

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ARTICLE

INTERNATIONAL LAW AND THE ISRAELI EMBASSY AND AMIA BOMBINGS IN BUENOS AIRES: IRANIAN TERRORISM, ARGENTINE CORRUPTION, AND THE BIRTH OF AN INTERNATIONAL COLD CASE

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Introduction

In the twentieth century, South Americans from the Andes to the Southern Cone confronted widespread domestic terrorism and organized crime, fought endless drug wars, struggled against murderous dictatorships and military juntas, romanced with wild demagogues, and suffered populist-induced economic collapse. It was these political trends that occupied the continent's peoples, while Europe, Africa, and Asia struggled with transnational terrorist groups often predicated on radical right-wing, left-wing, and religious ideologies. For a time, South America's geographical distance from the Eurasian and African landmasses preserved its less-than-prominent locus within the matrix of global crusades between East and West, colonialism and self-determination, secularism and fundamentalism—but the illusion of South America's immunity to foreign political struggles was ephemeral, and soon after the fall of the Berlin Wall, would be shattered in the most tragic and terrible way.

Indeed, on March 17, 1992, a suicide bomber drove a car laden with explosives into the Embassy of the State of Israel in Buenos Aires, Argentina, killing 29 civilians and maiming 242.[1] While the Islamic Jihad Organization (a nom de guerre utilized by Hezbollah, a Lebanese paramilitary-cum-political party)[2] claimed responsibility for the bombing (releasing surveillance footage to prove the claim),[3] the culpability of the Islamic Republic of Iran in planning, funding, and orchestrating the attack on the Israeli Embassy has been authoritatively corroborated by Argentine, American, and Israeli investigative authorities.[4] Just two years later, as it was still reeling from the deadliest terrorist

1 Ben-Rafael, et. al. v. Islamic Republic of Iran, et. al. 540 F. Supp. 2d 39, 45 (D.D.C. 2008)

2 Ibid.

3 Matthew Levitt. "Iranian and Hezbollah Operations in South America: Then and Now," PRISM 5(4), December 2015: 120.

4 Carlos Escudé and Beatriz Gurevich. "Limits to Governability, Corruption and Transnational Terrorism: The Case of the 1992 and 1994 Attacks in Buenos Aires." Estudios Interdisciplinarios de América Latina 14(2), 2003: 129.

attack in its history, Argentina again fell victim to a deadly act of terrorism: in the early morning of July 18, 1994, another suicide bomber (later identified as a 21-year-old Lebanese Hezbollah militant named Ibrahim Hussein Berro)[5] drove a Renault Trafic carrying several hundred kilograms of TNT and ammonium nitrate to the entrance of the Asociación Mutual Israelita Argentina (AMIA) Jewish community center building in central Buenos Aires, and detonated his payload.[6] Within seconds of detonation, the six-story AMIA building—home to the largest collection of Latin American Jewish artifacts in the world, as well as the national archives of Argentina's large Jewish community—imploded into rubble, claiming 85 victims and over 300 injured.[7] The attack on the AMIA is significant not only in that it remains the single worst terrorist attack in the history of Latin America,[8] but also in its resonance as the moment (alongside the Israeli Embassy bombing) in which South America first became an active target of Islamist militants seeking to play out their own political and religious conflicts and psychodramas in the continent.[9]

Naturally, the AMIA and Embassy bombings devastated Argentina, which at the time, was still engaged in a period of democratic re-consolidation, having emerged only a decade earlier from half a century of brutal military dictatorship.[10] Seen and felt by Argentines as not only deliberate attacks on the country's Jewish community (Latin America's largest and the world's sixth-largest)[11] but attacks on the entire Republic, the AMIA and Embassy bombings remain a potent subject in Argentine public discourse and memory, a consequence of the Argentine state's perpetual failure to conduct anything resembling a competent, impartial investigation into the attacks.[12] Indeed, though never exactly renowned for exceptional probity or independence, Argentina's judiciary has become increasingly marred by corruption in the decades since the end of the country's dictatorship, raising uncomfortable, but urgent questions about the salience of rule of law in the country.[13] More grave, however, is the continued ebb of an already porous separation between the judicial and executive branches, a trend which greatly accelerated during the eight-year presidency of Cristina Fernández de Kirchner (2007-15), and symptomatic of what Douglas

5 Ibid.

6 Douglas Farah. "The Murder of Alberto Nisman: How the Government of Cristina Fernández de Kirchner Created the Environment for a Perfect Crime." International Assessment and Strategy Center, March 2015: 5.

7 Levitt, 121

8 Farah, 5

9 Escudé and Gurevich, 128

10 Karen Ann Faulk, "The Walls of the Labyrinth: Impunity, Corruption, and the Limits of Politics in Contemporary Argentina" (Ph.D. diss., University of Michigan, 2008): 164

11 Escudé and Gurevich, 136

12 Faulk, 179

13 Par Engstrom. "Addressing the Past, Avoiding the Present, Ignoring the Future? Ongoing Human Rights Trials in Argentina." LASA Forum 44(3), 2013: 30

Farah describes as the "larger mosaic of corruption, foreign influence peddling and [obstruction of justice] that define[d] her government."[14]

Indeed, Argentina's numerous investigations and judicial proceedings into the AMIA and Israeli Embassy attacks have been marked by a muddy combination of successive cover-ups at the presidential level,[15] judicial corruption and bribery,[16] an alleged quid-pro-quo to shield Iranian suspects in return for preferential trading terms,[17] and even the shocking assassination of the case's most respected and competent prosecutor.[18] That justice in the case of the two Buenos Aires bombings remains elusive after two decades of state failure to execute an effective, impartial, and thorough investigation is but a single case-study exposing the dire consequences of Argentina's sometimes shambolic, often incompetent federal judiciary, and the societal and political degradation resultant of a system defined more by 'obstruction of justice' than 'rule of law.' But as the case entails what are largely determined to have been two successive Iranian-concocted terrorist plots on Argentine soil,[19] the botched domestic proceedings in Buenos Aires raise broader questions about potential access to international legal mechanisms for judicial remedy in cases of state-sponsored terrorism where domestic judicial organs prove unable or unwilling to perform effective proceedings to that end.[20] Even more broadly, the particulars of the AMIA case also serve as a useful lens through which to examine the suitability of existing norms and institutions of international criminal law and public international law in effectively addressing cases of state-sponsored terrorism, according to the international community's enumerated commitment to preventing impunity for perpetrators of such acts, and ensuring justice for their victims.[21]

Accordingly, this paper contains three primary sections: the first comprises a detailed timeline of Argentina's botched domestic investigation into the bombings and aims to provide the historical context on which this paper's broader subject is predicated—namely, the theoretical exploration of the merits, demerits, and procedural hurdles of applying international law to a domestic criminal case (albeit one of an international character), present the prosecuting state's abiding failure to provide judicial remedy, and the offending state's refusal to honor its customary aut dedere aut judicare obligations. The second section considers in depth each of these substantive questions in the context of

14 Farah, 6

15 Escudé and Gurevich, 139

16 Ibid.

17 David M. K Sheinin. "The Death of Alberto Nisman, the Argentine Presidency Unhinged, and the Secret History of Shared United States-Argentine Strategy in the Middle East." LASA Forum 47(1), 2016: 35

18 Farah, 5

19 Escudé and Gurevich, 129

20 Faulk, 178

21 Christophe Paulussen. "Impunity for International Terrorists? Key Legal Questions and Practical Considerations.". (research paper, International Centre for Counter-Terrorism - The Hague), April 2012: 1

the historical background, and in doing so, provides a detailed analysis of the international legal principles, which would govern any attempt to internationalize the adjudication of the AMIA case—namely, the patchwork network of treaties and customary law, which comprise the uniquely fraught legal regime on international terrorism, with specific attention to the legal criteria establishing state responsibility for terrorist acts, and the legal doctrines of effective control and overall control as related to actions conducted by state-backed paramilitaries, such as Hezbollah. The third and final section proceeds to articulate the jurisdictional and procedural "barriers to entry" (as well as potential pathways) which Argentina would encounter in a potential bid to access any of the notable international legal bodies to seek remedy in the AMIA case; specifically considered are the mandate and jurisdictional competencies of the International Court of Justice.

Indeed, considering the myriad obstacles to achieving international justice in the case of the 1992 and 1994 terrorist bombings in Argentina's capital, this paper aims to demonstrate the limitations of international public and criminal law (at the intersection of which this case is necessarily domiciled) in providing advanced legal mechanisms to contend with the scourge of state-sponsored terrorism and promote accountability for its perpetrators. In doing so, this paper seeks to illustrate that, rather than furthering global efforts to counter de facto and de jure impunity for "perpetrators, organizers, and sponsors of terrorist attacks [as well as] hold to account those responsible for aiding, supporting, or harboring [them],"[22] international public and criminal law actually have the counterproductive effect of further entrenching impunity for these "bad actors" in the breach. The severe flaws constraining the existing international criminal legal architecture vis-à-vis the "crime" of terrorism (and more broadly, the absence of a universal* compulsory mechanism accessible to states within multilateral forums) constitutes the most significant factor in the hurdles to international remedy in Argentina's AMIA case. In sum, this paper aims to position the decades-long failure to achieve judicial remedy in the AMIA case as cautionary evidence of the enduring deficiencies within the architecture of international criminal law, which preclude an adequate instrument of supranational recourse for state victims of state-sponsored terrorism, and further entrench the pernicious condition of impunity for states that sponsor terrorism, and the individuals and groups they employ to that end. In the end, this failure amounts to a regrettable perversion of international criminal law, a mechanism designed to further the reach of international justice, but in the very obstruction of which it has ironically come to participate.

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22 Paulussen, 1-2

* as contrasted with an ad hoc or situational mechanism

I. The AMIA Case against Argentine (in)Justice

The Compromised Investigation

While the 1992 and 1994 Buenos Aires bombings each gained the title of "Argentina's worst-ever terrorist attack" following the release of their respective casualty tallies, unfortunately, that same modifier could adequately describe the relative quality of the country's investigations into those attacks. Of such poor quality were the AMIA investigations, that in 2003, the newly-inaugurated president Néstor Kirchner denounced them as a "national disgrace."[23] More recently, Claudio Grossman, the Chilean lawyer who served as the Organization of American States' observer to the case, recalled, "every aspect of the case was a disaster, beginning with the initial investigation."[24] Indeed, in the course of its twenty-three-year existence, the AMIA case has felled numerous men and women, who, having participated in illicit activities—from bribery to obstruction of justice—found their reputations, careers, and even their liberty destroyed by the case's long wake. And yet, for all the investigation's success in exposing high-level corruption, it is that very corruption, which has continually hamstrung proceedings and prevented the construction of a durable framework to move toward the fulfillment of justice for the bombing's victims. Unfortunately, the case has occasioned a net-zero gain for the victims of the bombings and more importantly, for Argentine justice itself.

Indeed, not only was the AMIA investigation rife with corruption, it was crippled in its earliest stages by severe qualitative, technical, and operational problems, due in part to the failure of the provincial and federal governments to invest the requisite human, fiscal, and mechanical resources required to conduct a rigorous and probative investigation into the country's worst-ever terrorist attack.[25] In a 2003 interview with the New York Times, Argentine journalist Raúl Kollmann contrasted the attention and manpower Argentina devoted to the AMIA investigation with the United States' response to the attacks on the federal building in Oklahoma City and the American embassies in Nairobi and Dar es Salaam, "At times, only 15 to 20 people were assigned to [the AMIA case], while [in the wake of] the Oklahoma City bombing, 5,000 law enforcement officials were deployed immediately… and over 1,500 were flown to East Africa… these agents interrogated 10,000 witnesses in four days. In Argentina, witnesses are still waiting to be called… [and] it took over three years to put together a 100-person team of investigators that never functioned properly." "The real problem," Kollmann concluded, "is that the Argentine government was never

23 Levitt, 123

24 Dexter Filkins. "A Deadly Conspiracy in Buenos Aires?," The New Yorker, July 20, 2015.

25 Farid Hekmat. "Terror in Buenos Aires: The Islamic Republic's Forgotten Crime Against Humanity." (report, The Abdorrahman Boroumand Foundation), July 18, 2009: 2

interested in solving the case."[26] And many within Argentina share his belief; bolstered by evidence of profound negligence on the part of investigators—namely that neither autopsies nor DNA tests were performed for nearly a decade after the bombing, in addition to the inexplicable decision by police investigators to "simply [dump] in a bin [the remains of] a head found near the scene, thought to have been that of the [suicide] bomber [Berro]."[27] These events constitute a wider trend during the investigation in which "evidence was removed from the rubble without forensic analysis, evidence was mishandled or lost,* and key witnesses were ignored for years."[28]

Official Conspiracy and the "Local Connection"

Compounding the under-resourced investigation's operational failures (as well as what appears to have been systemic incompetence and dereliction among investigators), was the rampant political malfeasance which compromised the AMIA case for an entire decade, culminating in the state's effective declaration of a 'mistrial' in late 2004, and the investigation's total collapse. As Mr. Grossman asserted, the dismal fate of the AMIA investigation was apparent from its outset; the first portent of the case's ultimate doom lay in the man charged with its ultimate oversight, then-President Carlos Menem, who by the time of the attack had already acquired a reputation for corrupt dealings, including widespread allegations of being "bought and paid for" by unsavory foreign governments, including Gaddafi's Libya and Hafez al-Assad's Syria.[29] Indeed, Menem set the tone for what would become a corrupt, compromised investigation almost immediately after the attack on the AMIA. In his first press conference following the bombing, the president strongly implied that rogue officers of the Buenos Aires Metropolitan Police had orchestrated the attack. However, a month later, following an outcry from Jewish community leaders who noted the nearly-identical traits tying the AMIA bombing and the Iranian-commissioned Embassy bombing two years prior, as well as senior law enforcement officials, who denounced the president's attempt to prejudge the outcome of the federal investigation, Menem performed an abrupt about-face, denying he had ever implicated 'corrupted officers' of the Buenos Aires Metropolitan Police, and then denouncing Iran for its campaign of terror.[30] Despite Menem's apparent

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26 Escudé and Gurevich, 135

27 Hekmat, 22

* Including parts of the Renault truck discovered by police and allowed to languish in a remote warehouse, as potentially crucial evidence degraded with exposure to the 'elements.' See Filkins, "Deadly Conspiracy"

28 Hekmat, 2

29 Escudé and Gurevich, 130

30 Ibid., 133

willingness to personally "name and shame" Iran for its orchestration of the attack, the manner in which the investigation unfolded would prove the opposite. Although Iranian-Hezbollah culpability was evident from the outset of the investigation (and promptly corroborated by Argentine, Israeli, and American authorities: SIDE, Mossad, and FBI, respectively), the prosecutors assigned to the case chose instead to focus solely on a so-called "local connection," operating under a thesis that rogue police officers and agents of various federal security services (described alternatively as: "fascistic," "right-wing," or "anti-Jewish" mercenaries) served as accomplices to the attack by contriving the logistical conditions, which permitted the AMIA bombing to play out unimpeded by local authorities.[31] Thus, of the 22 indictments handed down during the first phase of criminal proceedings overseen by federal Judge Juan José Galeano, 17 were for members of the Buenos Aires Police, while the other five comprised of Carlos Telleldín (a salesman of used and stolen cars, who was eventually found to have sold the car used to bomb the AMIA to Mohsen Rabbani, Iran's point-man in Buenos Aires and logistical planner for the attack) and his associates.[32]

Eventually, the "local connection" pursued by prosecutors (the thread on which the entire case revolved) was discredited amidst the revelation that Judge Galeano bribed Telleldín to the tune of $400,000 (financed by SIDE at the behest of President Menem[33]), instructing him to revise his initial testimony to implicate members of the Buenos Aires police, so as to provide ostensible credence to the concocted "local connection" theory.[34] Initially, the motive for Galeano to obstruct justice (he was found to have personally destroyed key evidence in the case[35]) is puzzling, but it was eventually revealed that his illicit actions functioned as part of a cover-up intended to pin the blame for the AMIA attack on alleged 'rogue' officers of the provincial police forces, while obfuscating the well-established evidence pointing to Iran's culpability for orchestrating the attack.[36] As if the existence of a cover-up involving the case's presiding judge was not damning enough, it was soon discovered that the origins of the cover-up lay even further up within the highest levels of Argentina's government, as President Carlos Menem and SIDE head Hugo Anzorreguy were implicated, in addition to two (Eamon Mullen and José Barbaccia) of the case's three prosecutors.[37] The attempt by Argentina's most powerful leaders to obstruct justice in the case of the deadliest foreign attack ever commissioned on their nation's soil is perhaps not as surprising as it seems; Faulk asserts that "[in

31 Escudé and Gurevich, 130
32 Hekmat, 11-12
33 Ibid., 25 and Filkins, "Deadly Conspiracy"
34 Levitt 123
35 Escudé and Gurevich, 139
36 Faulk, 22
37 Ibid., 180 and Filkins, "Deadly Conspiracy"

Argentina] it is widely believed that acts defined as criminal, such as the AMIA bombing remain unpunished as a consequence to the webs of relationships and interests that defines the workings of politics…the corrupt relationships that operate as the basis of politics inhibit the resolution of these illegal acts, creating an] [auto]-perpetuating climate of impunity.[38] Indeed, cover-ups of the attack, which began during the presidency of Carlos Menem (and which continued during the presidencies of Fernando de la Rúa, Eduardo Duhalde,[39] and allegedly, Cristina Fernández de Kirchner[40]) were initially meant to divert attention from incriminating actions taken (and not taken) by Menem and his administration, which, if exposed, may have destabilized the government.[41] Certainly, a probative investigation pointing not only to negligence on the part of Menem and his administration, but also to a broader, graver trend of "...deterioration of the state apparatus [and] its chains of command" would have crippled trust in Argentina's political institutions—from the president down to the law enforcement agencies sworn with the defense of the nation and the safety of its citizens.[42] In truth, the Menem government had objective grounds to fear a rigorous investigation, given evidence of: inaction by numerous federal security services and intelligence agencies in the lead up to the AMIA bombing despite receipt of multiple advance warnings of the impending attack;[43] the unexplained absence of usually ubiquitous neighborhood police patrols and federal security guards* at the time of both the Embassy and AMIA bombings;[44] as well as the dereliction of the National Office of Immigration in applying sufficient scrutiny to the entries and exits of foreigners into and from Argentina around the time of the bombings, especially given that the sudden, illegal entry (through the lawless Triple Border at which Argentina, Paraguay, and Brazil meet) of 17 individuals ("couriers") to Argentina in the days and weeks prior to the bombing, all of whom holed up at the Iranian Embassy for several days before hastily departing just 24 hours prior to the attack—should have raised numerous alarm bells among Argentina's border agents.[45] In addition to these eyebrow-raising circumstances, the final factor which prompted Menem and his allies to improvise a cover-up concerned the president's apparent history of murky dealings with Iranian intelligence and regime authorities, the most incriminating of which involved an alleged $10 million bribe from the Iranians paid directly to Menem's Geneva-domiciled bank

38 Ibid., 22
39 Escudé and Gurevich, 139
40 Levitt, 119
41 Escudé and Gurevich, 135
42 Ibid., 134
43 Ibid., 128

* inexplicably off-duty during the attacks. see below
44 Escudé and Gurevich, 135
45 Ibid., 129 and Levitt, 121

account[46] in a quid pro quo deal to induce Menem to quash any inquiries into Tehran's role in orchestrating the 1992 Embassy bombing.[47] As with all exposed cover-ups, that every incriminating fact was eventually exposed (along with the cover-up itself) in the course of the AMIA investigation is the highest of ironies.

Indeed, over the course of three years (from September 2001 to September 2004), in what became the longest trial in Argentine history, all 22 individuals indicted by Judge Galeano (including the Buenos Aires policemen; Carlos Telleldín, and his associates) were tried before the Third Federal Criminal Oral Court (known as TOF3) in the Autonomous City of Buenos Aires.[48] As the trial wore on, overwhelming evidence of the aforementioned criminal wrongdoing committed by Galeano, Menem, Anzorreguy, and the two prosecutors, among others, came to light in the courtroom, leading to the swift removal in December 2003 of Galeano as presiding judge (and ultimately, his impeachment and criminal prosecution in the ongoing "AMIA 2" trial), as well as the dismissal of prosecutors Mullen and Barbaccia in April 2004.[49] Due to the exposure of the sweeping corruption and obstruction of justice that had pervaded the AMIA investigation from its inception, following the conclusion of oral testimony, in September 2004 the TOF3 panel of judges nullified the entire criminal case that had come before it, expunged all charges against the 22 indictees, and voided the conclusions of the investigation into the attack conducted theretofore, denouncing it as "part of an elaborate framework designed to falsely incriminate the accused." Indeed, given the evidence of corruption, the TOF3 called for a probe into the investigation to scrutinize the conduct of Galeano, Menem, Anzorreguy, and Mullen and Barbaccia, among others.[50] All of them have been indicted for a litany including some of the highest crimes in Argentina (notably: obstruction of justice, attempt to conceal, abuse of power, extortion, perjury, bribery, embezzlement…) and are currently standing trial in before the TOF2 in the AMIA 2 case, which commenced in 2015.[51]

The AMIA Case at the Inter-American Commission on Human Rights

Throughout the three-year-long TOF3 trial, a second judicial proceeding was underway, initiated by the victims of the Buenos Aires bombings. Indeed, one of the natural consequences arising from the corrupt investigation and embattled criminal case was the collective fury and disgust of the survivors and the families of the bombings' victims. In her detailed discussion of the AMIA

46 Filkins, "Deadly Conspiracy"
47 Levitt, 123
48 Ibid.
49 Ibid.
50 Faulk, 175
51 Ibid.

case in Walls of the Labyrinth: Impunity, Corruption, and the Limits of Politics in Contemporary Argentina, Karen Faulk describes the AMIA victims' vision of justice as one that "...looks to the state as the appropriate and necessary provider of justice [as an inviolable right of citizenship]..." and which "...[takes] the form of a trial of [suspects] in an impartial court, where guilt or innocence is to be established according to accepted and established legal procedures through the presentation of credible evidence…"[52] However, given the aforementioned "difficulties" pervading the Argentine state's fraught investigative and judicial proceedings in the months and years following the AMIA bombing, this state-centric vision of justice proved unobtainable for the victims and their families.[53] The byproduct "distrust in and perception of the judiciary as corrupt, inefficient, and [co-opted by] the executive branch of government..." led the bombings' survivors and the families of the victims to seek alternative avenues of justice extrinsic to the state, culminating in the petition lodged by Memoria Activa (Active Memory) (the principal organized group in Argentina advocating for the rights of the survivors and families of the victims of the AMIA bombing) to the Inter-American Commission on Human Rights (IACHR) in July 1999.[54] As the petition constitutes a crucial event in the history of the AMIA saga, especially as the case's first contact with international law—vis-à-vis the multilateral legal regime of the Americas—a basic understanding of the nature and functions of the IACHR is crucial to contextualizing the implications of Memoria Activa's action and the ensuing legal process.

A permanent organ of the Organization of American States (OAS), the multilateral organization established in 1948 to deepen political, legal, and economic cooperation and solidarity between the nations of North and South America, the Inter-American Commission on Human Rights is a quasi-judicial body mandated to further "the promotion and protection of human rights" in the Americas by ensuring member states' fidelity to and compliance with their legal obligations enumerated in the foundational instruments of the Inter-American System of Human Rights, namely: the OAS Charter, the American Declaration of the Rights and Duties of Man (the Bogotá Declaration), and most significantly, the American Convention on Human Rights (the Pact of San José, or ACHR).[55] As an institution premised to investigate and resolve potential violations of human rights (the competency to adjudicate and award judicial remedies for violations rests with the Inter-American Court of Human Rights, a bona fide tribunal of law), the IACHR's dispute mechanism functions by way of petitions lodged by states, NGOs, or individuals purporting violations of human rights and/

52 Faulk, 154-55
53 Ibid.
54 Ibid.
55 Ibid., 164

or breaches of states' obligations stipulated by the aforementioned instruments of the Inter-American System of Human Rights (the OAS Charter, American Declaration of the Rights and Duties of Man, American Convention on Human Rights (ACHR)).[56]

After years of privation of justice by the Argentine state perceived by AMIA survivors and families of the victims, Memoria Activa organized the submission of a petition to the IACHR, alleging derogations of American human rights obligations by the Argentine Republic. Memoria Activa's decision to bring 'suit' against their own country was a difficult and controversial one, and certainly not unanimous among the bombings' victims and their families. A Memoria spokeswoman at the time said, "[In going before the IACHR], we are exercising our rights as Argentine citizens, and it brings us shame and pain to have had to come to this, but we are not the ones who [allowed] so much impunity."[57] Used in such a context, the term 'impunity' (impunidad in Spanish) is significant for Argentines, as it has come to connote the country's particular set of historical experiences informed by the aftermath of the Dirty War (1976-83), and the divisiveness of transitional justice during the country's turbulent period of democratic consolidation.[58] In Argentina, the definition of 'impunity' encompasses not only wrongful exemption from punishment but a fundamental lack of legal justice as owed to citizens by states. As Faulk argues, the concept of 'impunity' in Argentina is tied to national conceptions of democracy and the rule of law in that "...[Argentines widely believe] that acts defined as criminal, such as the AMIA bombing, remain unpunished as a consequence of the lack of ['the rule of law institutionalized by an effective and independent branch of government'] in national life."[59] It is thus important to understand Memoria Activa's case before the IACHR not only as a localized attempt by those affected by the Buenos Aires bombings to elicit justice for themselves and their families, but also in the broader context as an organized attempt by activist citizens seeking to navigate (and remedy) national historical traumas, and what is, in some respects, the unfinished process of democratization in Argentina.

Indeed, the specific points of unlawful derogation by Argentina alleged by Memoria Activa seem to illustrate the secondary, reformist aim of their case before the IACHR. The group's formal petition hinged on two major assertions, the first being that the Argentine Republic violated the bombing victims' rights as citizens* and abrogated its obligations constituted by Articles 4 and 5 of the

56 www.oas.org/en/iachr/mandate/functions.asp
57 Faulk, 177
58 Engstrom, 29-30
59 Faulk, 22-3

* Memoria selected four individual plaintiffs to represent all victims of the 1994 bombing, see: Faulk, 172

ACHR, in failing to protect the victims' right to life (Article 4(1)), and physical integrity (Article 5(1)).[60] In prosecuting this argument, Memoria and its lawyers pointed to the swift succession of deadly attacks targeting related institutions (i.e., connected to Jews), asserting that in the aftermath of the 1992 Israeli Embassy bombing, Argentina had an "obligation to foresee the possible danger of another attack, and respond appropriately in order to prevent a reoccurrence... [but]...failed to adopt the necessary measures to prevent the [second] attack [in 1994]."[61] As evidence of the state's derogation, Memoria assessed the police protection offered to local Jewish institutions to be insufficient, and highlighted the gross negligence of federal intelligence agencies in response to the receipt of multi-sourced indications and warnings of a second terrorist attack in the days and weeks leading up to the attack on the AMIA (most notably, the statement provided to the Argentine consulate in Milan, Italy by a tipster ten days prior to the bombing, which filtered through SIDE to the executive government only after the attack[62]).[63] For Memoria Activa, the sum of such inaction and dereliction by Argentine authorities constituted the state's failure to "fulfill its obligation to prevent, investigate, and penalize the attack," violating the victims' ACHR-guaranteed rights to life and integrity of person.[64]

While this first accusation emphasized the implications of Argentina's failure to prevent the 1994 attack, and was formulated with an eye to sticking the Argentine government with liability for the disbursement of damages to the AMIA victims, the second accusation more clearly illustrated the group's pursuit to catalyze judicial reform in Argentina as a byproduct of the IACHR's (presumed) external validation of the privation of justice in their own case.[65] Indeed, Memoria's second claim against Argentina in the IACHR petition asserted the state's violation of the victims' right to judicial protection, as enumerated by Article 25 of the ACHR, arguing that the Argentine state "violated to the detriment of the relatives of the victims the right to the judicial guarantees that assure the causes of the events that produced the damage be effectively investigated, the right that a regular process be followed against those responsible for having produced the damage, and that as part of this process the guilty be sanctioned and the victims compensated..."[66]

In late 2000, despite Carlos Menem's firm confidence that his administration had conducted investigations into the Buenos Aires bombings with "exemplary energy and promptness," as well as the protestations of his

60 Faulk, 164
61 Ibid.
62 Escudé and Gurevich, 128
63 Faulk, 165
64 Ibid.
65 Ibid., 174, 183
66 Ibid., 166

successor, Fernando de la Rúa, the IACHR agreed in early 2000 to a preliminary hearing of Memoria Activa's petition at the OAS Secretariat in Washington, D.C.[67] A second hearing in September 2001 resulted in the IACHR's conditional acceptance of Memoria's petition to access the body's competencies for the case of AMIA bombing. This "conditional acceptance" stemmed from the fact that Memoria Activa's petition failed to satisfy the IACHR's prerequisite "exhaustion of internal resources," given the ongoing TOF3 trial of the local connection. To this end, the IACHR appointed renowned Chilean jurist (and former IACHR president) Claudio Grossman, later Dean of American University's Washington College of Law, as its official observer to the litigation taking place in Buenos Aires, obliging him to present his findings to the Commission upon its conclusion, with a view to formulating an ultimate determination regarding the merits of Memoria Activa's petition against the Argentine Republic.[68]

In February 2005, five months after the TOF3 issued its ruling nullifying Galeano's case and investigation, Claudio Grossman presented his observer's report to the IACHR. In his report, Grossman expressed accord with the TOF3's ruling and firmly exhorted the IACHR to accept Memoria Activa's petition against Argentina; in addition, he condemned Argentina for its response to and subsequent conduct regarding the Buenos Aires bombings.[69] Remarkably, even before Grossman issued his rebuke, and with full expectation of reproach by the IACHR, Néstor Kirchner announced Argentina's full assumption of responsibility "...for the violations of human rights as denounced by the petitioners… [including] a failure to fulfill the function of prevention for not having adopted the necessary and effective measures to avoid the attack…[as well as] a covering up of the facts due to a deliberate failure to fulfill the function of investigation… [which] produced a clear privation of justice."[70] As Faulk notes, the government's declaration marked "an absolute change in the position of the State [with regard to] the AMIA;" whereas previous administrations proffered only indignant denials of impropriety along with hollow assertions of competence, Kirchner chose to publicly acknowledge the intractable corruption and obstruction that plagued the case.[71] Proactively admitting Argentina's culpability for all the customary and treaty violations alleged by Memoria Activa in its petition was a brilliant tactical play on Mr. Kirchner's part; by prostrating his government before the Organization of American States' principal human rights organ, he protected the dignity of his country. Accordingly, he prevented what would have been a deeply embarrassing condemnation of Argentina by the IACHR, but also paved the way for negotiating terms of settlement with Memoria Activa and other

67 Ibid., 174
68 Ibid.
69 Ibid., 175
70 Faulk., 179
71 Ibid.

victims' groups, and enlisted outside oversight through the IACHR's "friendly resolution" process.[72] In preparation for the friendly resolution negotiations, Memoria Activa compiled a list of desired remedial measures for the government to undertake, including the further strengthening of the Special Investigating Unit for the AMIA, which Kirchner had established the previous year (atop which he appointed Alberto Nisman as special prosecutor), financial reparations to family members of the victims, as well as the reimbursement of costs incurred by Memoria Activa and the co-complainants in bringing the petition before the IACHR.[73]

While Memoria Activa's successful petition before the Inter-American Commission on Human Rights demonstrates the potential effectiveness of supranational institutions in mediating internal disputes and catalyzing the actuation of justice, it also demonstrates the converse—that is, the impotence of supranational bodies and institutions promulgating international law in compelling states and government to commit to undertake or refrain from various actions and behavior. It is this subject with which this paper is primarily concerned; for, while the Argentine government pledged to renew and intensify its efforts to prosecute a just, fair, and impartial trial according to its laws, achieving such justice ultimately hinges on the appearance of the Iranian suspects in Buenos Aires. This seemingly indestructible barrier to justice haunted Alberto Nisman in his decades-long, toiling investigation into the AMIA attacks—but a barrier he was nevertheless relentlessly determined to overcome.

Interpol vs. Iran

In 2004, a year prior to the conclusion of the IACHR proceedings (and in anticipation of the Argentina's censure by the commission), newly-elected president Néstor Kirchner attempted to turn the corner in the AMIA investigation by establishing the Special Investigating Unit for the AMIA (La Unidad Fiscal AMIA) within the Ministry of Justice and appointing Alberto Nisman (the only prosecutor involved in the TOF3 case not accused of wrongdoing) as the Special Prosecutor in charge of the Unidad. As Sheinin argues, Kirchner's appointment of Nisman (despite his association) was accordant with Kirchner's "...new emphasis on human rights in national domestic policy, which included a renewed series of prosecutions of dictatorship-era killers…"[74] These twin developments played a significant role in shaping a hopeful narrative at the outset of Kirchner's presidency (bolstered later by the president's admission of guilt before the IACHR), creating a much welcome perception among Argentines

72 Ibid., 180
73 Ibid., 180-1
74 Sheinin, 35

and the country's Jewish community that "the investigation [had begun] to turn around…"[75]

Fortunately, tangible progress in the case followed the administration's initial steps: the first was Nisman's effort to restart the investigation of the AMIA bombing from scratch; the second was an official probe of layers of corruption and obstruction of justice marring the decade-long investigation.[76] By 2006, Nisman's team had produced 113,600 pages of documentation, after digging through hundreds of intelligence files, analyzing numerous intercepted telephone recordings, photographic evidence, witness statements, and leveraging information from investigations of superficially-similar attacks around the globe.[77] In October of that year, Nisman announced the AMIA Unit's determination of Hezbollah's culpability for implementing the bombing attack on the orders of the Iranian government—the highest-level officials of which planned and orchestrated the attack.[78] Nisman asserted Iran's motive for singling out Argentina as a desirable locus for an attack lay in its anger at Carlos Menem's decision (allegedly made at the behest of the United States) to renege on its planned nuclear technological partnership with Tehran,[79] while Iran's identification of the AMIA as the target of the bombing was consistent with Iran's eventual modus operandi (which emerged after the 1992 Israeli Embassy attack) of targeting Israeli and Jewish institutions abroad.[80] Upon receipt of Nisman's report of his findings, Judge Rodolfo Canicoba Corral (the federal judge presiding over the new case)[81] acted on the Unidad Fiscal's recommendations and issued arrest warrants for eight individuals whom he charged with the crime of terrorism.[82] In March 2007, upon the request of presiding Judge Canicoba, the International Police Organization (Interpol) promulgated "red notices" for eight of the nine individuals indicted by Argentina, including: Ahmad Reza Asghari, an Iranian diplomat stationed in Buenos Aires at the time of the AMIA attack and a member of the 'elite' Quds Force responsible for extraterritorial operations, such as the AMIA bombing; Ali Fallahian, Iran's Minister of Intelligence at the time of both the Israeli Embassy and AMIA bombings; Imad Fayez Mughniyah, a Lebanese national and Hezbollah's Head of Security known to be the mastermind of the 1983 bombings of the American Embassy and Marine barracks in Beirut;* Mohsen Rabbani, Iran's long-time top intelligence agent in Latin America and

75 Levitt, 123
76 Hekmat, 26
77 Ibid.
78 Ibid., 38
79 Ernesto Alvarado. "Match Made in Rubble? Iran and Argentina Seek the Truth in the AMIA Bombing." Human Rights Brief 20(3), 2013: 57
80 Escudé and Gurevich, 128
81 Levitt, 123
82 Farah, 17

* Mughniyah was killed in a joint U.S. and Israeli operation in 2008. see below:

cultural attaché at the Embassy in Buenos Aires just before the AMIA bombing—as well as the operative deemed to be the chief ground planner of the AMIA attack; Mohsen Rezaee, Chief of Intelligence of the Iranian Revolutionary Guards Corps (IRGC) at the time of both Buenos Aires bombings; and lastly, Ahmad Vahidi, Commander-in-Chief of the extraterritorial Quds Force at the time of both bombings.[83] While Interpol initially issued red notices for all eight indictees, upon Iran's appeal of the decision to the Interpol's General Assembly, the red notices issued for Ali Akbar Velayati, Iran's foreign minister at the time of the bombings, as well as Hadi Soleimanpour, who served as Iran's ambassador to Argentina at the time of the bombings, were revoked.[84]

The issuance of the Interpol red notices for the AMIA suspects indicted by Argentina was a game-changing moment in the trajectory of the case. Judge Canicoba Corral's arrest warrants for the Iranian suspects, like all domestic legal instruments, were valid only within the territorial borders governed by the legal code under which the warrants were promulgated (in that the territorial principle circumscribes a state's jurisdiction to prescribe, adjudicate, and enforce its laws by default, and assertions of extraterritorial jurisdiction must meet a series of stringent evidentiary thresholds). As none of the suspects indicted by Canicoba were Argentine nationals or residents, bringing them to stand trial would require locating, arresting, and transporting each of them to Argentina from whichever foreign country in which they are domiciled—a problem, given that Argentina's law enforcement agencies have no legal authority to operate outside Argentine territory (circumscribed again, by the territorial principle). While few would doubt the suitability of the evidentiary basis on which Argentina premises its assertion of subject-matter jurisdiction to adjudicate and enforce compliance with its laws by the non-national suspects in the case of the AMIA, access to such non-national suspects is a common problem, for which Interpol was founded to solve. By catalyzing close cooperation and collaboration among countries' law enforcement agencies, Interpol aims to erode the prohibitive effect of national borders on effective law enforcement, especially with regard to the pursuit of suspected criminals, especially in connection with transnational and international crimes. The organization's red notices, which are similar to "all-points bulletins" issued by municipal police (as opposed to 'international arrest warrants,' an as yet nonexistent mechanism to which they are often erroneously characterized) serve to alert law enforcement agencies around the world of the promulgation of arrest warrants by other states for individuals suspected to be outside the territory of the state in which they were indicted.[85] Red notices thus serve as a conditional

83 Farah, 17

84 Ibid.

85 Mario Savino. "Global Administrative Law Meets 'Soft' Powers: The Uncomfortable Case of Interpol Red Notices." New York University Journal of International Law and Politics 43(2), June 2010: 287

insurance policy for states' law enforcement, in that if any wanted individual for which an Interpol red notice has been issued appears in a given state's territory, that state can arrest or detain the suspect (indeed, is encouraged to do so—though the notices are not legally binding[86]), and, by request of the state in which the individual is wanted, choose to extradite the suspect to that state.[87] In sum, the Interpol red notice system aims to remove national borders as a variable in effective law enforcement and prosecution of criminal behavior. Importantly, Interpol's constitution requires stringent evaluation of nations' applications for red notices; given the potential for abuse, it does not "rubber stamp requests made by member states."[88] Because of this stringency, Argentine international lawyer Alessandro Spinillo argues that "Nisman's evidence [must have] appeared so credible that Interpol upheld Argentina's request [to issue notices] for six out of the eight [listed] suspects, despite [Iran]'s fierce opposition."[89] Indeed, not only has the Iranian government refused to cooperate with the red notices, but it has repeatedly denounced both the Interpol Executive Committee's issuance of them, as well as Argentina's accusations against its officials as a pernicious "Zionist plot" to destroy it.[90]

Although the issuance of Interpol red notices for those suspected of orchestrating the AMIA bombing was a significant "win" for the case, illustrating the trend towards greater progress and competence in the investigation under Nisman, it was also the high-water mark of success for the case, which would never again inch any closer to justice. To the contrary, it was only a matter of time before the AMIA investigation would yet again suffer a fatal deterioration at the hands of another president, whose decisions regarding the case many characterize as political malpractice, if not an intentional act of treason.[91]

Cristina and the Iranians: Memorandum of (Mis)Understanding?

President Cristina Fernández de Kirchner's history vis-à-vis the AMIA case during her two terms in office is paradoxical, polarizing, and controversial. Though most everything associated with Mrs. Kirchner and her presidency can be objectively described as such,[92] the extent to which this is true of her handling of the AMIA case (clearly a sensitive matter to Argentines) is such that it effectively crippled the final year of her presidency (2015), due to a

86 Ibid., 290

87 Ibid., 289

88 Alessandro Spinillo. "Latest Legal Developments in Connection with the AMIA Jewish Community Center Terrorist Bombing in Buenos Aires in 1994 - A Follow-Up Paper." Some Thoughts on International Law (blog), June 17, 2013

89 Ibid.

90 Savino, 317

91 Farah, 17

92 Mason Moseley. "Response to Argentine Prosecutor's Death Highlights Polarization and Mistrust of Institutions" AmericasBarometer Topical Brief, Latin American Public Opinion Project (LAPOP),Vanderbilt University, February 16, 2015.

precipitous drop in her credibility and authority among Argentines.[93] The sequence of events, which precipitated such an overwhelming lack of public confidence in Kirchner and her government in its last days is clear; as reporter Dexter Filkins details in his extensive profile of the former president in The New Yorker (published in the wake of special prosecutor Alberto Nisman's death in 2015), for the duration of her first term (2007-2011), Cristina Kirchner continued the flagship transitional justice policy of her husband, whom she succeeded in office. A former supreme court justice remarked to Filkins that "after taking office, Cristina presided over the convictions of hundreds of officers for murder and torture… what Néstor began, [she] continued."[94] As with her husband before her, and perhaps even more so, Kirchner's commitment to prosecuting human rights violations committed during the Dirty War also found expression in her approach to the AMIA case, especially on the international stage. Every year, Kirchner invited a group of AMIA survivors to travel with her to New York City for the UN General Assembly (UNGA), where she gave an annual tongue-lashing to Iran for perpetrating the bombings, and instructed Argentina's entire UN delegation to stage a walk-out from the assembly hall before Iranian president Mahmoud Ahmadinejad delivered his address.[95] In her first address to the UNGA as president of Argentina in September 2008, Fernández de Kirchner enjoined the Islamic Republic of Iran to "comply with the rules of international law" and extradite the six Iranian nationals indicted in Argentina for committing the terrorist attack on the AMIA. As if Iran's refusal to extradite its citizens lay in concern over Argentina's democratic bona fides, she stressed, "I want to ensure, with the conviction I have always had, that the innocence of an individual must be presumed until declared guilty by a competent judge in a final verdict. In my country those citizens will enjoy a fair, public, and oral trial, with all the guarantees granted by the rules in force in the Argentine Republic, and under supervision of the international community, due to the seriousness of the events."[96] Kirchner noted that Argentina's standing request for extradition had cleared Interpol's rigorous test for the promulgation of red notices not once, but twice, and affirmed her personal and political fidelity to the international "fight against impunity," which she identified as a "state policy" of Argentina.[97]

Indeed, despite the populist Fernández de Kirchner's decidedly erratic governing style, Filkins relates that "one matter on which [she] appeared steadfast was the AMIA bombing."[98] With the untimely death of her husband

93 Ibid.

94 Filkins, "Deadly Conspiracy"

95 Ibid.

96 "At UN Assembly, Kirchner asks Iran to Extradite AMIA Suspects," World Jewish Congress, September 24, 2008.

97 Ibid.

98 Filkins, "Deadly Conspiracy"

and predecessor, Néstor Kirchner, at the end of her first term (as well as her subsequent landslide reelection), however, Mrs. Kirchner's rhetorical hardline on Iran began to falter, eventually receding entirely.[99] The president first signaled this emerging shift during the 2011 UN General Assembly meeting, as her actions and decisions contrasted wildly with those of her previous trips; not only did Cristina travel to New York without her usual coterie of AMIA survivors, but she forsook her customary pulverizing diatribe against Iran for the AMIA attack, scrapped the Argentine delegation's traditional walk-out for Ahmadinejad's speech,[100] and declared her government's positive reception of a previously undisclosed communiqué from the Iranian government expressing ostensible willingness to "engage in constructive dialogue" with Argentina regarding the AMIA case (though Iran still insisted that Argentina's accusations were but a 'Zionist plot').[101] After decades of frigid diplomatic relations between Iran and Argentina due to the latter's indictment of Iranian officials for the AMIA attack,[102] President Kirchner's apparent intent to effect a reversal of long-standing Argentine foreign policy by seeking rapprochement with Tehran and pledging to work with Iran's government to "solve" the AMIA bombing was both surprising and profoundly perplexing to many Argentines.[103] For a while, this u-turn on relations with Iran was discernible only in slight shifts in Cristina Kirchner's rhetoric. On January 27th 2013, however, @CFKArgentina (as the president is virtually known), turned to her favorite communication platform, Twitter,* where, to the shock of Argentina and the world, she announced her government's successful conclusion of bilateral negotiations with the government of Iran for a Memorandum of Understanding (MoU) on the subject of the 1994 AMIA bombing, premised on a mutual commitment to ascertain the truth about the attack, and establishing a joint mechanism to that end.[104] In her excited barrage of tweets, the flamboyant Fernández de Kirchner referred to the accord, brokered in Addis Ababa by her (Jewish) Foreign Minister, Héctor Timerman,[105] as "historic" no less than ten times.[106] "[It is] historic," she tweeted, because "after almost 19 years since the AMIA bombing, we've achieved for the first time a legal instrument of international law between Argentina and Iran to advance knowledge of the truth about the attack." The Argentine president then concluded her eccentric, yet decidedly idiosyncratic "tweetstorm" with a cryptic proclamation that "we will never again let the AMIA tragedy be used as a chess

99 Ibid.
100 Ibid.
101 Levitt, 124
102 Ibid., 119
103 Sheinin, 35
104 "A Pact with the Devil?" The Economist, January 29, 2013.
105 Farah, 7
106 "A Pact with the Devil," The Economist

piece in the game of foreign geopolitical interests!"[107]

The following examination of Argentina and Iran's bilateral Memorandum of Understanding (MoU) and its role within the timeline of the AMIA case—especially relevant given its function as a mechanism of international law—comprises two chief topics: the first being the legal scope and character of the Memorandum and its provisions, the second being the material factors driving Mrs. Kirchner's initial decision to pursue the Memorandum with Iran.

The first article of the MoU between Argentina and Iran provides for the establishment of a "Truth Commission" comprised of five international lawyers (two jurists designated by each contracting state, and the fifth, a jointly-selected president) to "analyze all the documentation presented by the judicial authorities of the Argentine Republic and the Islamic Republic of Iran" related to the AMIA case.[108] In Argentina, public opinion on the Truth Commission largely bifurcated along the country's evenly-split ideological/partisan fault; while the Kirchneristas applauded their president's bold diplomacy in pursuit of justice for the AMIA and its victims,[109] the large "anti-K" faction (and, significantly, many in Argentina's Jewish community) criticized the Truth Commission as a scandalous outsourcing of Argentine criminal justice to Tehran, the accused party.[110] Indeed, criticism of the Memorandum initially focused on perceived structural flaws and procedural vulnerabilities of the proposed Truth Commission. As Spinillo argues, the MoU envisioned a prohibitively narrow mandate for the Truth Commission: to "[establish] recommendations on how to proceed with the case within the constitutional frameworks of the parties"—a clause notable more for the competencies it does not confer upon the Commission, namely: "to prosecute the crime and impose penalties on its instigators and perpetrators."[111] Indeed, despite Fernández de Kirchner's enthusiastic hailing of the MoU as "historic," the agreement neither explicitly or implicitly provided for the prosecution—or even the possibility of prosecution pending further investigation—of any of the Iranian suspects, nor did it establish the crucial guarantee (common in such commissions) that the Truth Commission's findings would be legally binding on both parties.[112] What many viewed as the deeply problematic nature of these provisions was exacerbated by the agreement's alleged "lethal flaw" contained within Article 5, which required "Argentine and Iranian judicial authorities [to] meet in Tehran to proceed to questioning those whom Interpol has issued a red notice."[113] Spinillo deems this to be unacceptable, given that the Iranian suspects

107 Filkins, "Deadly Conspiracy"
108 "A Pact with the Devil," The Economist
109 Sheinin, 37
110 Alvarado, 57
111 Spinillo, "Latest Legal Developments in Connection with the AMIA"
112 Filkins, "Deadly Conspiracy"
113 Spinillo, "Latest Legal Developments"

in question were wanted in Argentina not to assist in preliminary fact-finding, but to finally stand trial for the crimes for which they were long ago indicted.[114] In a TV interview in which he fiercely criticized Kirchner's MoU, Alberto Nisman proclaimed that "These crimes can be judged only where they happened."[115] Nisman also echoed the assertion of a number of Argentina's Jewish groups that the Memorandum of Understanding was illegal on the grounds that President Fernández de Kirchner's attempt to legislate a case of ongoing litigation occasioned an unconstitutional infringement of the powers of the federal judiciary by the executive branch.[116] Additionally, many Jewish leaders disputed the fundamental assumptions undergirding the document, arguing that the MoU could never be a fraction as effective or probative as Kirchner insisted it would, as Iran would never allow the Commission to expose any evidence incriminating it for the AMIA bombing. Not only did the AMIA itself issue a formal condemnation of the MoU, then-chief of the Simon Wiesenthal Center's Latin America bureau expressed bewilderment and disbelief at the idea of "...closing the case by collaborating with those who have denied any part in the bombing," while the director of the American Jewish Committee compared the logic of the Tehran-based Truth Commission to "asking Nazi Germany to help establish the facts of the Kristallnacht."[117]

In the face of such criticism, Cristina Kirchner defended her government's decision to pursue the Truth Commission with Iran, arguing that Iran's abiding refusal to extradite its officials charged by Argentina with involvement in the AMIA bombing (namely those with outstanding Interpol red notices) necessitated a new approach.[118] In her 2015 New Yorker interview with Filkins, Kirchner lamented that in the 21 years since the bombing, "[the Iranians] never answered anything… we were at a dead end!"[119] For CFK, the establishment of the Truth Commission was an important achievement for her administration, stating "We succeeded in persuading Iran to agree to have a discussion about the AMIA issue when they had refused it for decades.[120] Guillermo Carmona, then-president of the Argentine Foreign Relations Committee, praised the agreement as the only mechanism guaranteeing the opportunity for Argentine legal authorities to question Iranian officials protected by personal immunity, such as the (then) incumbent Minister of Defense, Ahmad Vahidi, who had been indicted for his role in the attack.[121] Foreign Minister Héctor Timerman, who spearheaded

114 Ibid.
115 Filkins, "Deadly Conspiracy"
116 Alvarado, 57
117 "A Pact with the Devil," The Economist
118 Alvarado, 57
119 Filkins, "Deadly Conspiracy"
120 Ibid.
121 Alvarado, 57

Argentina's negotiations with Iran, observed to Filkins that any potential resolution in the AMIA case foundered on intractable legal issues within the two countries, namely that Iran's constitution forbids the extradition of its nationals to a foreign state in any case, while Argentina's constitution precludes trials in absentia. "With no hope of resolving the case through standard legal channels, Timerman wanted to find some way of holding the perpetrators accountable."[122] Despite the criticism, the Argentine National Congress ratified the Memorandum of Understanding (albeit by razor-thin margins in both chambers) a month after its announcement.[123]

While international legal scholar Sergio Alvarado's assessment of the merits of Argentina and Iran's bilateral Truth Commission on the AMIA is certainly less sanguine than that of Mrs. Kirchner and her supporters at the time, it is also more optimistic than that of the MoU's erstwhile critics in Argentina's political opposition and Jewish community. Alvarado argues that the establishment of the Truth Commission adhered to "...an emerging norm in the international community of prosecuting massive and systematic human rights violations… such as the [AMIA] bombing in Argentina."[124] Citing statements made by the UN Special Rapporteur on Torture, Alvarado notes that states have obligations to respond to such violations of human rights, including "investigating, prosecuting, and punishing perpetrators; disclosing to victims, their families and societies all information about the events; offering victims adequate reparations; and separating the known perpetrators from positions of authority," and argues that "Argentina's push for collaboration adheres to its responsibility of diligently meeting these four requirements of accountability."[125] Yet Alvarado also displays some skepticism, remarking that in "attempting to work with Iran, Argentina seeks to meet its obligations of means and not results," in that the country will technically have met its legal obligations if the judicial process occasioned by the Truth Commission is conducted in good faith, as the aforementioned obligations are "...subject [only] to conditions of legitimacy in their performance," according to the Special Rapporteur.[126] He concludes that "the effectiveness of the truth commission will ultimately depend not only on its ability to find the truth, but to also use it to find justice," which according to Alvarado, necessarily entails "effective measures to prosecute those responsible."[127]

The merits of the Memorandum's ability or inability to meet Alvarado's standards notwithstanding, threads within the flurry of criticism and political

122 Filkins 2015
123 Spinillo, "Latest Legal Developments"
124 Alvarado, 57
125 Ibid.
126 Ibid.
127 Ibid.

jockeying over the Memorandum of Understanding slowly gave way to increased speculation of cynical or malign motives underlying the decision made by Cristina Fernández de Kirchner and her government to commence negotiations with Iran. The most serious of these allegation contended that the Memorandum was born of a Faustian bargain between Kirchner's government and Iran, whereby the President agreed to use her authority to stymie the investigation into Iran's role in the AMIA bombing, shield from prosecution the Iranian suspects previously indicted by Nisman, ensuring their impunity in exchange for warmer relations with Iran and more favorable terms of trade.[128] Even if one takes the President at her word that the MoU represented the only way to bringing the Iranian perpetrators to justice, the appeal of catalyzing warmer relations between Buenos Aires and Tehran (precluded for decades by the AMIA issue[129]) undoubtedly influenced her decision, especially given the exigencies presented by Argentina's economic woes at the time.[130] Most significantly, Argentina faced a growing energy crisis at the outset of Cristina's second term in office, the proximate cause of which was her decision not to implement her proposed phase-out of Argentina's decades-old scheme of massive fuel and energy subsidies, which had ballooned the country's national debt over decades. Not for the first time, Mrs. Kirchner traded in her proposed austerity plan to travel the path of autarky, re-nationalizing the country's largest energy company, and selling domestic oil, LNG, and electricity at artificial rates substantially lower than their international market value and sometimes even below production costs; by the end of 2012, Argentina's energy deficit grew to a hefty $7 billion.[131] Throw in the self-inflicted hemorrhaging of Argentina's foreign-exchange reserves (a result of its exclusion from global capital markets due in part to Mrs. Kirchner's government's economic mismanagement and refusal to settle terms with foreign bond-holders) and it becomes clear that the country's economic situation conspired to make its penchant for excessive imports of costly energy commodities unsustainable. In short, Cristina Kirchner needed a friend with some oil. She looked East to find one.[132]

The Economist illustrates that the Iranian government also shared Kirchner's view of the economic benefits of a rapprochement noting that Iran "suffer[ed] from shortages of many essential goods [due to the nuclear sanctions], and [was thus very] desperate for allies and trade partners." Argentina, which The Economist notes, did not comply with the international community's sanctions, was the seventh-biggest exporter to Iran at the time, and

128 Farah, 5

129 Levitt, 119

130 "A Pact with the Devil," The Economist

131 Mamta Badkar. "How Cristina Fernández Is Destroying Argentina's Economy." Business Insider. May 13, 2012.

132 "A Pact with the Devil," The Economist

during Cristina's presidency, Argentina's exports to Iran skyrocketed from $319 million to $1.08 billion.[133] Furthermore, the bilateral MoU on the AMIA was widely seen as representative of Cristina Kirchner's left-populist brand of foreign policy, as she nudged Argentina ever closer to the hard-left souverainisme of its socialist neighbors such as Cuba, Venezuela, Bolivia, and Ecuador, and began her characteristic fulminations against alleged U.S. imperialism (Barack Obama famously removed his translation earpiece during one of CFK's diatribes at the UNGA).[134] In seeking to "promote the 'multipolar world' not dominated by the [West]" of which Fernández de Kirchner and her fellow leaders of the Latin American "pink tide," namely Chavez, Correa, Lula, Ortega, and the Castro's, often spoke, Cristina Fernández de Kirchner sought to strengthen relations with countries allied in that fight, including U.S. adversaries, such as China, Russia, and significantly, the Islamic Republic of Iran.[135]

Victim 86: the Murder of Alberto Nisman

At that point still the special prosecutor in the AMIA case, Alberto Nisman was reportedly very disturbed by the Kirchner administration's decision to sign the Memorandum of Understanding, and viewed it as nothing short of treason committed by the President of the Nation and her Minister of Foreign Affairs. Quietly, he embarked on an investigation of Fernández de Kirchner, Timerman, and other government officials in search of potential wrongdoing, which he privately suspected, but nevertheless felt obliged to conduct his investigation according a due-diligence prosecutorial standard rather than allowing his gut to preside. Ultimately, Nisman's investigation led him to conclusions similar to those described above; in an official "judicial accusation" (a prosecutorial recommendation for indictment) submitted to the judiciary, he alleged, "During the time this criminal plot was hatched and implemented, the energy crisis which then, as now, was affecting the country, and the desire to reestablish full commercial relations at the government level were, together with a diplomatic strategy of rapprochement with the Islamic Republic of Iran, decisive factors in persuading the nation's leader, Dr. Cristina Elisabet Fernández, with the indispensable and invaluable participation and collaboration Héctor Timerman, to make the unfortunate decision to implement this immunity plan at the expense of justice in the AMIA case."[136]

While the foreign policy proclivities and economic aspirations of Argentina's president are but circumstantial evidence offering little proof to

133 Ibid.
134 Sheinin, 35 and Filkins, "Deadly Conspiracy"
135 "A Pact with the Devil," The Economist
136 Farah, 17

ground Nisman's assertion that both Cristina Kirchner and Héctor Timerman were "authors and accomplices of an aggravated cover-up and obstruction of justice regarding the Iranians accused of the AMIA terrorist attack," other evidence provides a degree of reasonable doubt as to Kirchner and Timerman's motives, notably the "40,000 legally authorized wiretapped conversations [of a secret backchannel] Nisman had access to in his case, [which] indicate [that] the president secretly met face to face with an Iranian emissary to discuss the deal, and promised [said] emissary that friendly officials would be placed in senior positions to help Iran" among other such seemingly damning bits.[137] According to Nisman, two men worked as Kirchner's emissaries, and it is their wiretapped conversations with Yussuf Khalil, an Argentine national of Lebanese origin who worked at the al-Tawhid mosque in Buenos Aires, the same mosque at which Moshen Rabbani once preached, which provided the grist of Nisman's argument.[138] Perhaps the clearest evidence within the wiretap transcripts surrounds a certain "off-book" intelligence officer, Ramón Allan Héctor Bogado, who reported directly to Cristina Kirchner; in February 2013, a month after the Argentine government announced the agreement for the truth commission, Bogado called Khalil, stating "I have gossip… I was told there at the house Interpol will lift our friends' arrest warrants," to which Khalil responded, "Thank goodness!" Bogado then noted that he was "acting on orders from the boss woman" and that "All this has been agreed to at the very top."[139] The damning crux of Nisman's argument is thus that Kirchner's Truth Commission was nothing more than a quid-pro-quo in which "the Argentine government would [remove the Iranian names from Interpol's wanted list."[140] Aside from Bogado's remarks, Nisman points to Article 7 of the Memorandum of Understanding, which states "This agreement, upon its signature, will be jointly sent by both ministers to the Secretary-General of Interpol as a fulfillment of Interpol requirements regarding this case."[141] Acknowledging its vagueness, Spinillo and Filkins nevertheless understand Article 7 as "suggest[ing] both countries expected some action from Interpol."[142] Ironically, the Iranian government elucidated its understanding of the clause rather quickly; on May 20, 2013, the Iranian Embassy in Buenos Aires announced that the Iranian government had ratified the Memorandum of Understanding,[143] while the Iranian government issued a statement through the state news agency, declaring that "[Pursuant]

137 Ibid., 5
138 Ibid., 18
139 Ibid.
140 Spinillo, "Latest Legal Developments"
141 "Memorandum of Understanding Between the Government of Argentina and the Government of Islamic Republic of Iran on the Issues Related to the Terrorist Attack Against AMIA Headquarters in Buenos Aires on July 18, 1994"
142 Filkins, "Deadly Conspiracy"
143 Spinillo, "Latest Legal Developments"

to the agreement signed by both countries, Interpol must lift the red notices against the Iranian authorities."[144] Yet Iran's announcement of its ratification of the Memorandum was rather disingenuous, as Article 6 of the MoU requires the depositing of instruments of ratification by both parties in order for the treaty to take legal force (a codification of Article 16 of the Vienna Convention on the Laws of Treaties), and the Argentine government issued a statement noting that it had not received the instruments from Tehran.[145] Unsurprisingly, Cristina Kirchner did not take kindly to Iran's prevaricating, exhorting Tehran in her 2014 UNGA address to "tell us if they have approved the agreement, when they are going to approve it if they haven't already, and, furthermore, that we can agree on a date to form a commission so that the Argentine judge can go to Iran."[146] Fortunately or unfortunately for Kirchner, Argentina, and the AMIA victims, and despite the epic controversy and allegations engendered by the MoU, none of it would come to pass. Nisman opined that the MoU ultimately foundered on the Argentine government's inability to lift Interpol's red notices for the AMIA suspects; the unexpected controversy over the MoU simply eliminated any political room to maneuver that Mrs. Kirchner would have needed to do so. Implying that Iran's sole impetus for entering into the MoU with Argentina was the removal of the Interpol notices for its nationals, Nisman argued that "Iran had little use for the pretense of investigating itself… and dragged its feet on [depositing the instruments of ratification of] the MoU, unwilling to take that step until the Interpol [red notices were lifted]."[147] Already effectively dead, the MoU received a de jure thumbs down in May 2014, when a federal court in Buenos Aires voided the MoU, affirming claimants' argument that the Memorandum constituted an illegal impingement by the executive on the competencies of the judiciary, violating the separation of powers clause of the Argentine constitution.[148] While Fernández de Kirchner's government quickly appealed the decision,[149] her successor as President, Mauricio Macri, who campaigned against "Argentina's Iran deal," formally dropped the government's appeal on his first day in office,[150] sealing the fate of the Memorandum of Understanding, which in the case of Argentina and Iran, was probably always going to be a contradiction in terms.

Although special prosecutor Nisman would not live to see the fruits of his investigation of Kirchner, Timerman, and the Memorandum of Understanding born out in the federal court, nor, more importantly, the court of public opinion,

144 Filkins, "Deadly Conspiracy"
145 Spinillo, "Latest Legal Developments"
146 Farah, 22
147 Ibid.
148 Levitt, 125
149 Ibid.
150 Sheinin, 38

the circumstances surrounding his death probably did more to undermine public trust in Cristina Fernández de Kirchner and her government than any other event during her (very eventful) presidency.[151] Indeed, mere hours before Nisman was scheduled to testify before the National Congress as to the merits of his judicial accusation against Mrs. Kirchner and Mr. Timerman, he was found dead in his apartment in the posh Puerto Madero district of Buenos Aires, "slumped against the bathroom door in a pool of blood [with] a bullet-hole through his head…a .22-calibre pistol and bullet casing on the floor next to his hand, [and] a draft of a legal document, [prepared] by Nisman [to request a warrant for the arrest of the President of Argentina, Dr. Cristina Elisabet Fernández de Kirchner] in the trash can."[152] Nisman's death thoroughly shocked Argentina (and indeed, the entire world); in a manner likened to the assassination of President John F. Kennedy, wild speculation and theories about Nisman's untimely death swirled throughout the entire country—seemingly overnight, posters sprung up asking "Who Killed Nisman"[153] from Buenos Aires to Ushuaia to Rosario and Salta—knowing the question was in vain, for the answer would likely elude the nation forever.

Unsurprisingly, Argentines directed much of their speculation and outrage toward President Fernández de Kirchner and the government, noting that Nisman believed his life to be in danger,[154] and highlighting the suspicious timing of his death—the morning before his scheduled appearance before Congress in which he planned to denounce Cristina Kirchner and Héctor Timerman as effective traitors to their nation. The official autopsy, which ruled Nisman's death a suicide, was exceedingly dubious: first, "no gunpowder residue was found on his hand, as is typical of self-inflicted gunshots."[155] Additionally, while Nisman's fingerprints were found on the pistol, no fingerprints were found belonging to his friend, Lagomarsino, to whom the gun belonged (he had lent it to Nisman after the latter said he feared for his and his daughters' lives.[156] As Filkins describes in his piece on Nisman's death, "Evidence [soon] accumulated that the investigation into Nisman's death had been so sloppy as to be fatally compromised; a woman summoned off the street to witness the crime scene investigation (as required by Argentine law) described a party-like atmosphere: 'They drank tea, ate croissants; they touched everything… there were, like, fifty people in the apartment.'"[157] Filkins notes that police photos from the scene, which he obtained from an Argentine journalist, depicted a group of police investigators sifting

151 Farah, 6
152 Filkins, "Deadly Conspiracy"
153 Ibid.
154 Filkins, "Deadly Conspiracy"
155 Ibid.
156 Ibid.
157 Ibid.

through Nisman's belongings without gloves.[158]

To many Argentines, the President's response to Nisman's death came across as baffling at the least, incriminating at the worst; about half of the country[159] and 70% of porteños[160] (residents of Buenos Aires) believed CFK ordered Nisman's assassination. As Mason Moseley observes in his AmericasBarometer topical brief on Argentines' reactions to Nisman's death and Mrs. Kirchner, "if Nisman was murdered, [it reveals] either the complicity of domestic actors in the killing of a public servant, or the state's inability to protect a man whom many suspected, including the prosecutor himself, was in danger."[161] Initially, Kirchner declared her agreement with the findings of the autopsy; after public backlash, she reversed herself three days later, claiming Nisman had been murdered in a plot to undermine her government and destroy her and undermine her administration.[162] In a post bizarrely titled, "The suicide (that I am convinced) was not suicide," uploaded to her (self-maintained) blog, Mrs. Kirchner insinuated that Nisman's accusations against her and Timerman and his assassination were linked, that Nisman served as a blind proxy for forces arrayed against her: "They used him while he was alive and then they needed him dead."[163] The following week, Kirchner announced that she would disband the national intelligence agency, SIDE, declaring her belief that rogue agents inside the SIDE murdered Nisman to discredit her.[164] Indeed, when Filkins interviewed her, Kirchner scoffed at Nisman's accusation against her and Timerman that the Memorandum of Understanding was a conspiratorial quid pro quo to sell out justice for the AMIA, calling it "ridiculous," "not serious," and an "indictment without any kind of evidence."[165] Fiercely denying that she ordered Nisman's assassination, CFK claimed the damage to her reputation precipitated by Nisman's death only proved her innocence; she asked Filkins, "Tell me, who has suffered the most with the death of prosecutor Alberto Nisman? You tell me, Sherlock Holmes!" Filkins allowed, "half the country believe [you were] involved in Nisman's death." "Exactly," she nodded, "This is one of the keys."[166]

Though multiple judges dismissed Nisman's complaint against Mrs. Kirchner and Mr. Timerman in early 2015, a year later, Argentina's Court of Cassation reinstated them in December 2016, as Kirchner and Timerman faced a number of other corruption and fraud charges stemming from her time as

158 Ibid.
159 Ibid.
160 Moseley, "Response to Argentine Prosecutor's Death Highlights Polarization"
161 Ibid.
162 Filkins, "Deadly Conspiracy"
163 Ibid.
164 Ibid.
165 Ibid.
166 Ibid.

president and senator, and his time as foreign minister in her government.[167] In late October 2017, just three days prior to the second round of closely-fought midterm legislative elections, which occasioned Fernández de Kirchner's comeback in Argentine politics as a Senator for Buenos Aires Province, the ex-president was subpoenaed to appear at a criminal hearing before the presiding judge in the AMIA case, Claudio Bonadio, and provide testimony about her decision to pursue the Memorandum of Understanding and AMIA Truth Commission with Iran.[168] True to form, Kirchner vigorously denied the allegations of treason (first lodged in Nisman's complaint) against her, labeling herself a victim of "defamation and harassment," endemic to a supposed vast campaign of political persecution waged against her through the federal judiciary by the center-right government of her successor, Mauricio Macri.[169] In addition to spuriously accusing the judge of involvement in the previous cover-up of the AMIA during the Menem presidency ("Dr. Bonadio, from you I expect no justice"), Cristina also alleged a causal relationship between the election of the Macri administration and the corruption of Argentina's judiciary (to which she, of course is the panacea), stating, "I trust fully that when the rule of law is restored in Argentina, having been so dramatically affected today by the spurious and shameless connection between the executive and the judiciary, the justice that I demand will finally be provided."[170] Though Fernández de Kirchner's election to Senate conferred upon her parliamentary immunity (indeed, many in Argentina suspect that obtaining such immunity may have been Kirchner's primary motive for returning to active politics and seeking a Senate seat), on December 7, 2017, Judge Bonadio indicted the former president on charges of obstruction of justice, aggravated concealment, and high treason for her actions intended to seek "impunity for the Iranian nationals accused of the attack on the AMIA headquarters and to normalize relations between [Argentina and Iran]." [171] With the indictment, Bonadio froze nearly $3 million dollars of Kirchner's assets, and formally requested the Argentine Senate vote to lift her parliamentary immunity to allow her remanding for pre-trial detention, which he argued was necessary to prevent her from "hinder[ing] judicial actions as well as the discovery of the truth."[172] The former president seems unlikely to face jail time in the immediate term, due in no small part to the two-thirds supermajority required for the lifting

167 Jonathan Gilbert. "Twisting Inquiry Into Buenos Aires Bombing Takes New Turn," The New York Times, February 1, 2016

168 Benedict Mander. "Argentine Ex-president Faces Court in Bombing Case," The Financial Times, October 26, 2017

169 Ibid.

170 Ibid.

171 Daniel Politi. "Judge Seeks Arrest of Ex-President of Argentina on Treason Charges," The New York Times, December 7, 2017

172 Ibid.

of an Argentine Senator's parliamentary immunity,[173] as well as concerns on the part of allies of the Macri government that lifting Kirchner's immunity could martyrize her on the altar of perceived political persecution and reinvigorate her flagging public support ahead of presidential elections in 2019 (here the current case of Brazil's Lula da Silva is instructive).[174] Prominent members of Argentina's Jewish community have responded positively to Kirchner's indictment; Ariel Cohen Sabban, head of the community's main activist lobby, the DAIA commented that Bonadio's indictments of Kirchner, Timerman, and 13 other co-conspirators (all of whom were detained in jail or house arrest) vindicates the investigative work of Alberto Nisman.[175] Fernández de Kirchner defended herself in a press conference following Bonadio's indictment, arguing that the charges filed against her have "nothing to do with justice or democracy… there's no cause, no crime, no motive. There was a judgment without cause. God knows it, the government knows it, President Macri knows it, too."[176] Argentina's Senate faces a constitutional deadline on the matter of Kirchner's immunity in the fall of 2018, though the criminal case against the former president for her conduct relating to the AMIA bombing continues in the interim with a new special prosecutor, Mario Cimadevilla, while the bombing's indicted suspects remain at-large.[177]

International Law and Justice for the AMIA

Given the abiding frozen state of the AMIA case within Argentina's judicial system due in large part to the Iranian government's refusal to extradite its indicted nationals to stand trial in Buenos Aires, there are strong, substantive arguments to be made for advancing the case from Argentina's domestic law to the province of international law. The notion of internationalizing the AMIA case is not an entirely new idea, as both Memoria Activa's petition before the IACHR and the short-lived Memorandum of Understanding between Iran and Argentina employed (or created) mechanisms undergirded by supranational legal doctrines. The novelty of what this paper proposes is the unprecedented scale of internationalization in the case. Transcending the limited scope of the Inter-American System and fatally flawed bilateral instruments, a wider conversation should begin of the potential merits and methods of advancing the stalled AMIA case before a competent international tribunal or body. Some commentators have suggested the Argentine government pursue such a supranational course

173 Ibid.

174 Max Radwin and Anthony Faiola. "Argentine Ex-President Cristina Fernández de Kirchner Charged with Treason," The Washington Post, December 7, 2017.

175 Politi, "Judge Seeks Arrest of Ex-President"

176 Radwin and Faiola, "Cristina Fernández de Kirchner Charged with Treason"

177 Mander, "Argentine Ex-President Faces Court"

of action, and Mr. Macri, himself, notionally referenced the idea in his 2016 address to the UNGA, declaring "In 1992 and 1994 Argentina was a victim of terrorism [and] we expect big international assistance to clarify…and punish the guilty parties."[178] [179] While the AMIA case has, of course, been marred by endemic corruption and obstruction of justice in Argentina, undoubtedly the most prohibitive barrier to the resolution of the criminal case has always been Iran's unsurprising refusal to extradite its accused nationals to stand trial in Buenos Aires for orchestrating the attack, as doing so would necessarily implicate the Iranian government, itself, in planning, contriving, and sponsoring the attack, which it vehemently denies.[180] Present these circumstances, which conspire not only to hinder the attainment of justice in the interim, but to effectively preclude any chance for justice in perpetuity, "it would be worthy to explore other remedies available under…international law in [order] to…bring those suspected of the crime to face trial before a real court of law…" as Spinillo so cogently states.[181]

Crucially, the nature and function of the AMIA case would necessarily transform by virtue of its ascension to the international arena. As the domestic case concerns Iranian officials wanted in Argentina to stand trial for their suspected violations of Argentine law, its object is to determine each individual suspect's personal guilt or innocence for committing an act prohibited in Argentine criminal code (i.e., bombing the AMIA and murdering 85 innocent people). But because the persistent stasis in the AMIA case stems from Argentina's inability to compel Iran to extradite its suspected nationals to Buenos Aires, the legal objective of an international AMIA case would not (and likely could not be) a trial of the indicted Iranian citizens according to the international criminal legal principle of individual criminal responsibility. There are a few reasons for this: first, all of the international criminal tribunals currently in operation would face the same difficulties in accessing the Iranian persons of interest in the case; second, due to their jurisdictional criteria, none of the criminal tribunals currently operating possesses the competence to adjudicate an internationalized AMIA case. While the specific reasons underlying the inadmissibility of such a case before any of the operating criminal tribunals remain well outside the scope of this paper, those reasons nevertheless impact the shape and function of a viable international case surrounding the bombings.

Indeed, there appear to be two viable functional forms for international adjudication of the AMIA bombings: the first would constitute an Argentine

178 Andres Oppenheimer. "Argentina Needs Outside Probe into Nisman's Death." Miami Herald, January 24, 2015.

179 Demian Bio. "Why Did Macri Fail To Mention Iran In His Speech Before The U.N.?" The Bubble. Sept 20 2016.

180 Alvarado, 57

181 Spinillo, "Latest Legal Developments"

petition to a competent international court contending that Iran is in breach of its aut dedere aut judicare obligation (i.e., to extradite or prosecute) with regard to its nationals indicted by Argentina for their complicity in the bombings. A case predicated on Iran's violation of its aut dedere aut judicare obligation to Argentina would have to prove that such an obligation exists for Iran; to do so, Argentina would have to: a) identify a viable legal norm ascribing the AMIA bombing with the status of an internationally unlawful act; b) prove Iran's responsibility for that unlawful act according to the evidentiary requirements of state responsibility and the control tests; and c) invoke relevant sources of international law (treaties, custom, and jurisprudence) which govern such internationally unlawful acts in order to discern the existence or non-existence of an aut dedere aut judicare obligation owed by Iran to Argentina in the case of the AMIA bombing. The role of the international court to which Argentina appeals for the AMIA case would thus rule on the merits of Argentina's argument and in the case of a positive determination of Iran's breached obligation, potentially formally compel Iran to fulfill that obligation.

Also governed at the junction of public international law and international criminal law (ICL), the second functional form for an international trial for the AMIA could is that of a civil suit brought by the Argentine Republic against the Islamic Republic of Iran alleging its state responsibility for the terrorist bombing attack on the AMIA building in Buenos Aires, as well as the violations of international norms ensuing thereby. Prosecuting this case necessitates nearly identical substantive considerations as the aut dedere case, but developed instead with respect to Iran's violation of an international norm or rule posited by Argentina as encompassing unlawful acts possessing traits inherent to the AMIA bombing.

Notably, the first case construction positions the invocation of international law in the AMIA case as a tool to further Argentine justice—in the sense that by finding Iran in breach of its obligation to Argentina, an international court could somehow help facilitate the criminal prosecution of Iran's indicted nationals in Argentina. In contrast, the second case construction manifests the implicit aim of Argentina to prove the culpability of the Islamic Republic for commissioning the AMIA bombing according to the law of state responsibility, with an end to "... obtain compensatory and punitive damage [as well as] deter future violations of ICL in addition to compensating victims."[182]

In detailing viable sources of international law undergirding a potential case for international remedy in relation to the 1994 and 1992 terrorist attacks in Buenos Aires—all but proven to have been the handiwork of the highest officials

182 M. Cherif Bassiouni, "The Subjects of International Criminal Law: Ratione Personae," in International Criminal Law. Volume I, Sources, Subjects, and Contents. (Martinus Nijhoff Publishers, 2008): 64

within the Iranian government—the following section aims first to deconstruct the fraught definition and contested space of "terrorism" within international law, alongside the open question of its customary recognition as an international crime, particularly in the context of state-sponsored terrorism. Accordingly, the descriptive criteria for determining state sponsorship in acts of terrorism is considered in concert with the law of state responsibility, which provides a critical nexus for evaluating the viability of Argentina's potential assertions for the jurisdiction of international law in the case of the AMIA bombing. Relatedly, this section surveys the landmark jurisprudence codifying tests of state control—highly significant to this study, given its function as a metric through which to determine the imputability to sovereign states (in this case, Iran) of unlawful acts committed by private persons and individuals affiliated to state-backed paramilitary groups (in this case, Hezbollah) according to the binding criteria of international criminal law. The section concludes with a detailed study of states' binding treaty and customary international obligations to other states with regard to the international legal prohibitions on the commission of international terrorism, unlawful uses of force, and acts of aggression, followed by an explanation of the implications arising from breaches of those obligations, with particular attention to that of aut dedere aut judicare.

The conclusions reached will also serve to guide a corollary assessment of the jurisdictional competence of the International Court of Justice as a forum before which Argentina might petition for international remedy in the case of the AMIA and Israeli Embassy bombings.

II. Terrorism, State Responsibility, Control, and International Obligations

Contested Legal Spaces: Terrorism as an International Crime?

As noted, the first step in determining the potential shape and form of an effective international case regarding Iran's involvement in the AMIA attack is to examine the legal concept of international terrorism, which is described here as occupying a contested space within the corpus of international law and jurisprudence. While so much of international law occupies a contested space (indeed, there is a reason international law is not called "universal law"), a concrete notion of terrorism is particularly fraught. As Joyner notes, "[the] highly subjective and politicized nature [of terrorism]" has precluded the emergence of "an exact, universally-agreed-upon [international legal] definition."[183] Undoubtedly, the greatest sticking point in crafting a universal definition stems from states' disagreement over the so-called "freedom-fighter exception,"

183 Christopher Joyner. "International Extradition and Global Terrorism: Bringing International Criminals to Justice," Loyola of Los Angeles International and Comparative Law Review 25, 2003: 496

which would provide a legal carve-out for most acts conducted by movements of national liberation and self-determination.[184] Notwithstanding the national liberation debate, a skeletal definition of international terrorism has emerged, shepherded by the UN General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism. The declaration stated, "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, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."[185] In 2004, the Declaration was bolstered by UN Security Council Resolution 1566, which referred to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury…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 abstain from doing any act."[186] Aside from the two common elements denoting "criminality" and "intent to provoke a state of terror," the definition of terrorism is almost universally deemed to exclude most (if not all) acts targeting individuals, groups, or entities possessing the status of privileged combatancy present in a state of active armed conflict or belligerent occupation.[187] Absent the status of privileged combatancy, such acts—especially those targeting civilians—could well rise to the level of war crimes, from which the notion likening terrorism to "peacetime equivalents of war crimes" arises.[188]

Applying this descriptive—if legally nascent—definition of terrorism, the 1994 bombing of the AMIA building in Buenos Aires meets the aforementioned elemental characteristics. The AMIA building, as the headquarters of a religious and cultural institution, was a civilian target wholly unconnected to any government or military installation. Furthermore, the Argentine Republic was neither an occupying power engaged in a non-international armed conflict (NIAC) with any national liberation group, nor was a participant in any international armed conflict (IAC) with any other sovereign state (including the accused sponsor, Iran).[189] As Hekmat notes, all victims of the attack were civilians, and the use of heavy-grade explosives connoted an intent to provoke widespread fear and panic.[190] The 1992 attack on the Israeli Embassy is more complicated due to its status as an internationally-protected diplomatic mission and, more importantly, the alleged involvement of the Lebanese non-state armed

184 Hekmat, 27
185 UN Office on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism, 2009: 10
186 Ibid.
187 Hekmat, 28
188 "Definitions of Terrorism." UNODC.org 2008
189 Hekmat, 28
190 Ibid.

paramilitary group Hezbollah, with which Israel was engaged in a de facto armed conflict and occupation in Lebanese territory. Jus in bello determinations regarding Hezbollah's belligerent status or the legality of the Israeli occupation of Southern Lebanon and its impact on the type of armed conflict existing at the time (governing the scope of permitted actions and targets) remain well outside the scope of this paper. However, one jus in bello question remains: did the conditions of the conflict (or international humanitarian law more generally) between Israel and Hezbollah in Southern Lebanon at the time permit extraterritorial targets? This question is obviated by the fact that the target was a diplomatic mission protected by international convention, rendering the Israeli Embassy attack illegal, terrorism or not.

Having established that the AMIA bombing meets the descriptive elements of an act of international terrorism—while the Embassy bombing constitutes a prohibited attack on an internationally protected target—the status of terrorism within the scope of international criminal law must be determined. Generally, the only crimes justiciable under international law are those "core crimes" possessing clear status as jus cogens (norms accepted as unequivocally inviolable under customary international law), namely, the umbrella crimes of genocide, war crimes, crimes against humanity, and crimes of aggression.[191] By contrast, terrorism has traditionally been viewed as a "treaty crime—proscribed in international law by virtue of agreement between states, [not because it is considered] an inherent violation of a norm of the international community," a fact due in no small part to the aforementioned lack of international consensus on a universal definition.[192] The result, as detailed by the UN Office on Drugs and Crime's Handbook on Criminal Justice Responses to Terrorism, is that "terrorist crimes…fall in the category of national criminal law of international concern;" therefore, "the duty to bring perpetrators of terrorism to justice rests solely with national criminal justice systems." Additionally, it notes that "without adequate domestic capacity to discharge that duty, international counterterrorism efforts will almost certainly fail."[193] While the contention that terrorism itself fails to constitute an international crime largely stands, the consensus has faced increased scrutiny following the September 11th attacks. Most notably, renowned international criminal law scholar Antonio Cassese delineated four conditions (most crucially, the second and third) by which an act of international terrorism would acquire the status of an international crime. In International Criminal Law, he argues:

Terrorist acts amount to international crimes when, first, they are not

191 UN Office on Drugs and Crime, 9

192 Erin Creegan. "A Permanent Hybrid Court for Terrorism." American University International Law Review 26(2), 2011: 244

193 UN Office on Drugs and Crime, 9

limited in their effects to one State solely, but transcend national boundaries as far as the persons implicated, the means employed, and the violence involved are concerned; and, secondly, they are carried out with the support, the toleration, or the acquiescence of the State where the terrorist organization is located or of a foreign State. The element of State promotion or State toleration, or even State acquiescence due to inability to eradicate the terrorist organization, seems crucial for elevating the offence to the rank of international crime. This is so, because it is at this stage that terrorism stops being a criminal activity against which States can fight by bilateral or multilateral cooperation, to become (and this is the third element) a phenomenon of concern for the whole international community, and a threat to the peace… It would seem that terrorist acts, if they fulfill the above conditions and in addition, fourthly, are very serious or large scale, may be regarded as international crimes.[194]

While Cassese's position does not yet represent an unqualified majority of jurisprudential opinion, it has certainly resonated with a wide number of international legal scholars, including Creegan, who independently opines that: for an international crime, often someone with state authority is perpetrating a wrong, so the only higher authority that can suppress the action is the international community of states… While a few states may refuse to suppress terrorism or even abet terrorists, those situations are the only ones in which international terrorism is similar to other kinds of truly international crime.[195] Sufficiently apprised that this view retains significant, but decidedly non-universal support among scholars, we now turn to the grave phenomenon of state-sponsored terrorism.

State-Sponsored Terrorism: A Descriptive Framework

State-sponsored terrorism, as Trapp observes, "has long been a feature of modern international relations."[196] The presumed strategic and ideological benefits that can compel sovereign states to support or commission terrorist attacks are numerous. Joyner counts three primary impetuses: "[1.] a sponsoring government is able to encourage and effectively pursue an internationally unlawful policy of its own choosing, while maintaining a cover of plausible denial; [2.] state sponsorship represents a low-cost, expedient means of… coercing or intimidating adversarial governments, [and/or] destabilizing… antagonistic foreign leaders; [3.] state-sponsored terrorism [offers a] means of exporting revolutionary ideology."[197] In this way, he concludes, terrorism

194 Paulussen, 6

195 Creegan, 248

196 Kimberley Trapp. "Holding States Responsible for Terrorism before the International Court of Justice." Journal of International Dispute Settlement 3(2), 2012: 279

197 Joyner, 497

has evolved into "an extended weapon of the state."[198] To the degree that the trademark utility of terrorism as a mode of geopolitical strategy is its "clandestine and low-level alternative to [using] force,"[199] states' underwriting of such acts is deployed with paramount obfuscation—with the potential effect of affording a veneer of plausible deniability to guilty states. Indeed, states accused of complicity in terrorism (either by virtue of active collusion or tacit condonation) unsurprisingly respond with "indignant denials." Given persuasive evidence of a given state's involvement in an act of terror discovered by official investigators, such denials are given short shrift by observers and authorities. Nevertheless, the furtiveness of state-sponsored terrorism—marked by convoluted financing and often prosecuted via non-state actors—and the seriousness of the crime raise the evidentiary threshold for corroborating a state's involvement. Although this paper asserts an inherent structural flaw of international law vis-à-vis its unfitness for holding sovereign states liable for acts of state-sponsored terrorism, insofar as it elucidates specific thresholds for determining when acts of terrorism can be legally attributed to sovereign states, international law is not altogether silent on the issue.

The international legal criteria regarding state-sponsored terrorism fall under two distinct but complementary categories. Whereas the first is a descriptive framework for culpability, identifying various actions and conditions that establish a positive determination of state involvement in acts of terrorism, the second is a structural template governing the actions and conditions that trigger a state's legal responsibility for "internationally wrongful acts," a principle fittingly known as the law of state responsibility. As the doctrine of state responsibility is integral to the later discussion of states' binding obligations, the following considers only the descriptive criteria denoting state-sponsored terrorism and uses them to assess the salience of the evidence alleging the attacks on the Israeli Embassy and the AMIA in 1992 and 1994 to be quintessential acts of state-sponsored terrorism, with Iran being the state sponsor in question.

In exploring the specific actions and norms that "current consensus of the international community" deems integral to state-sponsored terrorism, Cohan envisages a framework for evaluating state-sponsored terrorism by degrees "ranging from active planning, direction, and control of terrorist operations to indirect activities that aid and abet the terrorists."[200] To this end, he proposes the following continuum:

(1) State officials perform terrorist acts; (2) The state employs unofficial agents for terrorist acts; (3) The state supplies [direct or indirect] financial aid

198 Ibid.

199 Trapp, "Holding States Responsible," 279

200 John Alan Cohan. "Formulation of a State's Response to Terrorism and State-Sponsored Terrorism." Pace International Law Review 14(1), 2002: 92

or weapons [such as ordinance]; (4) The state supplies other logistical support [such as transportation]; (5) The state acquiesces to the presence of terrorist bases within its territory; (6) The state is unable to deal effectively with the terrorists… due to political factors or inherent weakness of leaders.[201]

Additionally, he specifies a number of other potential modes of state support, including the provision of diplomatic assets to directly or indirectly aid the facilitation of terrorist attacks, which finds significant expression in the AMIA case.[202]

Revolutionary Exports: Iranian Terror in the Argentine Capital

Cohan's variegated analysis of state-sponsored terrorism provides a useful blueprint with which to examine the merits of allegations of state-sponsorship in the case of the successive suicide bombings in Buenos Aires in the early 1990s. Any useful discussion of state-sponsored terrorism and Iran must begin with the country's less-than-exemplary track record. While numerous states resort to commissioning terrorists to further strategic ends, Hekmat argues that "the path taken by Iran [in sponsoring terrorism] is truly sui generis," in that no other state has resorted to sponsoring terrorism abroad to further its strategic aims to the degree Iran has.[203] To illustrate this point, he invokes the geographical ambition of Iran's state-sponsored terrorist attacks, noting that Iran and its militant proxies have attacked targets in America, the UK, Israel, France, Germany, Norway, Sweden, Austria, Turkey, Lebanon, Iraq, Pakistan, Indonesia, India, Japan, and, most topically, Argentina.[204] Indeed, there is little to no contestation over the fact that, following the Iranian Revolution, which catalyzed the reinvention of Iran as an Islamic republic, the country's fundamentalist leaders inaugurated a widespread campaign of political violence to "export the revolution" throughout the Muslim world. This revolution fetishized violent confrontation with the West (especially the United States and Israel—"Big Satan" and "Little Satan," respectively) and continues to this day.[205] As Alberto Nisman observed in his complaint against Fernández de Kirchner in 2013, Iran has never hidden, nor has attempted to mask, its compulsion to proselytize others (especially oppressed Shi'a in Lebanon and elsewhere).[206] On the contrary, Iran's own constitution goes so far as to declare the revolution's export as a central raison d'être of the Islamic Republic.[207] Considering Iran's

201 Ibid., 91
202 Ibid.
203 Hekmat, 36-7
204 Ibid.
205 Ben-Rafael v. Iran, 540 F. Supp.2d 39, 43-44 (D.D.C. 2008)
206 Ibid.
207 Farah, 11

lengthy history of employing political violence abroad (especially targeted assassinations and suicide and car bombings), the 1992 and 1994 bombings do not, at first blush, appear inconsistent with the country's well-established modus operandi (since 1984, the U.S. Department of State has designated Iran as a state-sponsor of terrorism).[208] In fact, many opine[209] [210] [211] that, far from inconsistent with this history, the 1992 and 1994 terrorist attacks "must be viewed within the context of [Iran's] past 30 years of [employing] violence abroad for political purposes."[212] The salience of this contention can be informally measured against Cohan's continuum of state-sponsored terrorism. It is important to note that each of these variables is alone sufficient to confirm state sponsorship of terrorism; although, as will be demonstrated, state-sponsored attacks often exhibit multiple degrees of involvement. Indeed, even when scrutinized through the lens of Cohan's continuum, a positive determination of Iranian sponsorship of the AMIA bombing is easily made, as the conclusions of Argentine, American, and Israeli investigations of the attack collectively demonstrate at least four of Cohan's variables. However, for brevity and relevance, evidence for only the first two will be presented.

The first degree on Cohan's continuum is the "performance" of terrorist acts by state officials. As the notion of presidents, ministers, or supreme leaders personally donning suicide vests or driving ordinance-laden cars is patently inconceivable, Cohan proposes a threshold definition of "performance," notably the "active planning, direction, and/or control of terrorist operations" exercised by state officers in their official capacity.[213] While the definitions of "active planning, direction, and control" in this context are somewhat nebulous, and a determination of state-sponsorship using the first degree of Cohan's framework might thus be of specious legal value, for the purpose of this paper, the common definitions will suffice. Accordingly, the known facts and evidence about the AMIA bombing's genesis reveal that not only did Iranian officials at the highest levels of government participate in active "planning, direction, and control," but that their participation was indispensable to orchestrating the attack—the hinge on which the entire operation turned.[214] While Iranian state officials' participation as such is assumed due to a number of other factors, the evidence of "planning, direction, and control" lies in testimony given by a witness code-named "Abolghasem Mesbahi," a former Iranian intelligence

208 Ben-Rafael v. Iran, 540 F. Supp. 2d 39, 53 (D.D.C. 2008)
209 Escudé and Gurevich, 138
210 Levitt, 119
211 Ben-Rafael v. Iran, 540 F. Supp. 2d 39, 47 (D.D.C. 2008)
212 Hekmat, 37
213 Cohan, 92
214 Hekmat, 36

officer (defected), to Argentine authorities during the initial investigation.[215] Crucially, Mesbahi revealed the existence of an August 14, 1993 meeting of senior officials in Mashhad (Iran's second most populous city), during which the officials contemplated the utility of conducting another "revolutionary act" in Argentina, and to that end, identified the AMIA Jewish community center as an ideal target.[216] While the Mashhad meeting certainly indicates the participatory role of Iranian government officials in concocting the AMIA bombing, a second meeting disclosed by Mesbahi, that of the Committee for Special Operations (a kind of kitchen cabinet within Iran's Supreme National Security Council), heralds the smoking gun. While this meeting is significant due to its official sanctioning of the AMIA building attack, it is no less critical for its attendance roster, which named many of the highest government officials in Iran at the time, including Supreme Leader of Iran Ali Khamenei, President Akbar Hashemi Rafsanjani, Intelligence Minister Ali Fallahian, Foreign Minister Ali Velayeti, Ahmad Asghari, an Islamic Revolutionary Guard Corps member stationed at the Iranian Embassy in Buenos Aires, as well as Mohsen Rabbani, the intelligence officer now known as the principal leader of the AMIA attack.[217] Significantly, Interpol later upheld red notices for all but two attendees (Khameini was not indicted in Argentina) of the Committee for Special Operations meeting,[218] which more than satisfies the "planning" criterion.

As for the "direction and control" criteria, a wealth of evidence points to ongoing communication between government officials in Tehran with Iranian diplomatic officials in Buenos Aires, as well as covert operatives based in the Triple Frontier city of Foz do Iguaçu, Brazil.[219] The clearest evidence of Iranian officials' "direction and control" of the operation lies in the activities of Mohsen Rabbani, the long-term Iranian intelligence operative in Latin America who served as "Iran's point man in Buenos Aires;" according to Hekmat, Rabbani was "the only one in Argentina with complete knowledge of the plan [to bomb the AMIA] and was in charge of local logistics (e.g., the procurement of the Renault Trafic, cell phones, explosives, and routes of escape)."[220] Until around six months prior to the bombing, Rabbani was a covert intelligence officer and, more importantly, the de facto head of Iranian intelligence in South America, leading intelligence operations and reportedly "using local Shi'ite scouts to assess Jewish and American targets in Buenos Aires since 1983," especially in his time preaching at the at-Tauhid mosque in Buenos Aires.[221] It is dubious that Rabbani's

215 Levitt, 121-2
216 Ibid.
217 Ibid.
218 Farah, 17
219 Levitt, 122
220 Hekmat, 6
221 Levitt, 122

actions as an intelligence operative could constitute direction and control by an Iranian official as such, though it would certainly intimate that such direction and control existed. Indeed, for Rabbani's actions to satisfy the direction and control threshold, he would have to have been acting in an official capacity. Ironically, the Iranian government itself provided the very basis for implicating Rabbani when it appointed him cultural attaché at the Embassy in Buenos Aires six months prior to the AMIA bombing—undoubtedly to proactively grant Rabbani diplomatic immunity in expectation of the attack's aftermath.[222] Even after his appointment as cultural attaché, Rabbani's primary role was to spearhead the planning of the AMIA bombing; investigators in the case assessed that his surveillance reports to Tehran proved "a determining factor in… the decision to carry out the AMIA attack."[223] The FBI task force, working jointly with Argentine authorities in 1994, uncovered a significant number of telephone calls between the mosque in Foz do Iguaçu, the Embassy of Iran in Brasilia, the at-Tauhid mosque in Buenos Aires, and the office where Rabbani worked as cultural attaché to the Embassy in Buenos Aires—suggesting two core groups of conspirators in South America: the first comprised of the Iranian diplomats and intelligence officers working from Buenos Aires and led by Rabbani and the second, a number of Hezbollah operatives engaged in intelligence-gathering and smuggling between the Brazilian and Argentine sides (Foz do Iguaçu and Puerto Iguazú) of the Triple Frontier.[224] While Rabbani's own actions as an officer of the Iranian government in Buenos Aires constituted "direction and control" over the terrorist attack, his authoritative position in overseeing the activities of Hezbollah agents based in Foz do Iguaçu lend the assertion even greater credence.

Moreover, persuasive evidence of Iranian actions falling under the scope of Cohan's fourth criterion—the state's provision of material or logistical support to aid the terrorists—also exists. In detailing Iranian material support in furtherance of the attack's preparation and orchestration, Hekmat points to the need of the ground conspirators in Buenos Aires for "forged passports, travel documents, intelligence reports, and contacts with ex-military or police personnel (essential to procuring explosives)," all of which, he contends, are competencies and resources that states alone could access.[225] In the same vein, Escudé and Gurevich highlight the conspirators' use of Iranian government property in the lead up to the attack, noting "the CIA and the Mossad [informed] Argentine intelligence that at least 17 couriers had arrived at the Iranian Embassy in Buenos Aires several days before the blast, and all had left 24 hours before the attack."[226] As noted previously, a state's provision of diplomatic assets to

222 Ibid.
223 Ibid.
224 Ibid.
225 Hekmat, 36
226 Escudé and Gurevich, 129

directly or indirectly facilitate terrorist attacks is one of the ancillary modes of state involvement Cohan references. While the Iranian Embassy in Buenos Aires had been the central locus for planning the attack from the start (given the contributions of senior diplomats and consular officers in facilitating logistical and clerical support),[227] the decision of Iranian authorities to permit members of Hezbollah (the 17 couriers) to utilize the Embassy in final preparations for the attack represents the clearest evidence yet that Iran furnished diplomatic assets in furtherance of the bombing. More salient still is the previously-mentioned appointment of Moshen Rabbani to the invented position of Iranian cultural attaché to Iran's Embassy in Buenos Aires. Absent verifiable evidence of Rabbani's engagement in cross-cultural exchanges and outreach activities in the Argentine capital, his appointment to an official position mere months prior to the bombing constitutes a flagrant abuse of diplomatic privileges and immunities afforded to such officers of state.[228] In addition to these instances of Iranian diplomatic and logistical support, financial evidence uncovered during the investigation draws a line connecting the Islamic Republic to monies received by Rabbani to finance various provisions for the attack. Levitt describes Iranian terrorist financing in detail, noting that in the lead up to the AMIA bombing, Rabbani—who maintained bank accounts at Deutsche Bank, Banco Sudameris, and Banco Tornquist—received Iranian funds via international bank transfers, with several originating in Tehran-based Bank Melli."[229] Considered in sum, this evidence effectively neutralizes any notion that Iran's sponsorship of the AMIA bombing was negligible, limited in scope, or insubstantial.

Brothers-in-Bombs: Hezbollah and the AMIA Attack

Though the preceding section squarely establishes the Iranian government's activities in connection with the AMIA bombing as elements of state-sponsored terrorism according to three of the descriptive counts set forth by Cohan, it largely ignores his second point, which considers any instance in which "a state employs unofficial agents for [the purpose of committing] terrorist acts" to be an act of state-sponsored terrorism.[230] Ignored no longer, Cohan's second variable is crucial to understanding the phenomenon of state-sponsored terrorism more broadly, as well as Iran's activities, including the 1992 and 1994 attacks, more narrowly. The broad historical consensus regarding both bombings ascribes "responsibility for masterminding the operation [to] Iran [but] the operational involvement of Hezbollah in the actual execution of the attack."[231]

227 Hekmat, 6
228 Ibid., 39
229 Levitt, 122
230 Cohan, 91
231 Escudé and Gurevich, 129

Assessing Hezbollah's role in conducting the attacks on Argentina with integrity requires an understanding of the bombings in the context of previous attacks similarly attributed to Iran and Hezbollah, jointly. As previously noted, the bombings in Argentina were conducted within a broader Iranian campaign of political violence and terrorism around the world. But as Trapp explains, "acts of terrorism by state organs will virtually always be in the form of covert operations, carried out by secret agents who do not display any outward manifestation of the authority under which they act."[232] To a certain extent, this encompasses the core of Hezbollah's effective function, if not its raison d'être, as it is well-established that Iran "invented, created, funded, [and] trained…Hezbollah" as a political conduit and military proxy enabling the country to exercise covert control and wield influence over its fellow Shi'a Muslims in Lebanon, with an eye to "exporting the revolution" to Beirut.[233] Inasmuch as Hezbollah developed into a potent force in Lebanese politics and society—as Tehran intended—its armed paramilitary wing is no less an Iranian creation, given that it has relied on Hezbollah's militia to conduct terrorist attacks around the world[234] in exchange for funds to sponsor Hezbollah's welfare programs in support of Lebanon's Shi'a. The effect is a veritable masterstroke for Iranian foreign policy: a strategic feedback loop, by which Iran empowers itself to export its Islamic Revolution through a loyal proxy, Hezbollah. The Iranian funding of Shi'a welfare programs endears the group to ordinary Lebanese citizens, thus bolstering its political capital in Beirut, and allows Iran to maintain its political foothold in Lebanon and export its revolution abroad. In this way, Hezbollah's role in conducting terrorist attacks around the globe at the behest of its Iranian benefactor is "highly probative of [its] involvement in [the AMIA and Israeli Embassy] bombing[s]."[235]

Not only did the leaders of Hezbollah—by their own admission—jubilantly declare responsibility in the immediate aftermath of the bombing of the Israeli Embassy,[236] but the facts discovered in the course of the investigations of both bombings corroborate the pivotal function of Hezbollah and its agents in orchestrating the attacks. In doing so, they bear witness to the potent malignancy of Iran and Hezbollah's symbiotic relationship. Indeed, in 2002, the FBI and SIDE identified the suicide bomber in the AMIA bombing as 21-year-old Ibrahim Hussein Berro, a Lebanese national and known member of Hezbollah.[237] Soon after the attack, Berro's family held a funeral for him (noteworthy for the number of high-ranking Hezbollah officials attending, as well as the deceased's

232 Kimberley Trapp. "Terrorism and the International Law of State Responsibility" in Research Handbook on International Law and Terrorism, ed. Ben Saul, 2014: 48.

233 Ben-Rafael v. Iran, 540 F. Supp.2d 39, 45 (D.D.C. 2008)

234 Ibid., 44

235 Ibid., 47

236 Levitt, 120

237 Alvarado, 56

empty coffin), while Baalbeck, Berro's hometown, dedicated an eponymous city square in recognition of his "martyrdom."[238] Together with Berro, two other Hezbollah members, Imad Mugniyah and Abu Mohamed Yassin, entered Argentina on July 1, 1994, by air, using counterfeit Greek-EU passports.[239] Upon arriving at Ezeiza International Airport, the group made numerous phone calls to a Lebanese number traced to Hezbollah's headquarters in Beirut, as well as a cell phone in Foz do Iguaçu, which was registered in Lusophone Brazil to a Spanish pseudonym "André Marques." Tellingly, it was never used again after July 18, 1994, the date of the AMIA attack.[240] While Berro was a young, expendable, rank-and-file member of Hezbollah, Imad Mugniyah—subject of a $5 million bounty levied by the United States and wanted in 42 different countries in connection with numerous terrorist attacks, including the Beirut barracks bombing, TWA Flight 847, and crucially, the Israeli Embassy bombing in Buenos Aires—was decidedly not a backbencher.[241] Undoubtedly, the presence of Mugniyah, Hezbollah's Head of Security, in Buenos Aires and Foz do Iguaçu in the days and weeks leading up to the AMIA bombing lends credence to Hezbollah's complicity in the AMIA bombing.

Judicial Contr(a)temps: Nicaragua, Tadić, and the Control Tests

A number of explanations exist as to why the consensus affirming the role of Hezbollah militants in both attacks in Buenos Aires is more broadly-held than that of Iran's culpability—the most notable being conflicting evidence regarding Hezbollah's relationship with Iran and the degree of autonomy it possesses vis-à-vis the Iranian government. The question is an important one in assessing the legal implications of Hezbollah's actions in the context of the AMIA and Embassy bombings. Because Hezbollah is not "a formal subdivision, instrumentality, or branch of the Islamic Republic of Iran, the relationship between the two must satisfy a certain legal threshold for Iran to be held [legally] responsible [for acts committed by members of Hezbollah]."[242] This forms part of the broader legal question of attributing state responsibility for acts of terrorism perpetrated by organized terrorist or paramilitary groups—the importance of which Trapp underscores, given that "successful invocations of state responsibility for terrorism are relatively rare,"[243] in part because "acts of [state-sponsored] international terrorism are not often carried out by organs of states, [which instead] conduct terrorist activities through private persons

238 Hekmat, 10
239 Ibid. 8-9
240 Ibid., 9
241 Ibid., 10
242 Hekmat, 35
243 Trapp, "Terrorism and State Responsibility," 55

or groups who act secretly (and deniably) on their behalf—and are therefore necessarily outside the formal structure of the state."[244] The International Law Commission (ILC) contends with this very problem in Article 8 of its Draft Articles on State Responsibility, which posits a set of standards governing the circumstances in which actions of private individuals can be imputable to sovereign states, namely: (1) whether the state has issued instructions to those persons; (2) whether the state has directed the persons to do something; or (3) whether the state has exercised control over those persons. According to the ILC, such "'instructions, direction or control' must relate to the specific conduct, held to constitute a breach of international law."[245] While the first and second standards appear to constitute relatively clear and cogent thresholds (though Trapp cautions that "in most cases [they] will pose insurmountable evidentiary difficulties"[246]), Article 8 fails to describe the scope of its third standard of the exercise of control—a vexing omission, which occasions Cassese's crucial question, "how penetrating should [the state's] control be for [it] to incur responsibility?"[247] A number of international courts and tribunals have confronted this issue, bequeathing significant jurisprudence from which two tests proposing divergent thresholds of state "control" have emerged. First is the "effective control" test, an incipient doctrine first crystallized by the International Court of Justice (ICJ) in its Nicaragua decision; the second is the "overall control" test, a contribution derived from a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the case Prosecutor v. Tadić.[248] The control tests are particularly relevant in the case of the AMIA and Israeli Embassy attacks. Given the pivotal role of Hezbollah agents in the commissioning of the bombings, a competent adjudicating body would have to discern whether the degree of Iranian control over Hezbollah was legally sufficient to trigger the substantive threshold proposed by Draft Article 8 to impute the unlawful actions committed by Hezbollah agents in the course of the AMIA and Embassy bombings to Iran. But determining the extent of this control is not inherently straightforward, as the "effective control" and "overall control" tests differ radically from one another in their respective criteria governing attribution of private individuals' actions to sovereign states—differences that will now be illustrated.

The "effective control" test, as previously noted, has its genesis in the ICJ's Nicaragua judgment. That case, Nicaragua v. United States, was submitted to the ICJ in 1986 by the Republic of Nicaragua, which alleged that the United

244 Ibid., 48

245 Cassese, Antonio. "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia." European Journal of International Law 18(4), September 2007: 663

246 Trapp, "Terrorism and State Responsibility," 48

247 Cassese, 663

248 Ibid., 649

States had abrogated numerous treaty obligations to Nicaragua by "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua."[249] Nicaragua's allegations refer to substantial support provided by the United States (through many, if not all, the ways alleged in the country's ICJ submission) to the Contras, a right-wing rebel group in Nicaragua working to overthrow the left-wing Sandinista government in Managua. In their guerrilla war against the Sandinistas, the Contras used military force and conducted armed operations "against the territorial sovereignty and political independence of that state;" in its decision, the ICJ held that in materially supporting the Contras, whose acts violated the aforementioned principles, the United States violated its obligations "not to intervene in the affairs of other states as well as the obligation not to use force in breach of the customary rule of international law corresponding to Article 2(4) of the UN Charter."[250] Thus, while the Court upheld Nicaragua's general contention of the United States' breaches of norms of public international law, it reckoned differently with the distinct norms of international humanitarian law (IHL), from which its formulation of the "effective control" test arose.[251] The invocation of IHL in the Nicaragua case stems from the specific charges brought by Nicaragua, asserting that the United States, by and through its material support for the Contras, was legally responsible for the grave breaches of IHL committed by the Contras in the duration of their guerilla war against the Nicaraguan government.[252] The incumbent question before the Court was thus one of state responsibility, and in particular, the imputability to a state of actions committed by private individuals over which the state exerts a degree of control. The legal implications of the Court's assessment of the relationship between the United States and the Contras for the Nicaragua case are thus identical to those concerning Iran and Hezbollah's relationship in the AMIA case. Accordingly, the ICJ set out first to distinguish "between two classes of individuals not having the status of de jure organs of a state but nevertheless [act] on behalf of that state;" the first class constitutes "those totally dependent on the foreign state—paid, equipped, generally supported by, and operating according to the 'planning and direction' of organs of that state, [while the second class comprises] persons who, although paid, financed and equipped by a foreign state, nonetheless [retain] a degree of independence from that state."[253] While the ICJ declared any acts committed by the first class of private individuals are, by virtue of their "total dependence" on a state, necessarily imputable to that state, it conditioned imputability to a state of actions committed by the second class of individuals

249 Cassese, 652
250 Ibid.
251 Ibid.
252 Ibid.
253 Ibid.

to a test of control—what became the "effective control" test.[254] With respect to Nicaragua's assertion that the international crimes committed by the Contras concomitantly attribute grave breaches of international humanitarian law to the United States—due to the latter's support of the former—the ICJ ruled to the contrary. The ICJ held that the United States could be liable for the breaches of IHL derived from those acts committed by the Contras in violation of such, only if it exercised "effective control" over the Contras, meaning that the United States must have issued specific orders to the Contras directing them to carry out those acts in violation of IHL.[255] The ICJ's "effective control" test thus sets a strict prerequisite to attribute state responsibility for individuals' unlawful conduct, namely, the presence of explicit state instructions for a given act. In other words, state orders must be specific and unique to the unlawful act in question in order to prove "effective control."

Trapp suggests that the "effective control" test is useful in the Nicaragua case solely because of the factual circumstances inherent to the Contras' struggle against the Sandinistas and the United States' material support to that end, arguing: "the [ICJ's] adoption of [the 'effective control'] standard was driven by the particular (and identical) factual matrix in the Nicaragua and Bosnia Genocide cases," both of which consisted of two distinct layers of activity.[256] The first layer was the paramilitary operations of the Contras and the Army of the Republika Srpska (VRS), conducted with the material support of the United States and Serbia, respectively, "with the objective of overthrowing a government and/or securing territorial control;" the second layer of activity constituted the grave breaches of IHL, or "international crimes" perpetrated by the Contras and VRS, respectively, in the course of said operations.[257] This is the crux of the issue; as Trapp underscores, the type of campaigns in which the Contras and VRS were engaged in (i.e., overthrowing a government or seizing/reclaiming territory) "can, in principle, be carried out without the commission of international crimes."[258] Accordingly, the ICJ formulated the "effective control" test "to ensure that a state's direct responsibility for such [grave international] crimes [committed by groups it supports] only arises where the state's control extends to the non-inherent features of the military campaign it supports."[259] In plainer words, if in the course of the paramilitary conflicts in Nicaragua and Bosnia, neither the United States nor Serbia specifically or directly ordered the Contras or the VRS to commit acts in violation of IHL, then neither state could be held responsible for such international crimes committed by individuals affiliated

254 Ibid.
255 Ibid., 653
256 Trapp, "Terrorism and State Responsibility," 50
257 Ibid.
258 Ibid.
259 Ibid.

with the Contras or the VRS. In this way, the "effective control" is suitable and appropriate in evaluating state responsibility in contexts similar to the Nicaragua and Bosnia Genocide cases. However, sound applications of the "effective control" test are limited, and the doctrine is increasingly seen as inadequate to contend with assessments of state responsibility for quickly evolving modes of conflict, especially in the crucial realms of hybrid warfare and international and state-sponsored terrorism.[260]

As to the viability of invoking "effective control" for acts of terrorism, Trapp cautions that unlike the paramilitary campaigns of the two cases mentioned above—which, as stated, could just as well have been executed without grave violations of IHL norms—acts of international terrorism are intrinsically severe breaches of IHL.[261] As such, the distinction between the two "layers of activity" found in the Nicaragua and Bosnia Genocide cases does not hold in cases of international terrorism, because no primary level of activity exists to obviate a state's "effective control" (and its concomitant responsibility) over the secondary, "non-inherent" (i.e., criminal) activities perpetrated by individuals it supports.[262] While one might therefore conclude that "effective control" fails to provide an adequate framework for determining state responsibility for acts of terrorism conducted by private individuals, the ICJ continues to stand by it, declaring in Bosnia Genocide that "Article 8 of the ILC Articles on State Responsibility must be understood in light of the Court's decision in Nicaragua, rendering 'effective control' the exclusive standard of control"[263] Unsurprisingly, this decision in Bosnia Genocide proved controversial, given its effective narrowing of the avenues for the attribution of state responsibility. Trapp contends as much, arguing that "a more flexible approach to 'control' is…necessary if under Article 8… the rules on state responsibility are to respond to the particularities of the terrorism context in a way that rigid adherence to the Nicaragua standard does not allow for."[264] Cassese concurs, proclaiming that "[there is a] serious threat to peace and security if international law does not have the means available for making [a] supporting state answerable for violations of international law by armed groups—at least where the [state's] support goes so far as to involve coordinating or helping in the general planning of the [unlawful] activities of [such] groups." Both Cassese and Trapp deem the "overall control" test to be a preferable standard for control, highlighting its greater versatility and flexibility.[265] [266]

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260 Cassese, 665
261 Trapp, "Terrorism and State Responsibility," 50
262 Ibid.
263 Ibid., 48
264 Ibid., 50
265 Ibid.
266 Cassese, 665

In its Tadić decision, the ICTY Appeals Chamber deemed the ICJ's "effective control" test suitable for determining state responsibility for illegal acts performed by private individuals at the direct behest of a state within the territory of another state.[267] But the ICTY Appeals Chamber also asserted its view to the greater utility of applying a standard of "overall state control" in attributing the unlawful acts of private individuals affiliated to organized, structured groups (such as terrorist organizations and paramilitaries) over which a state exerts an "overall" degree of control.[268] This "overall control" test is satisfied "not only in a state's equipping, financing, training, and [providing of] operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity."[269] As such, the argument for applying the "overall control" test in cases of state-sponsored terrorism stems from the contention— as espoused by Cassese—that "the systematic and broad support of [a] group by the state [coupled with] the hierarchically organized structure of [such a group]... cannot but imply that the state normally has a say in, as well as an impact on, the planning or organization of the group's activities," a broad conclusion that necessarily renders moot a determination of whether a state possesses "effective control" over particular unlawful acts in having directly ordered their execution.[270] Furthermore, Cassese argues the steep evidentiary threshold inherent in "effective control" would prove prohibitive in attributing responsibility to states for acts of terrorism they covertly sponsored, stating, "the hidden nature of those [terrorist] groups, their being divided up into small and closely-knit units [and] the secretive contacts of officials of some specific states with [them]... would make it virtually impossible to prove the issuance of instructions or directions [from a state] relating to each [individual] terrorist operation."[271] "Overall control," on the other hand, suffices to prove that a state "generally has a hand in" organizing or coordinating terrorist activities perpetrated by individuals within an organized group, thereby triggering state responsibility for any act thereof, given a state's overall and abiding control of the group.[272] The "overall control" test as posited by the ICTY Appeals Chamber in Tadić constitutes a decidedly more expansive view of international law, erring on the side of that regime, rather than that of states. Cassese reasons that this increases the effectiveness of international law in contending with such thorny (and undeniably political) issues of state responsibility in cases of terrorism in that "flexible ways of linking states to terrorist organizations are better suited at the international level than traditional methods, if one intends to target not only

267 Ibid., 657
268 Ibid.
269 Ibid.
270 Ibid., 661
271 Ibid., 666
272 Ibid.

terrorist organizations and their members but also those states that increasingly avail themselves of their barbarous methods."[273]

While this paper has attempted to parse known facts and evidence discovered about the Buenos Aires bombings that point to Iran's sponsorship and Hezbollah's execution, the evidence presented obviously constitutes but a fraction (albeit some of the most significant) of the known facts. And though it is exceedingly suggestive of such (to such a degree that there should be little doubt as to the veracity of the general thesis), the entirety of known evidence accrued during the various investigations of the bombings is by no means empirically bulletproof confirmation of the culpability of Iran and Hezbollah in the bombings. Of course, the unique perspective of every person naturally occasions divergent conclusions regarding identical information, insofar as a single thread of evidence will lead one person to a particular conclusion, it will lead another to a different conclusion. Consequently, the selection of the control test governing the evidentiary threshold for imputing non-official individuals' actions to sovereign states is critical to cases of internationally unlawful acts as severe as the AMIA and Israeli Embassy bombings. Indeed, if Mr. Macri's government (or any succeeding Argentine government) were to assert the province of international law and seek a competent forum to adjudicate for remedy and/or material damages in the AMIA and Israeli Embassy cases, the determination of state responsibility and the concomitant selection of a state control test to that end would both constitute two of the most consequential legal issues on which the cases would hinge.

Though Trapp and Cassese contend that because the "effective control" test is both so narrowly constituted and established with a nearly insurmountable evidentiary threshold, it is insufficiently suited for application to evolving modes of conflict, this paper contends that the evidence uncovered in the course of the AMIA investigation likely constitutes "effective control" of Iran over Hezbollah's specific, individual acts in targeting the AMIA building and the Israeli Embassy. First, the sustained contact between Hezbollah agents such as Mughniyeh and Iranian officials such as Rabbani (evinced by the numerous calls between the mosque in Foz do Iguaçu, Rabbani's office in Buenos Aires, and the Beirut number linked to Hezbollah) in the days, weeks, and months prior to the AMIA bombing, indicate communication and direction between the private individuals and the state sponsor. Second, the two meetings of Iranian officials, first in Mashhad, and then in Tehran, of the Committee for Special Operations implicate the highest officials in Iran's government in designing the attack. Lastly is the transformation of Rabbani (whose pivotal role in planning the AMIA bombing is borne out by such a wealth of evidence as to be exceedingly

273 Ibid.

difficult to dispute) from covert intelligence operative to diplomatic official with immunity. Collectively, these facts point to the direct issuance of instructions by the Iranian government to agents of Hezbollah, thus fulfilling the "effective control" requirement.

Yet, paradoxically, the evidentiary problem inherent to the "effective control" test remains. For one, the evidence of the Mashhad and Council meetings—as far as this author has determined—stems from the testimony of a single individual; while this in itself does not disprove the meetings' occurrences, it significantly weakens (perhaps fatally) its viability as determinative evidence in a court of law. Though it is hard to imagine that such weaknesses and flaws (assuming they are not systemic or fundamental) of some facts pertaining to the AMIA case would amount to a substantive de facto repudiation of Iran and Hezbollah's complicity in the attack, it is nonetheless conceivable that such weaknesses might serve to blunt the case's evidentiary potency to such an extent that a court finds it unable to satisfy the "effective control" test. Such a decision would demonstrate a court's (likely the ICJ's) enduring fidelity and deference to the "exacting standards" of the "effective control" test at the expense of reaching a veritable and just conclusion premised on a broader factual matrix imbued with far greater utility and exactitude than "effective control." This critique is precisely the one asserted by Trapp and Cassese in their warnings against judicial practice, which errs on the side of doctrinal integrity, but in doing so, codifies a specious precedent for exculpations of state responsibility inconsistent with the spirit of Article 8 of the ILC's Draft Articles. Whereas "effective control" fails to account for history at all, in considering the indisputably symbiotic benefactor-client relationship between Iran and Hezbollah—borne out through decades of evidence of Iran's direct control, funding, arming, training, etc. of Hezbollah militants—the "overall control" test provides a near unassailable foundation from which to impute responsibility to Iran for the unlawful acts committed by individuals affiliated to Hezbollah in their conducting of the 1992 and 1994 terrorist bombings.

Classifying the AMIA Bombing and Identifying Iran's Legal Obligations to Argentina

While a number of scholars, such as Creegan and Cassese, qualify the generally accepted premise that terrorism in and of itself does not customarily constitute an international crime, except in cases of clear state sponsorship of such, their contention is largely obviated in practical terms, in that no international prosecution for the "crime of state-sponsored terrorism" could occur due to the fundamental principle of criminal law around the world, nullum crimen sine lege, which holds that "there shall be no crime without

law." Plainly, for an act to be justiciable in a criminal tribunal, a state's criminal code must explicitly prohibit it; in terms of international criminal law, evidence of criminalization discerned from treaty law or customary law may suffice to invalidate nullum crimen sine lege. While Cohan recounts that, "as far back as 1977, commentators were suggesting 'hold[ing] states responsible in damages for the acts of terrorists when such acts can be attributed to them [as] a strategic use of traditional international law norms which... may produce short-run benefits and... will contribute to long-run interests of the world community,'"[274] the resulting question must therefore be to what degree did the international community execute this "suggestion" by way of international legal instruments to build a framework of accountability for such acts. Hoye provides a partial answer to this question: acknowledging the suggestion of "some courts and commentators that state-sponsored terrorism might [violate] a jus cogens norm of customary international law," he highlights that "in at least ten resolutions of the UN General Assembly, states have reaffirmed their 'unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed.'"[275] He laments that despite this nearly universal condemnation of state-sponsored terrorism, international criminal law provides no mechanism "by which to impose criminal penalties on states or governments that finance or otherwise support terrorist activities," let alone in cases surrounding individual criminal responsibility for acts of terrorism.[276] Though he is necessarily correct in his contention that international criminal law provides no effective mechanism of remedy in cases of state-sponsored terrorism (a premise at the core of this paper), as well as in his corollary observation that "pursuant to current international law, states remain immune from criminal culpability for their sponsorship and financing of terrorist acts… [while] the notion of state criminal responsibility [is nonexistent],"[277] international law is not silent on the matter of terrorism, and tangentially, of states' sponsorship thereof.

Adding the important caveat that "the framework of state responsibility for international terrorism is...neutral in its conception of the state in that questions of state responsibility arise whether states are directly responsible for acts of terrorism or indirectly responsible for failures to prevent or punish the conduct of non-state actors,"[278] Trapp describes in detail the most significant corpus of international law on the subject of terrorism, namely, the sixteen so-called "Terrorism Suppression Conventions" (TSCs), each of which "require[s] state parties to: (a) criminalize a particular manifestation of international terrorism

274 Cohan, 89

275 William P. Hoye. "Fighting Fire with Mire?: Civil Remedies & the New War on State-Sponsored Terrorism." Duke Journal Of Comparative & International Law 12(105), 2002: 110-11

276 Ibid., 111

277 Ibid., 113

278 Trapp, "Terrorism and State Responsibility," 55

under domestic law; (b) cooperate in the prevention of that terrorist act, and (c) take action to ensure that alleged offenders are held responsible for their crime (through the imposition of an [aut dedere aut judicare] obligation)."[279] The TSCs represent a significant benchmark of international cooperation on terrorism, though the caveat remains that none of them establishes their respective headline form of terrorism as a crime justiciable according to international criminal law.[280] Undoubtedly, the TSC with the most theoretical application to the attack on the AMIA building would be the International Convention for the Suppression of Terrorist Bombings. While the Convention, as titularly implied, provides a legal framework with an eye to the suppression of terrorist bombings, it in no way criminalizes the commission of terrorist bombings by individuals or states under international criminal law. The Bombing Suppression Convention, like the other TSCs, "simply create[s] an obligation for state parties to criminalize the offences in question under their domestic law, exercise jurisdiction over offenders under prescribed conditions and provide for international cooperation mechanisms that enable state parties to either prosecute or extradite the alleged offender."[281] As such, the Bombing Suppression Convention, despite its thematic relevance to the Buenos Aires bombings, could not serve as a jurisdictional basis from which Argentina could assert the justiciability of a criminal case against Iran for sponsoring a terrorist bombing within Argentine territory. In any event, the Bombing Suppression Convention, to which Iran is not a signatory, did not come into force until 2001, immediately precluding any assertion of subject-matter jurisdiction in an international AMIA case even if the TSC did criminalize such an act. And while Trapp asserts the proscriptive effect (with regard to terrorism) of a customary international legal norm obligating states "not to knowingly allow [their] territories to be used for acts contrary to the rights of other state—[compliance with which is] subject to a due diligence standard of conduct,"[282] this criminalizing effect of this obligation is nebulous enough as to be of dubious utility in comporting with nullum crimen sine lege. If neither the primary corpus of international legal instruments vis-à-vis terrorism nor the primary customary prohibition of terrorism confers the status of criminality to acts of terrorism under international law, the question remains: what principles or norms of international law, if any, exist under which acts of international terrorism can be justiciable before international tribunals, especially in the context of state-sponsored terrorism and the impetus to hold such sovereign states accountable for their acts.

Insofar as the AMIA bombing clearly qualifies as an act of international terrorism, this does not disqualify the attack from according to another veritable

279 Trapp, "Holding States Responsible," 282
280 UNODC. Handbook on Criminal Justice Responses to Terrorism, 2009: 11
281 Ibid.
282 Trapp, "Terrorism and State Responsibility," 43

category of unlawful act described by international law, which, unlike the contested criminality of "terrorism," would be justiciable under the same. Of the international principles and norms possessing potential application to the AMIA and Israeli Embassy bombings, the most convincing is that which governs the use of force by states—derived from Article 2, Clause 4 of the United Nations Charter, which mandates that:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

[...]

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Trapp defends the same view, relating that "international terrorism engaged in or supported by states against other states is but a particular form of using force in international relations…regulated by the UN Charter and customary international law."[283] She notes that a state's participation in terrorist acts can amount to an illegal perpetration of the crime of aggression by that state; crucially, the crime of aggression is one of the grave international crimes (with jus cogens status) enumerated in the Rome Treaty chartering the International Criminal Court.[284] Trapp proceeds to outline the circumstances present in which a generally prohibited act of terrorism manifests as a crime of aggression, explaining that such is engendered when the attack in question is: "[a] attributable to the state and [b] of such gravity as to [constitute such a crime] of aggression…" against the targeted state, "...had [the same act] been carried out by the state's military forces."[285] Otherwise, "if the terrorist attack is not grave enough to be characterized as [a crime of] aggression, but is nevertheless attributable to the state, the state's conduct will [rise] to a prohibited use of force in breach of Article 2(4) of the UN Charter."[286] According to Cohan, state responsibility for an act of terrorism as determined by the previously detailed "effective control" or "overall control" tests is "sufficient to legally charge a state for a [prohibited use of force] (as used in Article 2(4)) committed by international terrorists."[287]

While the province to determine whether the AMIA or Israeli Embassy bombings constitute a crime of aggression committed by Iran against Argentina

283 Trapp, "Terrorism and State Responsibility," 42
284 Ibid.
285 Ibid.
286 Ibid.
287 Cohan, 91

in breach of Article 2(4) of the UN Charter (with particular emphasis on whether the criteria occasioned sufficient "gravity" to constitute the crime of aggression) would naturally rest with a competent court of international law adjudicating the case, the alternate subject matter of an Iranian breach of aut dedere aut judicare obligations to Argentina is more straightforward. Because Iran has not signed the relevant TSCs (namely the Bombing Suppression Convention), it cannot be bound by the enforcement mechanisms of those treaties, namely, the aut dedere aut judicare obligation to extradite or prosecute with regard to the suspects within its territory (notwithstanding the fact that the predating of the AMIA and Embassy bombings to the enforcement of the relevant TSCs render their applicability moot). As such, an examination of customary law is necessary to determine a) the existence of an Iranian obligation to extradite or prosecute its nationals wanted in Argentina in connection with the Buenos Aires bombings, and b), in consistently refusing to do either, whether Tehran has not fulfilled its obligation to Argentina.

Unsurprisingly, Trapp also broaches this subject and concludes that "the extensive practice [i.e., in the TSCs] over the past 40 years imposing an aut dedere aut judicare obligation on states in regard to terrorist offences undermines claims as to its customary international law status."[288] Paulussen shares Trapp's conclusion, but argues that the absence of a customary obligation does not necessarily represent the end of the road to demonstrating the existence of the obligation in cases of terrorism.[289] He cites as evidence UNSC Resolution 1373 (2001), significant in its status as the first "legislative" instrument promulgated by the UNSC, binding all states to the provisions therein.[290] Of particular relevance is the Resolution's second article, in which:

The Security Council decides that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from

288 Trapp, "Terrorism and State Responsibility," 45
289 Paulussen, 14
290 Ibid.

using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

The operant clauses, Paulussen contends, are (c) and (e), in that the former obliges states to "deny safe haven" to terrorists as described, and the latter mandates that states "[bring] to justice" persons participating in such acts and even punish them in accordance with the gravity of such terrorist acts. Clauses 2(c) and (e), he argues, should thus be interpreted as positive confirmation of a tangible obligation in the corpus of international law binding states (such as Iran in the case of the suspects wanted in Argentina in connection with the AMIA bombing) to act affirmatively not only to prevent terrorism in their borders, but effect justice in the form of extradition or prosecution of persons accused.[291] This is a binding obligation that Iran has intentionally abrogated. Because the degree to which states have complied with the Resolution's provisions has been inconsistent, as Paulussen acknowledges, its merits could be doubted in a court of law accessed by Argentina to adjudicate the AMIA case. It is nevertheless a crucial issue to any international case regarding the 1992 and 1994 terrorist attacks.

III. The AMIA Case and the International Court of Justice

To the degree that it maintains a certain edifying utility, the preceding analysis of the most significant principles and norms of international law germane to the AMIA case (as an act of international terrorism directed by a sovereign state in violation of the territorial integrity and sovereignty of another) possesses value in and of itself. But its import is far greater as the evidentiary foundation from which to demonstrate the conclusions related to the primary enterprise of this paper; that is to say, the use of the deadly terrorist attacks afflicting Argentina in the 1990s as a case study yielding important conclusions about the fraught space if terrorism at the confluence of public international law and international criminal law—and in particular, the degree to which the existing international legal architecture comports with, or is disposed to support and actuate the international community's renewed effort to fight and eliminate de facto and de jure impunity for perpetrators of international terrorism.

291 Ibid, 14-15

The following section will thus apply the previously outlined norms pertinent to the AMIA case within the structure of an analysis of the jurisdictional competencies of the International Court of Justice. While the viability of a potential bid by Argentina to bring to bear the prerogatives of ICJ (while also leveraging the benefits of a high-profile international case) to advance the cause of the AMIA is necessarily conditioned by Court's institutional factors, such as the defined scope of its mandate, its jurisdictional competencies, and procedural regulations, the effect of those factors on the ultimate admissibility of a case such as the AMIA is itself entirely contingent on the merits of the principles of international law invoked by Argentina to argue for the admissibility of the case to the ICJ. As becomes clear, these immutable factors (i.e., mandate, jurisdiction, and procedure), coupled with the vagaries of politics, serve as much to preclude the potential of international adjudication in the AMIA case as they do to clear the path for it. It is thus with consideration of this vicissitudinal quality inherent in the legal junction at which the bodies of international public and criminal law meet that the justiciability of the AMIA case before the International Court of Justice will be evaluated with rigor.*[292]

The Israeli Embassy Bombing and the Internationally Protected Persons Convention

Of the potential international tribunals before which the AMIA case may be admissible, the intricacies of the International Court of Justice are the most interesting and potentially the most promising. In contrast to the International Criminal Court or ad hoc tribunals, the ICJ is not a criminal court competent to apply international criminal law to prosecute individuals charged in the breach by national authorities; the ICJ is a United Nations-chartered interstate dispute mechanism authorized to issue jurisprudential advisory opinions and facilitate judicial proceedings regarding disputes between sovereign states by interpreting customary international law and relevant international treaties and conventions. Thus, while Argentina could theoretically petition the ICJ to issue a ruling to compel Iran to extradite its citizens for trial, such a ruling on Iran's abrogation of aut dedere aut judicare obligations could not change the factual circumstances of Tehran's refusal to extradite its nationals to Buenos Aires. That said, the ICJ possesses a number of other functions, which would be of use to Argentina (perhaps jointly with Israel) to call attention to Iran's successive crimes in

292 *Admissibility of the AMIA case before the International Criminal Court (ICC) will not be considered, due to the Court's temporal jurisdiction requirement, which limits the admissibility of cases before the Court to alleged grave crimes committed prior to the July 2002 enforcement of the Rome Statute (the Court's founding charter). The ICC's temporal jurisdiction requirement thus precludes the admissibility of both the Israeli Embassy bombing of 1992 and the AMIA bombing of 1994 before the Court (although a litany of additional subject-matter issues would immediately proscribe any ICC jurisdiction over the bombings).

Buenos Aires and enshrine in the body of international jurisprudence Iran's responsibility for the attacks on the AMIA and Israeli Embassy.

As with all international judicial bodies, the scope of the ICJ's jurisdiction (governed by the ICJ Statute in Chapter XIV of the UN Charter) is strictly defined. There are a few elements qualifying the Court's mandate that are crucial to the AMIA and Embassy case: first, the ICJ's jurisdiction is not compulsory but predicated on consent of both applicant and respondent states (Argentina and Iran, respectively).[293] Consent, Trapp states, "can be expressed in an ad hoc fashion with reference to a particular dispute, pursuant to an [Article 36(2)] optional clause declaration [in which a state agrees to blanket ICJ jurisdiction for any future dispute, which may be lodged against it], or through compromissory clauses [enumerated in specific treaties invoked by applicant states to assert the ICJ's jurisdiction for the dispute in question]."[294] Because a respondent accused of state-sponsored terrorism (Iran) would hardly issue ad hoc consent to an ICJ inquiry initiated by state(s) it is alleged to have attacked (Argentina)—especially if it is guilty of doing so—and due to fact that such a state, which habitually utilizes terrorism as a tool of foreign policy would be more than disinclined to willingly bind itself to accept blanket ICJ jurisdiction by way of an Article 36(2) declaration, compromissory clauses represent the broadest potential space for asserting ICJ jurisdiction "over disputes involving state responsibility for international terrorism."[295] Given that Iran is just such a "habitual" employer of terrorism as an instrument of foreign policy described, such qualifications are exceedingly relevant in the case of a potential ICJ case brought by Argentina and/or Israel against Iran for orchestrating the attack on its Embassy in Buenos Aires. Indeed, because the Islamic Republic of Iran has neither deposited an Article 36(2) instrument with the United Nations in recognition of the ICJ's compulsory jurisdiction, nor, in light of its decades-long refusal to offer a bona fide commitment of cooperation with Argentina to solve the AMIA and Embassy attacks (barring Cristina Kirchner's Memorandum of Understanding), ICJ jurisdiction in any dispute lodged against Iran in the Hague could only be predicated on a compromissory clause providing for ICJ adjudication of disputes arising from any (germane) treaty to which Iran is a state party and against which it has deposited no reservation or proscriptive declaration.[296] In fact, the basis for the ICJ's jurisdiction in one of the most famous and contentious cases ever brought before it, the "Tehran Hostages case" (formally, United States of America v. Iran), hinged precisely on Iran's acceptance of the compromissory clause appended to the Vienna Convention.[297] But in the case of the AMIA attack,

293 Trapp, "Holding States Responsible," 285
294 Ibid.
295 Ibid., 286
296 Ibid., 295
297 Ibid.

there is no useful compromissory clause in a treaty relevant to the case on which Argentina could predicate its assertion for ICJ jurisdiction over the matter. Tellingly, the Islamic Republic of Iran is not a state party to the International Convention for the Suppression of Terrorist Bombings, nor to the International Convention for the Suppression of the Financing of Terrorism. Even if it were, the conventions were signed in 1998 and 1999, respectively, and came into force no earlier than 2001. No post-facto case for ICJ jurisdiction over the AMIA bombing could be made on the basis of a compromissory clause rendered after the incidents. But another viable avenue exists for the assertion of ICJ jurisdiction over an act of Iranian-sponsored terrorism in Argentina.

Indeed, to the degree that the 1994 AMIA bombing, as Argentina's most deadly foreign terrorist attack, looms large in Argentine public discourse and has therefore overshadowed, to a certain degree, the attack on the Israeli Embassy is evident.[298] However, there are two variables present in of the Israeli Embassy bombing that actually provide for greater access to remedy under international law than otherwise would be available to the AMIA bombing. The first of these variables relates not the bombings' respective body counts, but their targets. While the 1994 bombing targeted a private civil society institution, the AMIA, in 1992, the terrorist attack targeted the Embassy of the Israel in Argentina, a formal diplomatic mission protected by special convention under international law. The fact that the Islamic Republic of Iran chose to attack and destroy an Embassy maintained by the State of Israel—necessarily leading to the deaths of Israeli diplomatic officers—places Iran in breach of its treaty obligations enumerated in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (hereafter referenced as the "IPPC"), predicated on the Vienna Convention on Diplomatic Relations. While, in 1992, Israel chose not to assert exclusive investigative jurisdiction over the attack on its Embassy in Buenos Aires, choosing instead to cooperate with and support Argentine authorities' efforts to investigate and prosecute the attack, Iran's clear violation of its treaty obligations (and customary international law) by deliberately targeting protected diplomatic personnel provides a convincing legal basis upon which Argentina, perhaps in a joint petition with Israel, could seek a measure of redress at the International Court of Justice.

In such a potential ICJ complaint brought by Argentina and/or Israel regarding Iran's terrorist activities apropos its planning, financing, and logistical orchestration of the Israeli Embassy bombing, the complainant states would first invoke Iran's abrogation of obligations bound to it by virtue of it being party to the Convention on Internationally Protected Persons, citing as the basis for ICJ jurisdiction the compromissory clause enumerated in Article 13 of the IPPC,

298 Ben-Rafael v. Iran, 540 F. Supp. 2d 39, 46 (D.D.C. 2008)

which states:

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization or the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.

While the procedural requirements required by the first clause could be fulfilled easily, given Iran's express intention not to cooperate with Argentina with regard to the bombings, the second clause is problematic. Interestingly, Iran has not issued a reservation to opt-out of the IPPC's compromissory clause, whereas both Argentina and Israel have issued such reservations,[299] rendering any attempt by either or both states to invoke the IPPC's compromissory clause as a basis for ICJ jurisdiction in the Israeli Embassy bombing null and void. However, should Argentina or Israel wish to pursue a case before the ICJ, either (or both) could easily withdraw their reservation according to Article 22 of the Vienna Convention on the Law of Treaties.

After asserting this basis for ICJ's competency to adjudicate the dispute, Argentina and/or Israel would proceed to establish a compelling legal case against the Islamic Republic to prove not only its culpability in sponsoring and orchestrating the attack on the Israeli Embassy in 1992, but also that Iran's commissioning of the attack constitutes a violation of binding treaty obligations established with its accession to the IPPC. In the case of the Embassy bombing, charging Iran with breached obligations of the IPPC is rather low-hanging fruit. Indeed, the IPPC was drafted as a logical extension of the rights, obligations, and norms established by the Vienna Convention on Consular Relations (1963) and the follow-up Vienna Convention on Diplomatic Relations (1969). In his handbook for the Implementation of International Counter-Terrorism Conventions, British international legal scholar Anthony Aust writes that "[internationally protected persons] as covered by Article 1(1)(b) [of the IPPC] [necessarily includes] those entitled to personal inviolability under Article 29 [and consequently, Article 37] of the Vienna Convention on Diplomatic

299 Anthony Aust. "Diplomats' Convention," in Implementation Kits for the International Counter-Terrorism Conventions (manual, Commonwealth of Nations Secretariat), 1997: 133-4

Relations," which necessarily includes the staff members of the Israeli Embassy killed in the terrorist attack.[300] This assertion of subject-matter jurisdiction is unique in that the IPPC's definition of "internationally protected persons" hinges partly, as Aust explains, on the Vienna Convention, which governs the relationship between host nations and represented nations, establishing the reciprocal rights and obligations between them.[301] In this context, therefore, the Vienna Convention does not serve to "impose obligations on Iran with respect to the treatment of [Israeli] diplomats accredited to [Argentina], but only those accredited to Iran, itself."[302] In this vein, Iran could not be held liable under the IPPC for violating obligations derived from a treaty (the Vienna Convention) governing a relationship (between Argentina-Israel) to which it is not party. Consequently, there are large gaps in the IPPC, which can only be bridged, as Trapp argues, through an interpretation of the Convention accounting for the ICJ's decision in the Bosnia Genocide case (Bosnia and Herzegovina v Serbia and Montenegro). The ICJ's landmark judgment in the case has had a profound impact on the way in which a number of international legal issues are interpreted, especially with regard to treaty law. In the Bosnia Genocide decision, the ICJ held that a state's obligation to prevent genocide occurring within its territory as specified under the Convention on the Prevention and Punishment of the Crime of Genocide "necessarily implies a [concomitant] prohibition of the commission of genocide by the state itself." Accordingly, the Court adjudged that "a dispute regarding breach of the prohibition by a state is justiciable by the Court pursuant to the compromissory clause of the Genocide Convention."[303] As Trapp notes, the ICJ's Bosnia Genocide decision developed a framework for the interpretation of states' obligations, whereby a state's broad preventative obligation of some activity or crime inherently gives rise to a corollary obligation prohibiting the state from executing any of the acts which it is conventionally obligated to prevent.[304] Viewed through the prism of the Bosnia Genocide decision, the scope of a state's obligations regarding treatment of internationally protected persons as stipulated by the IPPC would expand from just those persons diplomatically accredited to it to all internationally protected persons. The implication of the Bosnia Genocide decision on the argumentative merits for the admissibility of a dispute regarding the Israeli Embassy bombing cannot be understated. As Trapp explains further, if interpreted through the Bosnia Genocide decision, the IPPC would "impose [an obligation] on states directly to refrain from uses of force against protected persons" regardless of nationality, territorial presence, or diplomatic accreditation, thereby creating a robust platform for ICJ subject-

300 Ibid., 123
301 Ibid.
302 Trapp, "Holding States Responsible," 297
303 Ibid., 286
304 Ibid., 287

matter jurisdiction, and "serv[ing] as a mechanism for implementing Iranian responsibility for acts of state terrorism."[305] In the Tehran Hostages Case, in 1979, the ICJ avoided explicitly contending with this question, but, should it appear before the Court again within an Argentine/Israeli complaint against Iran, that Court would undoubtedly deign to grapple with the implications of its Bosnia Genocide decision on states' obligations to internationally protected persons.

Consequently, having established that most, if not all, of the 29 victims of the Israeli Embassy bombing can likely be considered "internationally protected persons" as stipulated by the IPPC and Vienna Convention for the purposes of ICJ adjudication, it falls next to determine whether or not the Iranian government's orchestration of the terrorist attack on the Israeli Embassy constitutes a violation of the rights and privileges conferred to such protected persons by the IPPC. In its suit against Iran, Argentina would seek to establish Iran's commissioning of a terrorist attack targeting internationally protected persons (Israeli Embassy staff) as a violation in certain terms of Article 2 of the IPPC, which specifically proscribes the following acts—under which the bombing of Israel's Embassy in Buenos Aires would fall, if found to be imputable to Islamic Republic—against internationally protected persons:

The international commission of:

(a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty

(c) a threat to commit any such attack;

(d) an attempt to commit any such attack; and

(e) an act constituting participation as an accomplice in any such attack…

In the case of the Embassy bombing, Article 3(1)(a) protects Argentina's right to assert jurisdiction to enforce with regard to the crimes specified in Article 2 committed against internationally protected persons within its territory (providing the legal basis for Argentina to act as a complainant at the ICJ on behalf of Israeli diplomats), while Article 3(1)(c) allows Israel the right to assert jurisdiction over crimes committed against internationally protected persons "enjoying such status by virtue of functions [exercised] on [its] behalf." In addition, Articles 6 and 7 impose an aut dedere aut judicare obligation on the state in which the suspects reside, in this case, Iran.

Thus, while a sufficiently viable path exists for Argentina and/or Israel

305 Ibid.

to bring suit against Iran for its bombing of the Israeli Embassy in 1992 at the International Court of Justice, even an ICJ ruling finding Iran in breach of its IPPC obligations (including aut dedere aut judicare) would not suffice to coerce the country to extradite some of its highest former political leaders to stand trial in Argentina, given the ICJ's lack of a compulsory mechanism to force Iran's hand. Even so, an ICJ ruling is significant, and its potential findings confirming not only Iran's breach of obligations according to international law, but also regarding Argentina's substantive claims of Iranian culpability for the AMIA and Embassy attacks, would mark a watershed moment in eroding impunity by at least establishing 'guilt' in such a court. Alternatively, the ICJ Statute provides an altogether different route for asserting ICJ jurisdiction in a case, a route that necessarily circumvents the agreement of the state parties. Indeed, Article 96(1) of the UN Charter embues both the General Assembly and the Security Council with the power to submit a request to ICJ for an "advisory opinion" on any question of international law it deems appropriate. An appeal to the Security Council to request an ICJ advisory opinion could be an attractive prospect for the Argentine government, as that process is decidedly less onerous than directly petitioning the ICJ. The inherent appeal of procuring a UNSC or UNGA request for an advisory opinion in the AMIA case is that such a request constitutes the only grounds necessary to confer ICJ jurisdiction in a given case. The success of an Argentine venture for an advisory opinion would necessarily hinge on political factors inherent in securing UNSC or UNGA backing to this end, namely, the very real specter of a veto lodged by the Russian Federation in support of Iran, its notional ally. Notwithstanding this, as well as the fact that ICJ advisory opinions are just that—advisory—and thus non-binding, they, too, carry import as the product of the deliberation of the ICJ, the premier arbiter of international legal questions—and could be useful in any concerted diplomatic effort initiated by Argentina or Israel. In addition, many advisory opinions issued by the ICJ have contributed to jurisprudence used to prove the existence of incipient customary law. To this end, Argentina could utilize a veritable legal determination or advisory opinion delineating Iranian culpability for the AMIA bombing (or its violation of the aut dedere aut judicare obligation) as leverage to induce other influential bodies, such as the UNSC or UNGA (or even powerful states and regional blocs, such as United States and the European Union, respectively) to enact political and economic tools to pressure Iran to extradite its suspects. Unfortunately, any effective compulsory mechanism to force Iran's hand can only arise from narrowly-conceived political and economic initiatives on the part of states and multilateral bodies, rather than embedded in a construct or body of international criminal law. Until such time as either international criminal law establishes a framework for determining criminal state responsibility, or the international community creates an unprecedented compulsory mechanism to force states to comply with international rulings (both extremely unlikely

and, in this author's view, unwise), the international legal regime is of use primarily as a function of fact-finding or adjudications occasioning symbolic consequences, such as the naming and shaming of bad actors and state sponsors of terrorism. While these functions certainly have value to a certain degree, no substitute exists for veritable accountability and the erosion of impunity for those responsible for such reprehensible acts as the AMIA and Israeli Embassy attacks. If not in deference to the victims and survivors of those attacks and others like them, the international community should consider sharpening the legal spear of international criminal law for state-sponsored terrorism due to the ongoing grave and expansive security threat occasioned by such acts and the lack of accountability for them.

IV. Conclusion

At its core, this paper has aimed to illustrate the limitations of international criminal law in providing effective remedy to victims of state-sponsored terrorist attacks through a primary case study of the two terrorist bombings perpetrated by Iran and its proxies in Buenos Aires, Argentina, in the early 1990s. These limitations of international criminal law, which constrain the enactment of criminal sanctions against sovereign states (or, more pertinently, indicted officials acting in a representational capacity) that willfully contravene and violate opinio juris norms of the international community, stem from a broader "missing link" inherent in the international legal system, which is the absence of a universally applicable compulsory mechanism to bring repeatedly-offending, rogue states to heel. The merits or demerits of such a mechanism aside, its absence effectuates a quality that many have described as the "toothlessness" of international law.

As Joyner eloquently states, "The obligation to prosecute or extradite persons accused of terrorist offenses [as enumerated within the various international counter-terrorism legal instruments] underscores the pervasive recognition that governments are duty-bound to…make certain that persons who perpetrate injury or damage to the fundamental interests of the international community are apprehended, prosecuted, and brought to justice."[306] But when a government is unable or unwilling to uphold its obligations to suppress terrorism—especially apropos cases in which it is supporting or directing such acts, "those legal obligations [are] nothing more than words on paper."[307] As illustrated extensively, the AMIA case is a prime example of this phenomenon. Leaving aside the decades-long failure of the Argentine government to adequately contend with the case given an incompetent, dependent judiciary and executive corruption—which itself constitutes a violation of the state's international and American obligation to provide due process and remedy to

306 Joyner, 540
307 Ibid.

victims, especially given cases of grave violations of human rights—there are few effective levers of international law accessible to those advocating for justice and remedy. Save for the commission of an illegal rendition, no government, however powerful, and no international tribunal, however broad its mandate, can remand the Iranian nationals indicted by Argentina to stand trial outside Iranian territory without the consent of the Iranian government. This fact, Trapp argues, coupled with the increasing skepticism over the effectiveness of the international community's limited toolbox of ad hoc political measures intended to serve as compulsory inducements in response to state terrorism, must incentivize the international community to explore "different mechanisms for implementing state responsibility [for state-sponsored terrorism]."[308]

Consequently, the judicial fate of the AMIA case is uncertain. President Mauricio Macri has consistently pledged his commitment to see the AMIA case through to its natural end—in April, he told a group of reporters at the White House, "I reaffirmed [to President Trump] Argentina's absolute commitment to find the truth [about the AMIA], to clarify the death of the prosecutor, and the complaint he made… Because that is part of the building of a society that does not accept impunity and that works for the truth to arise."[309] Earlier this year, however, Macri's government submitted a bill to amend Argentina's constitution to allow for trials in absentia.[310] While the likelihood that the National Congress will ratify the amendment remains uncertain, its passage would augur a new phase in the AMIA saga and potentially pave the way for its (albeit inevitably contentious) conclusion, with the prosecution of the Iranian indictees in absentia by a court in Buenos Aires. Unsurprisingly, the merit of trials in absentia of the Iranian officials indicted for perpetrating the AMIA attack is a source of fierce debate in Argentina, especially within the Jewish community (the AMIA and DAIA—the Jewish community's lobby—support the bill, while Memoria Activa opposes it).[311] But as important as they are, the particular impediments to justice in the AMIA case are but a microcosm of the global problem of impunity for perpetrators of international crimes. Such hurdles, Spinillo opines, "cannot justify the international community's inaction and complacency with [regard to the issue of] impunity." To the contrary, he argues, "the AMIA attack underscores the urgent need to define and codify...the crime of international terrorism…[to better enable] effective prosecution on a global scale."[312]

In sum, enduring concerns about the web of institutional failures inherent in both the national and international responses to the two deadliest

308 Trapp, "Holding States Responsible," 280

309 "US Leaders Push Argentine President on Case of Slain Jewish Prosecutor," Jewish Telegraphic Agency, April 28, 2017.

310 Gilbert, "Twisting Inquiry"

311 Ibid.

312 Spinillo, "Latest Legal Developments"

terrorist bombings in Argentina continue to fuel critical debates on convergent issues, including the overarching functions and limitations of international law, its approach to terrorism perpetrated by sovereign states, the seesaw-like relationship between politics and justice, and even the notion of democratization as a perpetual process with no terminus. While this paper seeks to participate in and even shape the contours of this legal conversation, it also considers the potential deleterious trend of obscuring the first, and worst, crime in this saga—the murders of 115 innocent people. Perhaps in the case of the AMIA bombing, the unceasing pursuit of justice in the face of unyielding barriers cannot but catalyze the erosion of memory, the slow-building immunity to the material tragedies of 1994 and 1992. Indeed, the labyrinth of conspiracy obstructing and corrupting Argentine justice and the impotence and instability of international law in furthering remedy for those affected has no doubt compounded the preoccupation with criminal prosecution to end in impunity for those charged with participation. And yet, the possibility that the 85 victims and survivors of the bombing of the Asociación Mutual Israelita Argentina and the 29 victims of the Israeli Embassy bombing will never obtain this kind of courtroom justice is very real and perhaps even probable.

If this ongoing conversation about the mechanics of justice and its impediments vis-à-vis cases of international terrorism sponsored by rogue states (to which this paper has aimed to contribute) is of little tangible value in the decades-long pursuit of criminal prosecution in the case of the AMIA and Embassy bombings, perhaps its edifying quality will be of some value.[313] As noted earlier, Faulk observes that for Argentines, the notions of justice and memory are inextricably linked, especially in the context of collective loss and grief, such as that of the AMIA attack. Indeed, every year on July 18, between hundreds and thousands of Argentines march on the Plaza de Mayo bearing aloft signs reading "JUSTICIA y MEMORIA" and carrying photos of the bombings' victims. Their message is clear: after 23 years of state-abetted impunity, it is the state itself that has obstructed "justicia" and eroded "memoria" of the bombings' victims. In this logical form, courtroom justice is the prerequisite of memory. But perhaps this construction is too narrow. Perhaps memory is a justice all in its own. Indeed, in Deuteronomy 16:20, God delivers a commandment to the Israelites: "Justice, justice, shall you pursue." Perhaps Argentines can continue their fight against impunity for those who attacked their country, armed with the sure knowledge that preserving the flame of memory for the victims is a justice in itself.

313 Ibid.

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ARTICLE

DRED SCOTT V. SANDFORD AND THE PROSLAVERY CONSPIRACY

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Since 1857, the Supreme Court case Dred Scott v. Sandford retains its relevance in both American history and constitutional law[1] because it deals with questions of judicial politics, constitutional interpretation, and race relations that professional academics and the general public continue to contemplate to this day.[2] As a historical subject, authors typically designate Dred Scott as a major contributing factor to the Civil War.[3] The scholarship largely characterizes the ruling as a partisan pretense, claiming that the Court consciously abandoned "intellectually honest legal reasoning and the disinterested application of neutral principles of law … to pursue … political goals."[4] In particular, the argument against the Court alleges a proslavery conspiracy between the Democratic President-elect James Buchanan and two members of the Dred Scott majority, the concurring Justices John Catron and Robert Cooper Grier.[5] This allegation maintains that personal correspondence between these three men reveals their improper efforts to issue a proslavery ruling on the questions of black citizenship and congressional authority in the federal territories. Because of the ambiguity of the letters, the critics place them in a larger body of circumstantial evidence which includes the sectional political context and the shifting national power balance between the Democrats and the Republicans. Taken altogether, these circumstances make a proslavery conspiracy more likely than not.

Legal scholars who debate the logic of Dred Scott, however, afford the Court more credibility than the historians and the social critics. As such, their work largely requires them to assume the intellectual honesty of the Court's claims, even if they typically move to refute them.[6] History is included only

1 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857); Earl M. Maltz, Dred Scott and the Politics of Slavery, 142-143. (2007)

2 Jack M. Balkin & Sanford Levinson, Thirteen Ways of Looking at Dred Scott, Chi.-Kent L. Rev. 49-50 (2007).

3 Paul Finkelman, Scott V. Sanford: The Court's Most Dreadful Case and How It Changed History, 82.1 Chi.-Kent L. Rev. 3-4 (2007); Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 1036 Stan. L. Rev. (1992).

4 Ethan Greenberg, Dred Scott and the Dangers of a Political Court, 317. (2009)

5 Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln, 708-709. (2005)

6 For such an analysis of Dred Schott, see Cass Sustein, Dred Scott v. Sandford and Its Legacy in

insofar as it establishes context for the facts and contributes to the specific jurisprudential debate which has dominated the discussion of the case within their own academic circle.[7] Though this paper avoids that controversy as much as possible, it follows the general attitude of the legal scholars of all persuasions who do not dismiss the reasoning of the Court wholesale.

In short, this paper argues that for insufficient evidence, the common historical conclusion that the Court threw away all notions of proper judicial conduct to advance a proslavery agenda requires justification. Although the circumstantial evidence has effectively destroyed the reputation of Roger Brooke Taney's Court, it does not unequivocally prove that proslavery intentions determined the ruling.[8] Even if political considerations informed the outcome of Dred Scott, the Court nonetheless relied on legitimate—though arguably flawed—legal reasoning in its ruling. This paper does not seek to dismantle the idea that political inclinations, or even a proslavery conspiracy, had a part in the decision. It also does not seek to answer whether the outcome was correct. Instead, it aims to complicate the scholarship's cynical view of the Court.

First, this paper will analyze the previously mentioned letters to demonstrate the absence of explicit proof for the conspiracy allegations. Second, this paper will examine the Court's legal reasoning in Dred Scott in view of its prior slavery jurisprudence in Strader v. Graham and in Prigg v. Pennsylvania. This informed examination will do more than contextualize Dred Scott; it will also reveal the majority's belief that the Constitution protected slavery. The Court applied this belief when appropriate in other slavery-related cases and this fact speaks to the intellectual honesty of the Dred Scott decision. Though this piece primarily focuses on the legal issues, it will address the sectional political climate when appropriate. Collectively, these analyses not only weaken the charge of a conspiracy at work in Dred Scott, but they also aim to redirect general discussions about Supreme Court cases away from politics and back to jurisprudence. But before we explore these issues, we should first briefly examine the background of Dred Scott the litigant and the case which bears his name.

Robert, P. George, Great Cases in Constitutional Law, 64-89. (2000)

7 The disagreement falls between scholars who characterize the decision as a product of substantive due process reasoning and their opponents who contend that the ruling stems from originalist principles.

8 This paper does not, however, aim to rehabilitate the historical standing of Taney's Court; instead, it seeks to explain the Court's ruling without focusing on an alleged proslavery bias or conspiracy. Besides, the low regard for Taney seems rather fixed at this point. Even his home state of Maryland cannot find much to celebrate about his legacy. See: Justice Taney defended slavery in 1857. Now his statue is gone from Md.'s State House., The Washington Post(2017), https://www.washingtonpost.com/local/md-politics/md-senate-president-slams-hogan-for-fast-vote-to-remove-taney-statue/2017/08/17/41833b12-8390-11e7-ab27-1a21a8e006ab_story.html (last visited Sep 29, 2018).

Dred Scott and *Dred Scott*

Dred Scott's legal battle against slavery began in 1846—eleven years before the Supreme Court would finally reject his claim—when he and his wife Harriet filed petitions at the St. Louis District Court against their present owner, Irene Emerson (née Sanford). The Scotts contended that their previous residences in the free state of Illinois and the Wisconsin Territory negated all ownership claims against them and thereby made them free.[9]

Scott's personal experience with slavery began, however, decades before Dred Scott. He was born a slave in Virginia sometime in the late eighteenth or early nineteenth centuries. By 1833, Dr. John Emerson, a United States Army surgeon, bought Scott and brought him along to Fort Armstrong in Illinois.[10]

Scott never claimed emancipation while living in Illinois, probably because of his illiteracy. By 1836, he relocated with Emerson to Fort Snelling in present-day Minnesota, then a part of the Wisconsin Territory. Congress had prohibited slavery there by the Missouri Compromise, the Northwest Ordinance of 1787, and the Wisconsin Enabling Act. Notwithstanding the slavery ban, Scott remained under Emerson's power for nearly a year and a half at Fort Snelling. Once again, Scott's illiteracy, as well as a general lack of enforcement of antislavery regulations, most likely accounted for this fact.[11]

During his time at Fort Snelling, Scott met and wed Harriet Robinson, a fellow slave whom Emerson had also acquired. By October 1837, Emerson transferred to a post in St. Louis, leaving Scott and Harriet behind.[12] In November of that same year, Emerson transferred once again, this time to Fort Jesup in Louisiana. There he met and wed Irene Sanford. By the spring of 1838, he sent for his slaves to join him and his new wife. Traveling unaccompanied down the Mississippi River, the Scotts surely had many opportunities to demand emancipation or to simply vanish. They nevertheless went to their master, possibly because he may have promised them freedom at some future time. By 1840, Emerson went to Florida to serve in the Seminole War while his wife and slaves went to Missouri. Three years later, Emerson reunited with his family in St. Louis. He died shortly thereafter at the age of forty, leaving his estate and

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9 Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln, 709. (2005)

10 Paul Finkelman, Scott V. Sanford: A Brief History with Documents, 10-14 (1997)

11 Id. at 14-15.

12 While Emerson was away, he rented the services of Scott and Harriet out to others at Fort Snelling. Scott's later claim of freedom would emphasize this fact. Because of his absence, Emerson's perpetuation of the Scotts' enslavement could not pass the allowances free states and territories often made for slavery. For instance, many courts in these areas did not consider the transport of slaves through their jurisdictions as a violation of antislavery laws. But Emerson's sustained residence in the territory with his slaves -- as well as their continued enslavement after his departure -- could hardly qualify as transport. Furthermore, special immunities to military personnel, either in law or simply in practice, no longer applied to Emerson's case once he left his slaves behind. Id. at 16-17.

slaves to his widow Irene.[13]

For the next three years, Irene rented out the Scotts' services. In 1846, she refused the Scotts' attempts to purchase their own freedom. If the late Emerson had in fact promised to release the Scotts, Irene's failure to honor this agreement could have prompted the couple to file suit. Whatever the cause, within the year Scott and Harriet submitted their separate petitions to the district court. The cases would languish for years in litigation. After 1850, the courts combined the suits under Scott's name. By 1854, the Scotts' lawyers brought the issue to the federal courts. This time, they took action against Irene's brother, John Sanford, because she had given him control over her slaves. The case worked its way through the system and by February of 1856 and again in December of that same year, the Supreme Court heard the oral arguments of Dred Scott v. Sandford.[14]

Ultimately, the Court's ruling had three main parts. First, it held that Scott specifically, and blacks generally, were not citizens of the United States and therefore had no standing to petition the federal courts. Second, the Court argued that the Due Process Clause of the Fifth Amendment secured the right to own slaves in the federal territories. Third, it reasoned that, because of the second point, Congress had no power to ban slavery in said territories. So, the Missouri Compromise—which did just that—was unconstitutional.

Each point sent the Republicans and the abolitionist movement into a frenzy. The outcome of the case had just raised the political stakes of slavery to crisis levels, and the disaffected groups felt that in the face of such a devastation, their opposition to slavery mattered more than ever before. An article from The Anti-Slavery Bugle, for instance, gave the following assessment of the ruling: "[The Court] makes slavery the primary law of the Union … It makes slavery lawful and constitutional as well in Ohio and Massachusetts, as in Oregon and Kansas. It has free scope everywhere, and is everywhere to be defended."[15] In other words, many feared that Dred Scott threatened to nationalize slavery. The Court not only disallowed Congress from prohibiting slavery in the federal territories, but it also concluded that the Constitution itself protected the institution through its guarantee of property rights. The fact that this understanding of the Due Process Clause applied to the federal government rather than the state governments did not at all comfort the antislavery camp. Once the Court construed the Constitution in such a manner, the course for the country seemed inescapable. Broad interpretations do not constrain themselves but

13 Id. at 17-19

14 Id. at 19-28

15 Anti-slavery bugle. (New-Lisbon, Ohio) 1845-1861, March 21, 1857, Image 2, News about Chronicling America RSS, https://chroniclingamerica.loc.gov/lccn/sn83035487/1857-03-21/ed-1/seq-2/ (last visited Sep 29, 2018).

instead tend to extend as far as their logic permits. For this reason, the detractors of the decision worried that it would force "every judicial organization and every judicial officer in the land from the mayor of a petty village to the Chief Justice himself, to regard all slaves as … only property, everywhere …"[16] Despite the hyperbole, the Republicans and the antislavery activists felt that without their resistance, "submission [would] inevitably be the order of the day."[17]

Evidence of a Conspiracy

Notwithstanding these three points of the ruling and the reactions they provoked, modern evaluations of Dred Scott revolve around the idea that a concrete political conspiracy determined the outcome of the case. The previously mentioned communications between Buchanan, Catron, and Grier thus became the object of discussion. For example, historian Jean H. Baker writes that Buchanan "had been complicit in the decision, committing in his letters … the constitutional impropriety (or worse) of interfering with the Court's deliberations and violating … [the] separation of the judicial and executive branches."[18]

Baker implicates serious executive-judicial misconduct. Thankfully, the Justices' responses to Buchanan will clarify the confidence with which one can speak of a conspiracy at work. But before one examines this evidence, one should note that conspiracy charges against the Court predate the modern scholarship. The privacy of the Court's operations makes it all-too-easy to attack its motivations, and Republicans and skeptics of the time did just this after the decision became public.

These accusations focused on the two arguments in February and December of 1856, as mentioned in the preceding section. The critics claimed that the Court requested a second hearing in order to delay the release of the ruling until after the upcoming presidential election. The Court did so, the assertion continues, to prevent its proslavery ruling from energizing the Republicans against Buchanan. As fellow Democrats, the majority in Dred Scott surely favored Buchanan's candidacy. In 1858, Abraham Lincoln intimated a similar claim about the two hearings in his famous "House Divided" speech he delivered during his unsuccessful campaign for Illinois Senator Stephen Douglas's seat.[19]

Despite its popularity at the time, this initial accusation of judicial wrongdoing never had much strength. An especially damaging point was that that dissenting Justice John McLean voted to schedule another round of arguments.

16 Id.
17 Id.
18 Jean H. Baker, James Buchanan, 85. (2004)
19 Abraham Lincoln, A House Divided Speech at Springfield Illinois(2018).

During this time, McLean was seeking the Republican nomination for president, so authoring a dissent before the election would have aided his political aspirations. Instead of a conspiracy, the Justices most likely decided on a second hearing because they needed further argument to resolve disagreements that they had over several aspects of the case.[20]

Though the suspicions about the two hearings in Dred Scott have faded over time, they belonged to a pattern of undermining the honesty of the decision that continues to this day. In other words, it was a part of the larger charge that the Court underhandedly crafted a proslavery ruling according to the corrupt majority's political biases. Since this charge has never left us, we come finally to the series of letters that Catron and Grier wrote in response to Buchanan's inquiries in early 1857. Historian Philip Auchampaugh helped draw attention to this correspondence, but even when working with the same evidence, his conclusion contradicted the pro-conspiracy position of most writers. In his own words, Auchampaugh believed that when the Court decided Dred Scott, "there was no 'conspiracy' to foster slavery on the country."[21]

Even though this paper does not discount that possibility as unequivocally as Auchampaugh does, it agrees with his estimation of the letter evidence. Specifically, the letters alone cannot substantiate the existence of the proslavery conspiracy. Even so, one wonders why Buchanan got involved in the business of the Court at all. According to Auchampaugh, Buchanan wrote to the Justices not to influence the outcome of the case, but rather to gain information about the ruling in order to preemptively reconcile two factions of the Democratic Party: one group that favored the popular sovereignty solution to the slavery question, and another that believed the federal government ought to do more to protect slavery.[22] Because many Southerners would interpret Dred Scott as a statement against popular sovereignty, Buchanan wanted to soften the news for the disaffected group of Democrats as soon as possible.[23]

Whatever motivated Buchanan to write, to best understand the significance of the evidence, the rest of this section excerpts two large selections from Catron

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20 Paul Finkelman, Scott V. Sanford: The Court's Most Dreadful Case and How It Changed History, 82.1 Chi.-Kent L. Rev. 28 (2007)

21 Philip Auchampaugh, James Buchanan, the Court and the Dred Scott Case, 239 (1926); for the provenance of the letters, see also John Bassett Moore, Works of James Buchanan, 106-107 (10 Vol. 1912)

22 Id. at 233.

23 The ruling presented a challenge to Douglas in particular. He originally championed the popular sovereignty cause, so he spent the better part of the late 1850s trying to resolve the conflict between his position and the new order that many Democrats and Republicans believed that Dred Scott brought about. See Robert W. Johannsen, Stephen A. Douglas, 'Harper's Magazine,' and Popular Sovereignty, 606-607 (1959); Albert Grant Mallison, The Political Theories of Roger B. Taney, 1.3, 237 (1920). Despite the anti-popular sovereignty interpretation of the Court's ruling, this was not its most obvious meaning, constitutionally speaking. This paper addresses the issue in more detail at the end of the section entitled "Dred Scott: Denial of Congressional Authority."

and one from Grier. To begin, we know that Buchanan initiated the discussion about the case with the Court. He wrote first to his longtime friend Catron, who responded on February 6, 1857 as follows:

I received your note of the 3d inst. on yesterday, enquiring whether the Supreme Court was likely to pronounce their opinion in the Dred Scott's case before the 4th of March. It rests entirely with the Chief Justice to move in the matter. So far he has not said anything to me on the subject of Scott's case … Situated as you are, it is due to you to be informed whether and when the case is likely to be decided. I will ascertain and inform you by Monday or Tuesday at furtherest …[24]

In a letter dated February 10, 1857, Catron updated Buchanan about the status of the case, noting that the Court would issue its decision soon. Importantly, Catron also gave his opinion " that Congress has power to govern the Territories by the fourth and third section of the constitution [sic]."[25] This statement at first appears to contradict Catron's vote to overturn the Missouri Compromise in the opinion he would ultimately write. But, Catron did not do so despite his recognition of congressional authority over the territories. In his own words, Catron did so by the following analysis:

Louisiana was acquired by the United States by the Treaty of 1803 with important restrictions; the inhabitants of the ceded Territory were to be incorporaed [sic] into the Union of the United States, and admitted as soon as possible according to the principles of the Federal constitution to the enjoyment of all the rights of citizens of the United Staes [sic] 'and in the meantime shall be maintained and protected in the free enjoyment of their liberty, property, and religion they profess.' I read this third article of the treaty, that all the inhabitants of all the ceded country, were to be protected in their property, of whatsoever description the property (in 1803) was, during all the 'mean time' between the date of the Treaty, and the time when the acquired Territory was admitted into the Union.[26]

In other words, Catron believed that the Treaty of 1803 brought the Louisiana Territory under congressional power with the stipulation that all constitutionally protected property rights—including the ownership of slaves—be respected. As such, Congress's Missouri Compromise infringed on the slaveowners' property rights by banning the institution in large portions of the Louisiana Territory above the 36°30' line. Therefore, the act was unconstitutional. Catron presented the very same argument in his official opinion when he concluded that the Missouri Compromise was "void, and consequently

24 John Catron, Buchanan Papers, 234, (1857).
25 Id. at 234.
26 Id. at 235.

that the plaintiff, Scott, [could] claim no benefit under it."[27]

Granted Catron's assumption that the Constitution protected the ownership of slaves, his argument possessed a logic too powerful to have been just a mask for his proslavery bias. The reasonableness of the Justice's statutory interpretation in the letter, and its continuity with his later opinion in the case, challenges the idea that he started with an outcome in mind and worked backwards to fashion a dishonest argument. Even so, skeptics of the Court might point to Buchanan's communications with Grier to substantiate their claim of a proslavery conspiracy. But one cannot ignore that Buchanan wrote to Grier on Catron's suggestion. In a letter dated February 19th, Catron wrote, "Will you drop Grier a line, saying how necessary it is—& how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other."[28] The fact that Catron brought Grier into the discussion makes an executive-judicial conspiracy unlikely. Up to that point, Catron's own communications with Buchanan did not include any exchange of substantive recommendations for the case, so on this basis alone, it is doubtful that he expected anything different to occur between Buchanan and Grier. Additionally, Catron's words "one way or the other" suggest a degree of ambivalence about Grier's opinion. Even if Catron did attempt to persuade Grier to join the majority, such an interaction between Justices of the Court would not have qualified as improper and certainly not as a conspiracy. Admittedly, the ethics of using Buchanan as a surrogate to do so may have been questionable. Nevertheless, Grier's standing on the issue had little importance because the Court had already secured a solid majority. Therefore, whether Buchanan and Catron pressured Grier or not, the outcome of Dred Scott would have been the same.

Buchanan followed Catron's advice and wrote to Grier. Although we do not have Buchanan's letter, Grier's response reveals no coercion from Buchanan or his fellow Democratic Justices to decide a certain way. In fact, according to the following excerpt from Grier's letter, it was the two dissenting Justices McLean and Benjamin Robbins Curtis who prompted the majority to broaden their ruling beyond the question of Scott's citizenship:

… [I]t was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri compromise; and the case was committed to Judge Nelson to write the opinion of the court … but leaving both those difficult questions untouched. But it appeared that our brothers who dissented from the majority, especially Justice McLean, were determined to come out with a long and labored dissent, including their opinions & arguments on both the troublesome points, although not necessary to a

27 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857)

28 John Bassett Moore, Works of James Buchanan, 106 (2015)

decision of the case … Those who hold a different opinion from Messrs, McLean & Curtis on the powers of Congress & the validity of the compromise act feel compelled to express their opinions on the subject … A majority including all the judges south of Mason & Dixon's line agreeing in the result but not in their reasons—as the question will be thus forced upon us, I am anxious that it should not appear that the line of latitude should mark the line of division in the court … [T]he opinion of the majority will fail of much of its effect if founded on clashing & inconsistent arguments. On conversation with the Chief Justice, I have agreed to concur with him. Brother Wayne & myself will also use our endeavors to get brothers Daniels & Campbell & Catron to do the same. So that if the question must be met, there will be an opinion of the court upon it, if possible, without the contradictory views which would weaken its force.[29]

This statement shows that the necessity to respond to the dissenting Justices—and not a personal interest in slavery—compelled the majority to answer the unessential slavery-related questions in Dred Scott. Of course, if Buchanan got involved to reconcile the Democratic Party as Auchampaugh claims, then perhaps the Court's Democratic Justices formed a majority with the same goal in mind. In the least, Grier's letter hinted at such a level of political consciousness. He obliquely acknowledged that as a Northern Democrat, his concurrence would have added geographic diversity to the majority and thereby prevented the perception that sectional loyalties contributed to the decision. Even so, this majority had a cosmetic rather than prescriptive purpose concerning the individual Justices' opinions. While Grier's short concurrences contributed nothing new to Taney's opinion of the Court, the other concurring Justices each wrote lengthy opinions which worked through different arguments and lines of reasoning. They did so despite Grier's concern that this would weaken the force of the majority's decision.

To close, we may summarize this section as follows. First, we know that the Court most likely did not delay the ruling for political reasons. Second, regarding the proslavery conspiracy, the evidence tells us that Buchanan only asked for information about the Court's decision; we have no indication from the Justices' responses that Buchanan wrote to gain a certain outcome, let alone an explicitly proslavery one. Third, the letters also suggest that Catron had already outlined the reasoning for his final opinion before the correspondence even started, so any collusion between him and Buchanan with regards to his own decision seems unlikely. Furthermore, though Catron brought Grier into the discussion, he did not push his fellow Justice to a proslavery answer. Instead, Catron's words implied his interest only that Grier join the majority. If Catron made an invitation, it was Grier's to take or leave. Lastly, though

29 Id. at 106-107.

Grier's letter shows that political concerns may have precipitated the Court's majority, this hardly rises to the level of a proslavery conspiracy. Beyond Grier's own concurrences of a few hundred words, his concern that disparate lines of reasoning would weaken the majority of the Court was largely irrelevant for his colleagues; rather than simply agreeing with Taney's treatment as Grier did, each Justice chose to author detailed concurrences.[30]

Politics or Law? Two Approaches to Dred Scott

Moving away from the letters, the question of whether to read Dred Scott in view of the political context or the legal context is crucial, especially concerning the issue of congressional authority in the federal territories. The contentions that a proslavery bias directed the Court's ruling on this point rely on the sectional political context for support. Modern critics claim that the rise of antislavery Republicanism, combined with a shifting national power dynamic that especially disfavored the Democrats in the North, motivated the Court's Democratic majority to undercut its political opponents. Opposition to the spread of slavery in the federal territories constituted a major part of the newly-formed Republican Party's platform, so removing the issue from the political discourse would have unquestionably weakened its position.[31] This argument, while circumstantial, seems superficially plausible. Furthermore, the reactions of the decision's supporters seem to strengthen this interpretation. For instance, one proslavery publication asserted that the ruling represented "the funeral sermon of Black Republicanism," because it "[swept] away every plank of their platform, and [crushed] into nothingness the whole theory upon which their party was founded."[32] On a similar note, the pro-Democrat New York Herald claimed that the decision, "[shivered] the anti-slavery platform of the late great Northern Republican party into atoms."[33] Clearly, the Democrats appreciated the political value of the decision in not only forwarding their own interests but also in bringing down their adversaries.

Using the sectional partisanship to account for the Court's decision unquestionably opens the door to proslavery accusations. Doing so, however, ascribes too much explanatory power to politics and too little to legal thought in adjudication. Whatever one believes about the institutional position of the Court in the government, the framers did not design it as a political body.[34] Of course,

30 "The nine opinions, along with a handful of pages summarizing the lawyers' arguments, consume 260 pages of U.S. Reports." Paul Finkelman, Scott V. Sanford: The Court's Most Dreadful Case and How It Changed History, 82.1 Chi.-Kent L. Rev. 3-4 (2007)

31 Id. at 5.

32 Philadelphia Pennsylvanian, 1857.

33 New York Herald, 1957

the controversy over the Court's proper functions, powers, and authority never ends; notwithstanding these complexities, the point remains valid. Even with the debates about the proper place of the federal judiciary relative to the legislative and executive departments, scarcely anyone would deny that the Court has interpretive responsibilities. Therefore, we should avoid thinking of its business as politics by another name. Instead, without direct proof of partisan bias or political scheming, we should evaluate the Court's rulings by its legal reasoning and in view of its jurisprudence in alike cases. This attitude is especially important to fairly review politically charged proceedings because their outcomes often receive more attention than their logic.

To call Dred Scott politically charged would be an understatement, so let us now look at its logic. To begin, an interrogation of the majority's beliefs about the Constitution's relationship with slavery can help to not only explain the ruling but to also identify an intelligible body of jurisprudence in which to place the case. Most importantly, the Court believed that the Constitution did in fact protect slavery. This belief was a recurring theme in the Taney Court's jurisprudence; it was not only a well-established view at the time of Dred Scott, but it remains a subject of historical debate even to this today.[35] In Dred Scott, Taney expressed this view while addressing the issues of black citizenship and congressional authority. When combined with an examination of the historical racism of America's founding, this belief—rather than political bias—could explain the Court's denial of black citizenship. Coupling this belief with a substantive interpretation of the Fifth Amendment's Due Process Clause could also reasonably account for the denial of congressional authority in the federal territories. Indeed, both arguments would have fit in well with mainstream antebellum constitutional thought.[36] Furthermore, the Court believed in this idea with enough confidence to apply it beforehand in other cases, such as 1851's Strader v. Graham and 1842's Prigg v. Pennsylvania.[37] Besides Dred Scott,

34 During the Federalist campaign to ratify the Constitution, Alexander Hamilton argued that the Court ought to check the power of the legislature, but not act as a legislature itself. In Hamilton's own words, "The courts must declare the sense of the law, and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would … be the substitution of their pleasure to that of the legislative body." See Alexander Hamilton, The Federalist No. 78: The Judiciary Department in The Federalist Papers. Ian Shapiro, The Federalist Papers, 395, (2009). Despite Hamilton's essay, many legal scholars believe that in reality the courts perform political functions and in some cases, that they ought to do so. For more on these institutional conceptions of the Supreme Court and approaches to constitutional interpretation, see Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996); William J. Brennan Jr. The Constitution of the United States: Contemporary Ratification, 27.3 S. Tex. L. Rev. (1986).

35 Sean Wilentz, Constitutionally, Slavery Is No National Institution The New York Times (2015), https://www.nytimes.com/2015/09/16/opinion/constitutionally-slavery-is-no-national-institution.html (last visited Sep 29, 2018).; David Waldstreicher, Yes, Virginia, the Constitution Was Pro-Slavery The Atlantic (2015), https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/ (last visited Sep 29, 2018).

36 Mark A. Graber, Dred Scott and the Problem of Constitutional Evil, 30 (2006).

37 See Strader v. Graham, 51 U.S., 81 (1851); Prigg v. Pennsylvania, 41 U.S., 539 (1942).

Strader and Prigg stand as two of the Taney Court's most important slavery-related cases that betray the belief—either implicitly or explicitly —that the Constitution protected or otherwise supported slavery. As such, they both deserve our attention.

Strader and Dred Scott: Denial of Black Citizenship

Strader set the precedent for the Court's subsequent reaffirmation of Scott's slave status. Briefly, the facts of Strader are as follows: Dr. Christopher Graham would often allow his slaves to travel unaccompanied from Kentucky to Ohio and Indiana. During one of these trips, the slaves escaped to Canada. They traveled by way of a steamboat that Jacob Strader owned. So, Graham sued Strader for the value of his lost slaves. Strader denied responsibility because he believed that the slaves had gained their freedom when they entered Ohio and Indiana. Therefore, he had no hand in their escape because they were already free when his ship brought them to Canada.[38]

The case brought before the Court the issue of whether the time spent in these free areas indeed made the slaves free themselves. Interestingly, Taney authored the majority opinion and avoided explicitly answering the question. Instead, he proceeded cautiously, writing:

Every state has an undoubted right to determine the status, or domestic and social condition of the persons domiciled within its territory … And the condition of the negroes, therefore, as to freedom or slavery after their return depended altogether upon the laws of [Kentucky], and could not be influenced by the laws of Ohio.[39]

Despite the precarious attempt to balance the interests of both Kentucky and Ohio, Taney's ruling here revealed the belief that the Constitution protected slavery. Though he did not declare it explicitly, the outcome can work only if he applied this principle. It would have been impossible for the Court to accept the power of the states to enslave people as it did in Strader if it believed that such actions were constitutionally impermissible. Therefore, we can only conclude that by validating this power, the Court also validated the idea that slavery received constitutional protections or support on some ill-defined level.

In Dred Scott, Taney cited this reasoning when he addressed Scott's status and the attendant jurisdictional issue. On the question of Scott's freedom, Taney wrote that:

"the principle on which it depends was decided … in the case of Strader

38 Id.
39 Id.

… As Scott was a slave when taken into the State of Illinois by his owner … and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois."[40]

At least with respect to the status of Scott, the Court merely applied precedent. In fact, many had expected that the Court would uphold Scott's slave status and dismiss the case for lack of federal jurisdiction.

More surprising, however, may have been the Court's broadening of this point when it claimed that regardless of slave or free status, no black person possessed national citizenship. But this extension followed logically from the assumption that the Constitution protected slavery. When we dissect Taney's argument, it becomes clear that he ultimately appealed to this belief to make his decision. The claim against black citizenship had two parts: the first dealt with the history of racism and the Constitution; the second—and most important—considered the Constitution's Slave Trade Clause and Fugitive Slave Clause.[41] Simply put, the Court claimed that the framers likely made no distinction between free blacks and enslaved blacks when they wrote the Constitution; instead, they viewed them as a single disenfranchised class. Since all blacks were tied to slavery by their race, the two clauses which accommodated the institution meant that the Constitution excluded the entire group from national citizenship, actual free or slave status notwithstanding.

In greater detail, Taney believed that the persistent American history of anti-black racial discrimination meant that the framers imbued the Constitution with similarly racist sentiments. Taney could appreciate the legacy of this inequality even in his own time; for him, several state laws which disadvantaged blacks throughout the country proved that these ideas had a strong historical foundation. Looking at the perceptions of blacks during the ratification period convinced the Court that the Constitution did not include them as citizens of the United States. Why? According to Taney's own words, blacks

"were identified in the public mind … as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union."[42]

In other words, the Court believed that the Constitution had little consideration for blacks. But that alone did not suffice to deny them citizenship. Instead, the historical connection that Taney alleged between the black race and slavery, combined with the two previously mentioned constitutional provisions that protected slavery, convinced him that the Constitution excluded blacks and

40 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857)
41 U.S. Const. art. IV, § 2; U.S. Const. art. I, § 9.
42 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857)

"their posterity [from] the blessings of liberty, or any of the personal rights so carefully provided for the citizen."[43] In short, though this belief allowed the Court to uphold the power of the states to assign slave or free status in Strader, it also enabled it to refuse national recognition of black citizenship based on these statuses in Dred Scott.

Even if no one at the time predicted that Dred Scott would have definitely precluded blacks from national citizenship, this result did not prove altogether unsettling for most Americans. Within both Southern and Northern mainstream political opinion, favoring black citizenship was an equally distasteful position. The reasons for the South's disapproval require no discussion. The North rejected the idea, however, despite its generally antislavery politics. In his first debate with Senator Douglas, Lincoln signified this conflict between the antislavery platform and popular racism. While he reaffirmed his opposition to slavery, he recognized the difficulties of abolition, asking "What [should we do]? Free [the slaves], and make them politically and socially our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not …"[44] Judging from this quote, racial prejudice clearly played a large part in the persistent anti-black discrimination throughout the Northern states. Indeed, Northern blacks largely found themselves excluded from equal suffrage and full access to basic public institutions relative to their white neighbors.[45]

Having said that, no one doubts the leadership of the North in the antislavery movement; but all the same, the Northern states never unanimously aimed for immediate and full civil equality among the races within their respective jurisdictions. So, on the topic of black citizenship, "the Dred Scott decision … had a majoritarian ring that transcended sectional lines."[46] Therefore, the accusations of political bias against the Court following its ruling gave little attention to this question. Instead, suspicions revolved around one of Dred Scott's more controversial holdings, namely the denial of congressional authority to regulate slavery in the federal territories. However, before considering this aspect of the ruling, we should first briefly examine the Court's belief that the Constitution protected slavery in Prigg.

Prigg: Denial of Personal Liberty Laws

Prigg involved clashes between a Pennsylvania personal liberty law, the

43 Id.

44 Harold Holzer, The Lincoln-Douglas Debates: The First Complete, Unexpurgated Text, 61 (2004)

45 Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War, 261 (1978)

46 Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics, 430 (1978)

Constitution's Fugitive Slave Clause, and the Federal Fugitive Slave Law of 1793. In order to prevent the wrongful capture of free blacks, the Pennsylvania law forced slave catchers to comply with procedural requirements in the execution of their work. The Pennsylvania court, however, declared the act unconstitutional because it denied "the right of slaveholders to recover their slaves …"[47] Interestingly, Justice Joseph Story authored the majority opinion despite his anti slavery beliefs.[48] In keeping with the general direction of the Taney Court in such matters, the majority based its ruling on the belief that the Constitution protected slavery.

Story contended that the Fugitive Slave Clause "was so vital to the preservation of [slaveholders'] domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed."[49] In other words, even with his political and moral opposition to slavery, Story accepted the precept underpinning the majority's ruling in Dred Scott. This adds to the Court's credibility across the board, since law done right will not always lead to a personally gratifying result.

Relative to Dred Scott, the decision in Prigg had far more politically disastrous implications for not only slaves themselves, but for blacks of any status throughout the nation. It effectively sanctioned the targeting of these individuals for confinement without oversight, thereby supporting "the constant threat of enslavement experienced by free brown-skinned Americans in both the North and the South."[50] And yet, as far as proslavery accusations go, Story largely avoids them while Taney cannot escape them. Regardless, the point is that each decision relied on the same presumption.

Dred Scott: Denial of Congressional Authority

Like Strader and Prigg, the belief that the Constitution protected slavery also extended to Dred Scott on the question of congressional authority in the federal territories. Based on the Court's previously mentioned determination that neither the history nor the text of the Constitution provided for black citizenship and civil rights, Taney concluded that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."[51] Whether the Constitution really protected slavery does not matter. What does matter is the fact that many

47 Prigg v. Pennsylvania, 41 U.S., 539 (1942).

48 Christopher L. Eisgruber, Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism, 55.1 Chi.-Kent L.Rev. 292 (1988)

49 Prigg v. Pennsylvania, 41 U.S., 539 (1942).

50 Jamal Greene, The Anticanon, 125.2 Harv. L. Rev., 428 (2011). In the same article, Green argues that Prigg was "good law at the time of Dred Scott…To hold in the face of such precedent that the same Constitution recognize[d] the citizenship of free blacks feelsl ike the rankest sophistry," Id. at 409.

51 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857).

people—and not only proslavery actors—believed that it did.[52]

Given this assumption, Taney's dismissal of congressional authority per the Due Process Clause looks no more suspicious than other cases which have also employed substantive due process reasoning. If his conclusion appears more doubtful than these cases, it would only be fair to ask if any political biases of the critics can explain this disparity.[53] Granted, Taney's own motivations understandably appear questionable in view of the political context. Even so, judging not only from the plausible position that the Constitution protected slavery, but also from the legal process behind Dred Scott, the Court forwarded a serious argument which deserves the same consideration as cases that have used similar interpretive methods.

Though one might disagree with the Court's assumptions, conclusions, or the quality of its legal and historical scholarship, it nonetheless applied the most uncontroversial understanding of substantive due process in reaching its decision.[54] Taney's claim that "an act of Congress which deprives a citizen of the United States of his liberty or property … could hardly be dignified with the name of due process of law" aligns perfectly with the concept, even today.[55] In short, though a proslavery bias may have had some part in the ruling, we cannot accurately determine the extent of its influence. But we can determine that the Court made reasonable constitutional claims grounded in law, the possible political motivations and maneuvers notwithstanding.

Of course, critics could easily argue that the Court twisted legitimate interpretive methods to accommodate a proslavery agenda. If the Court had such a bias, the majority would have likely favored agreeable legal theories and historical scholarship over the less tractable text of the Constitution. The property

52 Besides Story's acceptance of the idea, the abolitionist William Lloyd Garrison famously described the Constitution as a "covenant with death" because of its compromises with slavery. See William Lloyd Garrison, Repeal of the Union, (1842) On the less extreme side of antislavery politics, Frederick Douglass initially had a similar opinion, claiming that the framers secured "the pro-slavery principle" in the Constitution. See Frederick Douglass, Oath to Support the Constitution, (1850).

53 Because slavery is not a viable political platform today, condemning the substantive due process reasoning of Dred Scott as a deception seems easy enough. But when the Court applies the same reasoning to the political issues of our time (in cases such as 1992's Planned Parenthood v. Casey, 2003's Lawrence v. Texas, and 2015's Obergefell v. Hodges) very few view the process to the outcome as illegitimate. A few distinguished liberal and conservative jurists have dismissed the concept of substantive due process, but their opinions do not presently dominate the field (and in some instances—like that of Robert Bork—act as a liability for those who hold them). See generally CR Sunstein, Dred Scott v. Sandford (1996); Antonin Scalia, Originalism: The Lesser Evil, U. Cin. L. Rev., 57 (1989); William H. Rehnquist, The Notion of a Living Constitution, Tex. L. Rev. 54 (1976). Of course, not everyone agrees that Dred Scott belongs to the same category as modern substantive due process cases. See Christopher L. Eisgruber Dred Again: Originalism's Forgotten Past," (1993).

54 For criticism of Taney's scholarship, see H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation, 121 (1993)

55 Dred Scott v. Sandford, 60 U.S. 393, 19 (1857); Of course, later Fourteenth Amendment substantive due process differs from that of the Fifth Amendment. In principle, however, Taney's version of the concept for the federal government matches its subsequent extension to the states.

clause, for example, should have presented an almost insurmountable challenge for Taney's argument. It reads that:

"The Congress shall have power to … make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States…"[56]

The last half of the clause seems especially troubling for the Court, as it suggests that using the Due Process Clause to limit congressional authority in the territories would be unconstitutional. But this interpretation of the property clause was not immediately clear at the time. In fact, the Court would not form a doctrine about the application of the Constitution to the federal territories until nearly fifty years later in the so-called Insular Cases.[57] Without a consensus on the meaning of the property clause, the appropriateness of the Court's use of the Due Process Clause in Dred Scott comes down to the question of whether one believes that the clause guarantees procedure only or substance as well. Though an important question, this paper does not seek to answer it.

Additionally, besides just the presumption of the Court's good faith, further evidence suggests that Taney employed substantive due process honestly. The critics of this method often claim that it first entered the federal courts in Dred Scott, but Taney actually introduced it five years prior in the little known and politically insignificant case of Bloomer v. McQuewan.[58] As such, though the generally conservative criticism that substantive due process might enable judges to inject their personal political beliefs into their legal opinions remains, the concept itself did not come about in an effort to do so. Therefore, at the very least we can be confident that Taney did not construct it in Dred Scott as a novel way to defend slavery. Of course, critics of the Court could still contend that he employed it in such a manner. Nevertheless, this key component of the decision clearly originated from the judicial rather than political context.

Even when we consider the political context, the charges against the Court remain weak. By the Kansas-Nebraska Act of 1854, Congress determined that those living in the territories and the states had the power to answer the slavery

56 U.S. Const. art. IV, § 3.

57 For more on the Insular Cases, see Sanford Levinson, Why the Canon Should be Expanded to Include The Insular Cases and the Saga of American Expansionism, 17.2 (2000)..

58 Bloomer v. McQuewan, 55 U.S. 539 (1852). The case was highly technical because it dealt with patent laws, so its facts do not matter. For our purposes, its pronouncement of substantive due process does matter. According to Taney, "it can hardly be maintained that Congress could lawfully deprive a citizen of the use of his property … The 5th amendment to the Constitution of the United States declares, that no person shall be deprived of life, liberty, or property, without due process of law … [An] act of Congress … depriving the appellees of the right to [their property], certainly could not be regarded as due process of law." Bloomer v. McQuewan (Taney, majority). Based on this, there was no difference between Taney's understanding of the substantive due process argument when he first made it and when he later applied it in Dred Scott

question themselves. This doctrine, known as popular sovereignty, became a major liability for the Democrats. It increased sectional tensions, most notably in Kansas where armed violence between radical abolitionists and proslavery extremists had erupted. This worsening situation consequently diminished the Democratic Party's national support.[59] Despite these serious problems, the Dred Scott decision did little to solve them. Rather than invalidating the disastrous Kansas-Nebraska Act, the Court instead proclaimed the Missouri Compromise unconstitutional. It did so even though the Kansas-Nebraska Act had effectively repealed the Missouri Compromise nearly three years prior. If the Court had indeed worked according to proslavery political motivations, then its decision missed the mark entirely.[60] Of course, many Democrats and Republicans believed that by denying congressional authority in the territories, the ruling had overturned popular sovereignty as well. Lincoln challenged Douglas on this point during their debate at Freeport. In response, Douglas claimed that the doctrine and the decision did not contradict each other:

> [T]he people have the lawful means to introduce [slavery] or exclude it as they please … [I]f the people are opposed to slavery, they will elect representatives to [the local legislature] who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension.[61]

Douglas emphasized the distinction between the powers of Congress and the powers of the territorial governments themselves. He later clarified this argument in an article, writing that "[t]he powers which Congress may thus confer but can not [sic] exercise, are such as relate to the domestic affairs and internal polity of the Territory."[62] In short, Douglas asserted that although Congress could not ban slavery in the federal territories, the territorial legislatures could. This view seemed to parallel the reasoning of the Court in Dred Scott. The majority decided that Congress could not forbid slavery in the federal territories per the Fifth Amendment, but it made no pronouncement about the power of these territorial legislatures over slavery. As the Fifth Amendment addresses Congress and not necessarily the territorial governments, the Court's decision could logically provide little relief—if any at all—for Democrats concerning the violent conflicts that popular sovereignty had caused.

Of course, this did not prevent Southern Democrats in particular from construing the decision against Douglas' interpretation. In fact, Douglas'

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59 For an account of the violence in Kansas, see Western Reserve Chronicle, A Reign of Terror in Kansas (1856).

60 The two laws did have a key difference, though: the Missouri Compromise was actually relevant to the case while the Kansas-Nebraska Act was not.

61 Stephen Douglas, The Second Joint Debate at Freeport, August 27, 86-134 (1858)

62 Stephen Douglas, The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories, 521 (1859).

adherence to popular sovereignty greatly damaged his political career.[63] But situated as they were, the Democrats had a strong incentive to interpret the ruling in the most favorable manner possible; as partisan actors, their views make perfect sense. But to believe that the Court intended to do away with popular sovereignty in Dred Scott, we would have to accept an unlikely proposition: that the majority avoided the issue altogether and instead invalidated the Missouri Compromise as a proxy. Of course, it would have also been necessary for the Court to have expected that both the Democrats and the Republicans would recognize this substitution and extend the constitutional argument for limited congressional powers to the powers of the territorial governments. Altogether, this would have called for incredible foresight. Ironically, critics often claim that the Court lacked just this when it supposedly failed to see how its alleged proslavery ruling would galvanize the Republicans.

Conclusion

In summary, this paper has argued that while proslavery opinions may have had a role in Dred Scott, ample evidence shows that the Court made legitimate constitutional claims. Its arguments, regardless of their persuasiveness, had enough plausibility to elevate the decision beyond the status of a purely partisan fabrication. Not only is there unambiguous proof of a proslavery conspiracy underlying the ruling, but an examination of the Court's belief that the Constitution protected slavery—read alongside other slavery-related cases—also indicates that the majority had a reasonable legal basis for its conclusions. At the time, the North and the Republicans naturally had nothing to praise about the decision. Today, we can similarly find little to commend. But we should not conflate the ruling's disagreeable political implications with the constitutional beliefs and interpretive processes by which the Court operated.

Beyond Dred Scott, this paper has also sought to move the discussions about the Court away from politics and back to jurisprudence. It did not do so to defend any single decision of the Court, nor to promote any specific interpretation or evaluation of the Court's judicial philosophies, past or present. Furthermore, this paper has not argued against looking for and removing political bias whenever and wherever we discover it in the judicial system. Instead, the point was to emphasize how certain beliefs about the Constitution—and approaches to its interpretation—can result in consistent but politically controversial decisions. All of this is to say that we ought not to discount or support any rulings of the Court based on their material consequences. Instead, we should evaluate these decisions based on the validity and quality of their legal arguments.

63 Robert Walter Johannsen, Stephen A. Douglas, 608-609 (1973).

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