

2000

## New Era, New Threats: Wrestling with Interstitial Actors

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### Recommended Citation

Joshua A. Levy, *New Era, New Threats: Wrestling with Interstitial Actors*, 21 MICH. J. INT'L L. 523 (2000).

Available at: <http://repository.law.umich.edu/mjil/vol21/iss3/5>

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## FOREWORD

# NEW ERA, NEW THREATS: WRESTLING WITH INTERSTITIAL ACTORS

*Joshua A. Levy\**

A NOTE FROM THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY ("THE STANDING COMMITTEE"): *The Standing Committee assisted the Michigan Journal of International Law with the organization of its symposium entitled, "Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime," and takes great pleasure in distributing the transcripts and articles from the symposium proceedings to members of the international security law community worldwide. This symposium is the first of its kind not only in terms of its content, but also in terms of its vision demonstrated by the students who took it upon themselves to bring the issues that intersect law and national security to a public discourse. We are delighted to have participated in this landmark event and hope, through the distribution of these materials and continued dialogue, that we remain involved in promoting its legacy.*

With the fall of the Soviet Union in 1991, global foreign relations devolved from a bipolar "stability" between two superpowers to a single hegemon, struggling to define itself. Prior to 1991, security threats were largely comprised of state versus state conflicts. Today, however, significant security threats derive from "interstitial actors," those entities who—aspersions notwithstanding—neither represent nor claim to represent an internationally recognized nation-state, yet whose reach and sophistication resemble a nation-state (e.g., drug barons, Hamas, Cosa Nostra).<sup>1</sup> The factional implosion of the Balkans and the African Great Lakes region tragically illustrate this development.

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1. See Symposium Proposal of the Michigan Journal of International Law (January 11, 1999) [hereinafter Proposal] (quoting an April 1, 1998 telephone interview with Elizabeth Rindskopf, former General Counsel of the CIA) (on file with the *Michigan Journal of Inter-*

Powerful interstitial actors are not new to global affairs.<sup>2</sup> In fact, their prior historical impact is exactly what concerns policymakers and their legal advisers world-wide. One need only recall the Roman empire, its losses to the Huns, and its ultimate sacking by the Vandals in order to recognize the security dilemma, which interstitial actors pose for states and, yes, empires. The very success of the Huns and Vandals against the Roman Empire came from their ability to turn the rules of war and diplomacy on their head.<sup>3</sup> The Romans had no experience negotiating with, let alone fighting against, tribes. By the time the Romans developed a method of addressing these tribal threats, it was too late.

Threats from modern interstitial actors have proven equally perplexing for today's policymakers.<sup>4</sup> In August 1998, Osama bin Laden orchestrated the bombing of the United States embassies in Kenya and Tanzania. How to respond to this act perplexed the policymakers in Washington. In fact, the decision by the Clinton administration to retaliate against bin Laden by, *inter alia*, bombing an alleged dual use

*national Law*). Quoting the Proposal, Professor Phillip Nichols correctly notes that "multinational corporations, international financial institutions, international organizations, and many other legitimate entities fit into [Rindskopf's] definition of interstitial actors." Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 469 (1999).

2. See Douglas Kash, *The 21st Century Pirate: Modernity of an Ancient Scourge*, 22 A.B.A. NAT'L SEC. L. REPORT 1 (2000) (explaining that "pirate attacks against large ships have doubled during the 1990s to approximately 300 per year"). Today's maritime pirates are not state-sponsored, but "consist[] of well-organized bands of trained mercenaries typically working on behalf of international crime syndicates." Kash, *supra*, at 4.

3. Referring to Genseric, King of the Vandals, Edward Gibbon wrote, "The designs of Roman government were repeatedly baffled by his artful delays, ambiguous promises, and apparent concessions. . . ." EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 591 (8th ed. 1974). Being "more ambitious of spoil than of glory, [the Vandals] seldom attacked any fortified cities or engaged any regular troops in the open field." *Id.* at 601.

4. Introducing an analysis of how to respond "proportionately" to terrorism, Professor Ruth Wedgwood described the challenges involved in addressing threats from "modern" terrorists,

Modern terrorism has salient differences from traditional warfare. The actors are often not states, but rather ideological, political, or ethnic factions. States have a host of international commitments and aspirations that create an incentive to avoid all-out warfare and to avoid undermining the rules of war, while a single-purpose terrorist organization may operate without mitigation. A terrorist group often calculates that it will win attention for its cause and undermine a target government by the very atrocity of its tactics. A terrorist group is less vulnerable to international sanctions, as it does not possess a visible economy, land area, or identified population. With an uncertain membership and inchoate form, terrorist networks lie outside the web of civil responsibility that constrains private and public actors in international society.

Ruth Wedgwood, *Responding to Terrorism: The Strikes against Bin Laden*, 24 YALE J. INT'L L. 559, 559 (1999).

pharmaceutical facility in Sudan has been criticized for its lack of proportionality and reliance on faulty intelligence.<sup>5</sup> Though reliance on faulty intelligence presents its own unique problems, determining what a proportional, appropriate, and effective response to interstitial actors generates difficult overlapping strategic and legal questions.

Imperative then today is discussion, study, and coordination among the many states threatened by interstitial actors. This sort of dialogue is precisely what *The Michigan Journal of International Law* sought to continue in its symposium, entitled, "Post Cold War International Security Threats: Terrorism, Drugs, and Organized Crime," held February 19–20, 2000, at the University of Michigan Law School. There, over thirty of the most active minds working in international security law exchanged their views with the general public on this topic. The *Michigan Journal of International Law* found it fitting to hold such a dialogue in Ann Arbor because in 1971 that city witnessed the first-ever prosecuted terrorist attack on U.S. soil—an attempted bombing of the Federal Building. In that case (the "*Keith* case"), the United States Supreme Court decided that despite the national security implications of the crime, the government's interest in national security did not outweigh the Fourth Amendment rights of the defendants, each of whom were U.S. citizens.<sup>6</sup> Though the case left the question open for similarly situated foreign defendants,<sup>7</sup> the *Keith* court's message is clear: why maintain national security, if we undermine those liberties which we seek to secure?

Though the issues in *Keith* were apparently the first of their kind raised before the federal judiciary,<sup>8</sup> they are not the last. Law's intersection with national security presents new questions in this post-Cold War world. Most of these questions demand not a single country's attention, but many. For example, the PKK's raid last year on an Israeli embassy, located in Germany, in retaliation for Israel's involvement in arresting Ocalan implicated the interests of the EU, Israel, Germany, and Turkey.<sup>9</sup> This scenario demands law enforcement and intelligence of each country to enter the scene, share information, and gather information (evidence)

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5. See *id.* at 570–71 (disputing use of soil sample taken by agent inside gates at Khar-toum plant).

6. See *United States v. United States Dist. Ct.*, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L.Ed.2d 752 (1972) [hereinafter the *Keith* case].

7. See *id.* at 322 n. 20 (finding warrantless surveillance may be constitutional where security threatened by foreign power).

8. See *id.* at 299.

9. See Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 *FORDHAM INT'L L. J.* 606, 611 (2000) (discussing Turkey's animosity toward EU because of its handling of capture of known Kurdish terrorist, Abdullah Ocalan).

in an attempt to arrest and prosecute the crime's perpetrators.<sup>10</sup> But, which country should accomplish such efforts? In which country's court should the case be tried? Which law should be applied? Moreover, organized financial crimes present even more complex questions, especially when money is stolen from one country and laundered in several more, such as the BCCI scandal.<sup>11</sup>

Solutions to these problems on the front and back ends are long overdue. As the reader will note, packed within the following symposium transcript are creative solutions and poignant questions. The *Michigan Journal of International Law* is grateful to those speakers who presented papers and participated in panel discussions that enriched this critical dialogue.

The symposium broke into two days. The first day concentrated on the definitions of the aforementioned threats. Panel discussions on that day included: Challenges from Interstitial Actors and Their Crimes; How Can Terrorism Be Defined?; Financial Aspects of Terrorism; Defining Drug Trafficking as a National Security Threat; Asylum Law and the Extradition of Terrorists; and a keynote address by Ambassador Anthony Quainton.

The second day of the symposium reviewed, in the main, how policy makers and their legal counsel should address these threats from interstitial actors. Panel discussions for that day are entitled: Law Enforcement and Gathering Evidence; Rendition of Foreign Criminals from Foreign Soil; Weapons of Mass Destruction as Implements of Terrorism; Prosecuting and Defending a Foreign Criminal; and International Criminal Court.

Hopefully, the symposium will spark meaningful action toward creating such desperately needed solutions in the intersecting fields of law and national security policy as well as the study of international security law in law schools world-wide. Without such education, continued dialogue, and action, we mark the beginning of the end. With them, however, this world may continue on its road toward becoming a collection of secure democracies, held fast by the rule of law.

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10. See, e.g., Elizabeth Rindskopf & Joshua A. Levy, *Law Enforcement and Intelligence: No Longer Ships Passing in the Night*, 3 J. NAT'L SECURITY L. \_\_ (forthcoming 2000); Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 74 (1990).

11. See Phyllis Solomon, *Are Money Launderers All Washed up in the Western Hemisphere? The OAS Model Regulations*, 17 HASTINGS INT'L & COMP. L. REV. 433, 437 (1994) (summarizing BCCI case).