

Signaling or Pressuring for Protection?
**Examining Judicial Socialization
and INGO Intervention
in the Protection of a Terrorist Suspect's
Right to Due Process**

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I. Significance of Study

The September 11th terrorist attacks and ensuing “War on Terror” have caused democracies to struggle to balance upholding national security preservation under threats of terrorism and upholding liberal norms, particularly due process. Although international laws exist, primarily in the Geneva Conventions, they provide little guidance as they were designed to maintain warring states’ sovereignty. Consequently, these Conventions say little regarding conflict between state and non-state actors, such as terrorist non-state actors. Because terrorists are non-state actors and disregard the laws of armed conflict, there is difficulty in applying the traditional model of conventions. Particularly descriptive of this issue is the tension denying terrorist suspects’ rights. The rise of non-state actors, though, is far from limited to non-state combatants.

Over the past century, public international law has undergone transitions allowing international nongovernmental organizations (hereafter referred to as “INGOs”), to become prominent players in international legislation. Technological advancements and the creation of the Internet reduced INGO organization and operation costs, allowing them to multiply in number and increase their efficacy. Thus, the organizational capacity of transnational society led to the evolution of states accepting new limits on their sovereignty in the human rights realm as well as accepting accountability in governments’ mutual relationships with one another and with their citizens (Simmons 2009).

Law-governed interstate behavior reveals state acceptance of limits on their sovereignty in international human rights law (Henkin (1979). Because they can hold

governments accountable to existing laws by publishing neutral versions of public affairs thereby challenging governments to justify or alter state practices, INGOs can break the state's monopoly on information and norm creation. This research will map the relationships between INGOs and domestic court systems amidst the backdrop of developing international norms on due process. More specifically, this thesis will study this question: *when and how does the interplay of INGOs and "socialized" domestic courts foster greater adherence to international norms?*

This topic is of personal importance because it marries the writer's broad yet profound interests in human rights and how social mobilization can affect a judicial system's protection or denial of human rights. More specifically, this paper is a demonstration of how the government both initiates and finalizes protection of the right of its citizens.

II. Definition of Important Variables

A. Key Independent Variable 1: *INGO Intervention*

Murphy (2006) defines INGOs as, "groups of persons or societies, voluntarily created, that act independent of governments on a non-profit basis" and are "of interest to international law when concerned with matters transcending national boundaries" (58). Accordingly, while many INGOs do not accept government donations in order to retain independence from states, other INGOs "embrace" government involvement, as they may be creations of national or international law. Despite having transnational scope to its activities, a single national legal system can create INGOs. An example is the International Committee of the Red Cross. Created under Swiss law by Swiss nationals, the ICRC is one of the world's largest INGOs in world politics.

INGOs affect transnational private behavior by engaging in transnational lobbying campaigns and focusing on corporations engaging in poor environmental practices to influence how governments and international organizations address transnational problems. Furthermore, they actively participate in drafting treaty regimes to influence state views and actively monitor a state party's implementation of a treaty. Murphy (2006)'s definition provides a thorough explanation of an INGO's placement and involvement in world politics.

Meanwhile, Avant (2004) contends that INGOs behave differently from other actors in world politics. INGOs "act as advocacy networks or international pressure groups to affect state policy as well as business and individual behavior and increasingly also *implement* policy directly – often in partnership with governments and/or international organizations" (Avant 2004, 361-362). INGOs, as non-state actors, are changing a state's practice of sovereignty. As policy advocates, they are becoming a main source of policy implementation within a sovereign entity. Avant (2004) argues, however, that these non-governmental actors work as "informers, professors and experts". While potentially attempting to influence political processes, they do so remaining politically neutral with respect to a regime or party and working with domestic leaders. Therefore, INGOs act uniquely within the international political arena while still exerting significant influence on world politics by remaining politically neutral and by maintaining the self-defined role of non-governmental organizations.

Jarvik (2007) questions Avant (2004)'s assertions that non-governmental organization activities are necessarily politically neutral. As global networks are growing, NGOs (especially the transnational type) are increasing their influence. In a

number of political controversies, civil society groups have proved capable of conducting lobbying campaigns changing government policies in even the most developed and stable nations. Such large efforts could cause increased tensions between non-state actors and national governments at the “risk of an emotional, cultural and political earthquake” (p. 221). Furthermore, Jarvik explores the possibility that INGOs and NGOs are typically politically driven by the context where they were formed. For example, those established in the Western World are likely to conform and champion Western values and politics.

Henderson (2010) highlights another dimension of the role played by INGOs in global governance. By frequently speaking for people at the grassroots level, INGOs make global governance and the policy-making process more democratic. They democratize global governance by bringing to the forefront the interests of ordinary citizens and persistently insisting that policy-making reflect transparency. With representatives regularly outnumbering those of states at international conferences, INGOs effectively shape international public policy. They pressure corporations with publicized campaigns, lobby in government offices and file legal briefs in both national and international courts. He uses Amnesty International as an example of an INGO having input on treaty formation, citing its 1984 conversion into the *Convention Against Torture*.

An identifying element of Henderson’s definition, though, is the discussion of their legal personality. Like Murphy (2006), he uses the ICRC as an example. Its recognition in both Swiss civil law and international law through the Geneva Conventions affords the INGO a very strong legal personality. Under the Economic and Social Council of the UN, many INGOs receive consultative status enabling them to offer

expert testimony and submit information relevant to an issue in international courts. Being granted consultative status in perhaps the world's most important treaty, the UN Charter, attests to an INGO's appreciable legal standing.

After reviewing the literature, INGOs are understood, for the purposes of this paper, to be international advocacy groups that may enjoy international personality and are usually involved in bringing grassroots concerns to the global agenda and in addressing transnational issues. Their actions can range from political campaigns shedding light on poor labor or environment conditions to drafting treaties to later be adopted by the United Nations.

B. Key Independent Variable 2: “*Judicial Socialization*”

Tzanakopoulous and Tams (2013) contend that as the boundary between international and domestic jurisdictions becomes increasingly porous, “more international law is applied by more national courts in a more consequential (and less parochial) way” (Ibid.,1). Although international law is occasionally molded into domestic law, the authors clarify that a domestic court's receptivity – the court's willingness to introduce and implement international norms into its domestic jurisdiction – is state (and content) specific by writing that:

While international law (or parts of it) may be automatically incorporated in domestic law, it may not be directly invocable before and applicable by the domestic court because it is not self-executing, or on the basis of other ‘avoidance techniques’ (3). Furthermore, when domestic courts do engage with international legal issues, they often do not in a “straightforward” way (Ibid., p.3).

In other words, domestic courts can be receptive or resistant to international law. Judges who have been “socialized” in international law, however, are likely to promote more receptive courts.

Judges who have been “socialized” in international law, usually through international conferences, conventions, and gathering with fellow justices around the world are more likely to be receptive to the force of international law in regulating domestic behavior. As noted by a relative-newcomer to international law, U.S. Supreme Court Justice Sandra Day O’Connor, “international law is no longer confined in relevance to a few treaties and business agreements. Rather, it...regulates actions or events that transcend national frontiers” (2003). Rather than individuals working through these problems through a nation-state system, the domestic-frontier offers those participating in international conventions and acknowledging the relativity of international law in domestic systems a “wide range of solutions to various problems through a mix of domestic and international rules” (Slaughter and Burke-White 2006, 130).

Slaughter and Burke-White (2006)’s analysis of a domestic court’s receptiveness to international law embodies Tzankopoulous and Tams’ summary of court receptivity in terms of “socialized” judicial systems. Warning against the lethality of determining international law’s worth by its level of receptivity in domestic courts, they write that the penetration of international law into the exclusive zone of domestic affairs is inevitable because “international problems have domestic roots that an interstate legal system is often powerless to address” (Ibid., 111). To create desirable conditions in the international system, international law must address the will – and capacity – of domestic

governments to respond to these issues, shifting the primary purpose of international law from providing regulation above the nation state to interacting with, strengthening and supporting domestic institutions. More simply stated, the effectiveness of international response to these challenges lies within the international legal order's ability to influence domestic court receptivity to international laws and norms.

Slaughter and Burke-White (2006) use the European Union as an example of a group of states exploring the domestic-foreign frontier. The EU is relying upon the functions of international law as a primary tool of reform and socialization. Consequently, "Europeans themselves are coming to recognize these uses of law; a new generation of European policy thinkers has openly proclaimed the virtues of the European way of law" (Ibid., 112). By expanding laws from being national to European, EU law has migrated from a thin set of agreements based on States' functional needs into a programmatic and comprehensive legal order. Naturally exposed to international conventions and courts arguably intensifying after World War II, European state judicial systems have been "socialized," and consequently capable of using law as a weapon.

Another excellent example of court receptivity is *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (1999) as it involves domestic adherence to an international norm across various states. This case concerns the government of Spain's attempt to extradite Senator Pinochet from The United Kingdom to stand trial for crimes committed (primarily in Chile) as head of state (Epps 2009). Pertaining to *Pinochet*, the most important requirement calling for extradition is the double criminality rule (the conduct complained of must constitute a crime under the law of both Spain and of the United Kingdom at the date it was

committed). An activist Spanish judge relied on both domestic and international law to request Pinochet's extradition, and a British court then drew on recently developed international norms to authorize extradition (Khagram, Riker, Sikkink 2002). Despite having built domestic protection against prosecution through constitutional guarantees, friendly appointees in the court system, and an electoral system favoring his political party, intense international activity broke down the domestic barriers to Pinochet's prosecution. When returned to Chile, Pinochet was prosecuted for human rights abuses.

Despite his previous examples of court receptivity, O'Keefe (2013) recognizes that courts generally prefer to base their rulings on domestic legal principles. This speaks to a court's likelihood to either ignore or defy international norms, and the United States serves as a frequent example of prioritizing national interests over international norms.

In fact, the United States Supreme Court Case *Windsor v. United States* (2013) provides a most recent example of the late adoption of an international norm to maintain national interests. Article 16 of the Universal Declaration of Human Rights (1948), to which the United States is a state party, declares:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution.

UN treaty bodies and numerous inter-governmental human rights bodies most frequently interpret this non-discrimination principle as prohibiting marriage discrimination based on gender and sexual orientation. The United States' Defense of Marriage Act, although recently deemed unconstitutional in late June 2013, conveys the United States federal court's previous defiance of an international norm (Amnesty International 2012a) to protect marriage equality.

Signed by President Clinton in 1996, DOMA prevented same-sex couples – whose marriages were recognized by their home state – from receiving the benefits available to other married couples under federal law. Despite the Obama administration’s desire to repeal DOMA, the Justice Department initially defended the act. The United States Supreme Court reconsidered DOMA by agreeing to hear Windsor’s case when she sued the federal government after the Internal Revenue Service denied her refund request for federal taxes she paid after her spouse died in 2009 on grounds that their marriage was not federally recognized. In late June 2013, a narrow 5-4 ruling in *Windsor v. United States* (2013) ruled DOMA unconstitutional. Dissents from four of the nine justices, however, reveal their defiance to adopt the international norm as federal domestic law.

In the majority opinion, Justice Kennedy indirectly expressed compliance with international norms by writing:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

By ruling that DOMA violated the Fifth Amendment, the Court ruled that the persons were being discriminated against based on sexual orientation, and thus violated Article 16 of the UDHR.

Scalia disagreed with the majority’s ruling that DOMA violated the Fifth Amendment’s requirement of equality in his dissent delivered from the bench.

In the majority’s telling, this story is black-and-white: hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one’s political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today’s Court can handle. Too bad.

Scalia's dissent and a delayed ruling granting marriage equality represent the United States federal court's reluctance to adopt an international norm when it contradicts existing domestic interests.

Offering a comparison to a court's willingness to adopt international norms solidifies the understanding of court receptivity as a court's willingness to introduce and implement international norms into its domestic jurisdiction. While Scalia makes a point not to attend international conferences, European Union members (including the United Kingdom and Spain) willingly participate in international conferences and conventions, embracing opportunity for socialization. It can be reasonably contended that a court's willingness to receive international norms in its domestic court is directly related to the "socialization" of its judges to international norms.

C. Defining "International Due Process Rights"

The War on Terror generated an examination on current judicial institutions' protection of terrorist suspect's rights, which is due process for the purposes of this paper. The following section is an attempt to provide a cohesive definition of the concept of due process protection based on international laws and standards. The author distinguishes substantive and procedural due process while drawing forth the concept's requisite practices by reviewing some of the most recent writing that has been completed on the subject of a suspected terrorist's right to due process.

Due process can be either *substantive* or *procedural*. Procedural due process refers to the ways in which law is formulated and applied. Because this research examines the international law of due process, it also focuses on the international

application of law. The five sources of international law are international treaties or conventions, customs, general principles, judicial decision and scholarly writings. Treaties are written and binding between state parties. Customs are created through state usage, and general principles are supplementary to international treaties or customs. Although judicial decisions and scholarly writings cannot make law, each previously established supports international law.

As defined by the Vienna Convention on the Law of Treaties, a treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (Article 2, 1969). States are not bound to treaties they do not sign or ratify, but if a state ratifies a treaty, the state is then a party and bound to its conditions. If a state chooses to sign a treaty but not ratify the treaty, it is a signatory state and is thus obligated not to destroy the treaty for other states. If the language of the document demonstrates the intent to create a legally binding instrument, it is a treaty (Murphy 2006).

Because they are equal, treaties and customs can modify each other. Customs, though, are relatively uniform and consistent state practices regarding particular matters and a belief among states that such practice is legally compelled (*opinio juris*). Although no particular duration is required, usually the passage of time is required as evidence of generality and consistency (though some authors have argued for “instant customary international law” (see Cheng [1965] for a fuller treatment). Although international in nature, customary law can have a regional application only (Brownlie 1998).

Judicial decisions and scholarly writings are considered to be “evidences” of international law. As described by Murphy (2006), “reference may be made to the decisions of courts and the writings of scholars when identifying the content of international law” (Ibid., 88). The courts and scholars do not make or create the law themselves, but instead reach conclusions based on review of law. Judicial decisions “are regarded as authoritative evidence of the state of the law” (Ibid., 19). Accepted writings are occasionally considered because they are “the teachings of the most highly qualified” (Ibid., 24). Although subsidiary, judicial decisions and scholarly writings are useful in international legal relations as they can help clarify the existence of norms (Brownlie 1998).

Unlike procedural due process, substantive due process addresses fundamental norms. Although no state can derogate from them because they are so fundamental, their fundamental nature keeps them from being governable through procedure. Also known as *jus cogens*, D’Amato (1990) explains that according to The Vienna Convention on the Law of Treaties, these “super customs” “can be modified only by a subsequent norm of general international law having the same character” (Ibid., 5). So, a *jus cogens* can be modified only by a *jus cogens* (Ibid., 1990). Some norms considered to be *jus cogens* are the prohibition of the use of force, torture, racial discrimination, genocide, war crimes, crimes against humanity, slavery and piracy (Shaw 2008).

Protection of a suspected terrorist’s right to due process is defined in both substantive and due process law. Because the denial of due process is considered to be psychological torture, the *jus cogens* prohibiting the use of torture grants substantive protection of the right to due process. Procedurally, various treaties supplemented by

general principles and supported by various academic writings and judicial decisions protect a suspected terrorist's right to due process.

The International Covenant on Civil and Political Rights (ICCPR, 1966) was perhaps the first international treaty to internationally mandate due process. Article 9, Part 1 reads, "no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty on such grounds and in accordance with such procedure as are established by law." Sections two through five of Article 9 further the expectations for due process by requiring promptly informing the reason of arrest, a prompt court date before a judge or other authorized officer, the right to a speedy trial, the right to appear before court, and compensation if the victim was unlawfully arrested or detained (ICCPR 1966).

More recently, the Convention Against Torture (1984) defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third party information [...], or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or a the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Denying a suspected terrorist due process rights is considered to be a form of psychological torture because it imprisons the victim without specifying one's charges, one's trial date, and occasionally forbidding appearance at his trial. Therefore, the ICCPR and the CAT not only protect against the *jus cogens* norm of torture, but also due process rights.

After this review of the literature, protection of due process rights, for the purposes of this paper, is considered to be a suspect's right to be promptly informed of

the charges he or she is facing, the right to appear at his trial, and a fair and speedy trial. For terrorist suspects, if any of the conditions set forth by the ICCPR or CAT are violated, due process is not considered protected.

III. Theoretical Framework and Literature Review

This section of the paper develops two causal pathways to explain the possible interplay of INGOs and domestic courts with regards to greater adherence to international norms. The key variables in the framework are INGO intervention and judicial socialization. Besides these two key variables, the literature has identified three other important factors that may influence the decision of the domestic judicial system to extend or not to extend protection to the internationally-recognized due process rights of suspected terrorists: the domestic judges' relations with the current government, the support of domestic NGOs, and popular sentiment.

A. “Pressuring Theory” of Rights Protection

The pressuring theory proposes that INGOs, spurred by NGOs, can cause states to adhere to international norms through inflicting outside pressure on domestic courts. Courts and judges are generally vulnerable to pressure from the outside when they blatantly stray from international norms (Henderson 2010; Ronen 2013). They are likely to “give in” to pressure to preserve themselves, in an act of “strategic defection” from an unpopular government.

Lehman (2007), however, contends that “the reality is that INGOs remain as much vulnerable to one side of politics as they do to the other, and it would be neither

helpful nor accurate to merely portray influence in their operations by one side of politics as inherently “good” and the other bad” (Ibid., 647). He continues by noting the challenge this poses in the future development of INGO accountability. INGOs have the potential to play an important community role, but in an unalienated society. By highlighting issues such as human rights violations, however, INGOs inherently alienate state practices by striving to unalienate members of society. Therefore, INGOs can be part of a solution when civil society is not just about developing political space but an “authentic determination in the realization of freedom and justice (Ibid., 667).

INGOs can undertake various activities to create “pressure” on courts and regimes. The first is researching judicial access through interviews. The second activity is the ability of the INGO to successfully communicate with political bodies. The third is the use of media and the ability to mobilize and publicize information to advocate and advance the right to due process, and the fourth activity is the INGO’s ability to actively campaign and protest for its cause. Gathering research would be the most basic and least effective effort performed by an INGO to protect a suspected terrorist’s right to due process while organizing campaigns and protests is considered the most effective.

Table 1: INGO Intervention Activities

(Arranged according to increasing intensity of Involvement, where No. 4 is most intense)

1. Gathering Research;
2. Communicating with Political Bodies;
3. Mobilizing and Publicizing Information;
4. Organizing Campaigns and Protests.

A primary tool for gathering research is interviewing detained suspected terrorists. Letter campaigns – the practice of an INGO volunteer communicating with prisoners through letters – allow volunteers to collect information and data about a prisoner. Letters were not only sent to prisoners, but also prison officials and relevant government leaders. The campaigns frequently resulted in better treatment for prisoners (Power 2002). Power uses a testimony of a former Dominican prisoner, Julio de Pena Valdez, as an example of how the letter writing campaign helped a detainee seek justice:

When the two hundred letters came the guards gave me back my clothes. Then the next two hundred letters came and the prison director came to see me. When the next pile of letters arrived, the director got in touch with his superior. The letters kept coming and coming: three thousand of them. The President was informed. The letters still kept arriving and the President called the prison and told them to let me go (Ibid., 134).

The testament (2002) reveals that research allows an INGO to not only gather information and data about a prisoner, but also communicate the information to higher authorities, states and the general public. Expressly, it allows the INGO to convey to higher governing authorities, political bodies and the general public how a terrorist's right to due process is being denied. Despite enormously expanding its reach and range of operations, letter-writing campaigns are a principal tool of INGOs to pressure governments by providing the public with information.

Although politically neutral by character, INGOs also characteristically work with those in power to achieve their goals. Maintaining relationships with governing political bodies such as sovereign states and the United Nations is essential for an INGO to become an influential advocacy and agenda-setting organization. Because INGOs are politically neutral and independent non-profit agencies, they serve as a neutral voice for political bodies like the United Nations. By communicating with political and governing

bodies, INGO volunteers have the ability to discuss with the necessary leaders the policies most needed to create international policies to protect and advance human rights. INGOs can develop an ability to play a role in international human rights agenda-setting by focusing on regular communication with the United Nations and other political bodies. Furthermore, this relationship legitimizes the INGO. Legitimization allows volunteers from the INGO to attend meetings, work with various UN bodies and participate in the resolution draft process. Thus, the INGO gains a reputation for providing credible information and impartially well-documented evidence as well as being asked to participate in the activities of various UN organizations (Lehmann 2007), placing the INGO's policy goals on the international agenda.

Not only do INGOs rely on research, communication and involvement with political bodies to inform the public and advance their goals, but they also rely on the media to mobilize and publicize information for further advancement. After demanding access to prisoners held in Guantánamo Bay, Amnesty International released memoranda outlining the concerns over the "War on Terror" and the human rights abuses consequently produced.

In a press release accompanying an open letter sent to George W. Bush, the INGO publicized that not only had the INGO expressed concerns of human rights abuses in detention camps run by the US military, but also that the memorandums addressing such concerns went unanswered. In the press release, Amnesty International stated, "the US administration has shown a consistent disregard for the Geneva Conventions and basic principles of law, human rights and decency". The INGO was able to unite segments of

the American population condemning the practices in the camps through the media and subsequent press releases (Amnesty International 2012b).

At increasing levels, various news periodicals and papers began writing on the denial of due process. Eggen and Smith reported in *The Washington Post* that “the US government was holding about 550 people at a prison at its Naval base at Guantánamo Bay. Some had been held for nearly three years without charges or access to attorneys (Lewis 2004). Since the INGO dedicated to creating “a world in which every person enjoys all the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards” began to shed light on denial of due process in the United States’ extra-territorial detention camps, the state faces the threat of a tarnished reputation of abandoning the freedoms it arguably created (AI 2012b, para 1). As informed by Amnesty International, an INGO’s use of media allows it to mobilize populations on an international level and publicize information to advocate for and advance its goals.

Perhaps the most effective way an INGO advances its goals is through campaigns and protests. While media mobilizes information, campaigns and protests mobilize people with a common goal or concern. Such efforts, though, become stronger with increased interaction. That is, because campaigns and protests are only possible through establishing the previously discussed conditions – gathering research, communicating with political bodies and mobilization and publication of information – it provides the strongest means of influencing international policymaking. Campaigns and protests unionize those with common goals and or concerns. Campaign efforts generally include the creation of education packets to inform and recruit the public.

Rather frequently, campaigns evolve into protests. Because INGOs preserve independent non-profit status, they can freely publicize gathered research without being responsible to anyone other than to the victims of those publications. Furthermore, by uniting those with a common goal under a politically neutral and independently funded front, INGOs can pressure political bodies, particularly states, to alter eliminate or enforce specific policies through protests without the threat of political repression. In fact, INGOs “at all times maintain an overall balance between its activity in relations to states adhering to the different world political ideologies and groupings” (Power 2002, 148). Therefore, policy change is more likely to occur when political neutral bodies (INGOs) pressure the government because their means of doing so invulnerable to the government while reflecting the public will.

This research proposes that the most interactive campaigns are inherently the most intensive and therefore the most effective. Thus, while gathering research provides a most basic method for an INGO to attempt to achieve adequate protection of a terrorist’s right to due process, organizing campaigns and protests are likely to be the most effective while communicating with political bodies and mobilizing and publicizing information somewhere in the middle. Studies by Lohmann (1993), van Alebeek (2013) and Tzankapoulous and Tams (2013) contend when a state is likely to give into pressure and signs of doing so.

Tzankapoulous and Tams (2013) offer research supporting the claims that INGO intervention pressures courts to foster greater adherence to international norms, noting that domestic courts cannot create international norms, international norms can be “fused” with domestic-law concepts (Ibid., 3). Although engaging with topics addressed

under international law, domestic courts typically apply domestic law, but because courts operate within systems that empower or constrain them (domestic courts being part of a broader international legal society), domestic decisions are shaped notably by the doctrine of sources of international law. In order to exert influence within the global world order, domestic courts engage with INGOs and influential bodies of the like. Thus, courts will subside to INGO pressure and adhere to international norms to maintain power within global society.

Van Alebeek (2013) extended Tsankapoulous and Tams' (2013) explanation by focusing on *jus cogens*. According to van Alebeek, domestic rulings on *jus cogens*, norms characteristically international, are scrutinized if they stray from the application of international law. Although the relation between international and domestic legal orders from the perspective of international law is dualist, domestic-court decisions have legal relevance in the international legal order because court activity is considered state practice and thus capable of contributing to custom formation. But, because the expertise of a domestic court's proper application of international law is often questioned, domestic courts are frequently considered 'suboptimal international law appliers' (Ibid., 3). Consequently, international organizations suspecting a state's misapplication or negligence of an international norm or custom intervene through mobilization to pressure domestic courts to apply international norms in areas that are inherently international.

In an important work, Lohmann (1993) contended that political activity is indicative of an INGO inflicting pressure on courts. Although acting in accordance with domestic legislation, courts have the power of interpretation. When grassroots concerns garner the attention of INGOs, INGOs then intervene by asserting pressure on the courts

to reevaluate legislative precedent. Weighing the decision to subsidize to international pressure to foster greater adherence to international norms, courts demonstrate the pressuring theory, or the method of decision-making in which a competitive situation is analyzed to determine the optimal course of action for an interested party (in this case, the courts) (Downs 1957).

Lohmann (1993) further wrote that major policy shifts are often preceded by political action, and that rational, self-interested individuals have incentives to engage in costly political action because their activity is informative for their political leader(s). INGOs disperse information among the heterogeneous members of society, and their information is pertinent to the policy decision that must be made by the government that faces the choice of implementing a policy alternative or maintaining the status quo. She continues by supporting Downs' (1957) contention that while political leaders are traditionally assumed to be well informed, the populace is assumed to be rationally ignorant. As indicated by Lohmann, however:

This assumption is plausible for expert knowledge that is costly to obtain, but is less appealing for types of knowledge that are costless by-products of practical experience. [...] One individual's experience might lead to a fairly imprecise estimate of the benefits that will be derived from various policy alternatives in the future, whereas the collective experiences of all members of society might reflect these benefits quite accurately (1993, 3).

The political action mechanism characterized here is based on the assumption that individuals gather information about policy consequences in their daily lives, but does not require individuals to be well informed.

In summary, the pressuring theory contends that popular sentiment and the density of civil society will increase an INGO's pressure on a state, especially in a democracy. When judges and benefactors are reelected, the judicial system will give in

to pressure for self-preservation by appealing to the demands of their constituencies. In a more authoritative government, if the collapse of a state's regime is foresighted, the court may give in to pressure by abandoning the collapsing government.

The *Pinochet* (1998) case provides a very good illustration of the pressuring theory at work. Originally founded in the 1980s as a broad amalgamation of parties and civil groups in opposition to the perpetuation of General Pinochet's military regime, the Concertación evolved into an electoral and governing alliance of four major political parties reinstating democracy in Chile in the 1990s (Helmke 2006). Relying on political allies abroad and utilizing preexisting domestic and international norms, Pinochet's victims used INGOs to strengthen their position and pressure his military government.

The linkage between domestic human rights groups with transnational human rights networks achieved three types of success. First, although never winning an important court case under the military regime, transnational linkages mitigated the impact of human rights abuses by providing legal, financial and psychological aid. Second, the INGOs preserved political space for the domestic human rights groups, allowing them to function during periods of intense repression. Third, growth through transnational linkage led to increased political involvement.

By monitoring human rights abuses by (1) facilitating the flow of information out of Chile; (2) legitimizing the substance of the information because of the monitors' impartiality; (3) motivating Western states to pressure the military regime, and (4) providing a way for international actors to engage the military regime despite its closed nature, INGOs successfully pressured the military regime to "alter its agenda, discourse, policies and practices in ways that brought it closer to the demands of human rights

groups” (Khagram, Riker, Sikkink 2002, 67). Although repressive until the end, Pinochet eventually abandoned his post as leader of authoritarian Chile in the face of intense military intervention (Ibid.).

Conclusively, INGOs can successfully pressure governments when domestic civil society is dense and popular sentiments are strong enough that judges and benefactors react to the pressures of INGOs for self-preservation, especially when the courts expect failure of a weak executive power. Giving into pressure allows states to maintain their sovereignty by reestablishing their domestic jurisdiction. Because domestic jurisdiction is threatened with international intervention, state governments are likely to give into popular sentiments guided by international norms as a means of protecting sovereignty. *When successful, the pressure theory asserts that a state’s judicial system is willing to abandon its current rule of law for self-preservation.*

B. “Signaling Theory” of Rights Protection

When discussing a domestic court’s ability to foster international norms, the signaling theory places the domestic court at the lead. More “socialized” court systems, through their decisions, “signal” to other political actors (e.g. INGOs and NGOs), and probably other branches of government as well, that they are “willing” to align the domestic system with international norms. Since this is usually done in incremental steps, the courts send “signals,” through its decisions, that it needs the support from other actors in order for its “jurisprudential enterprise” to succeed (Lohmann 1993; Roberts 2011).

Why should domestic courts take the lead in this “judicial enterprise?” Slaughter and Burke-White (2006) argue that domestic spheres can actually maintain their

sovereignty through responding by “evolving to focus on inclusion – rather than exclusion – and to embrace – rather than reject – the influence on international rules and institutions on domestic political processes” (Slaughter and Burke-White 2006,128). Using international law to build the will and capacity of states to act domestically offers great opportunities for domestic institutions to grow stronger if domestic courts have exposure to, previous interaction and/or experience with international courts of law. As such, more socialized domestic court systems are more likely to be persuaded by international courts and their decisions.

Courts can maintain the status quo by prioritizing immunity over adherence to international norms, but they can also “signal” for change through reinterpretation of the domestic application of international norms. Reinterpretation suggests that the court believes the domestic application of international norms has either not been enforced or not been enforced correctly. By maintaining status quo or reinterpreting international law, courts are inherently creators of international law, but they “cloak” this role through the judicial “cover” (Roberts 2013, Ronen 2013). *When courts have a strong relationship with the current government, they are able to forge the incorporation of international law.* When the government is strong, the “judicial enterprise” of greater protection can preserve, or even strengthen the government. *In the context of a weakening government, the “signaling” can hasten the regime’s demise.*

Roberts (2013) recognizes, however, that conflict arises between loyalists to international law and to national interests when court decisions legitimize in terms of a state’s own interests and ethos rather than under international law. As the laws of conduct are related to national security, if the court relies too heavily on the international

community to guide domestic governance and jurisdiction, domestic legislation could weaken national security issues. *Here, popular sentiment can play a role, as it can provide support for the direction that the court is pursuing.*

Another set of actors that can amplify the “signals” of the court to the existing polity is domestic NGOs. Simmons (2009) cites Donnelly (1998) to explain low activist activity in socialized courts with equal power within their government systems. According to Donnelly, “...the key to change in state practice probably lies not in any one type or forum of activity but in the mobilization of multiple complementary channels of influence” (Simmons 2009, 98). Although NGOs and INGOs (organizations of activists) could provide influence, socialized courts typically look to governments and treaties for influence as they increase a government’s legitimacy. Governments with preferences closest to those of treaties regulating international norms (the Convention Against Torture, for example) are most likely to ratify those treaties to maintain their reputation and protect national interests. The involvement of NGOs and INGOs would attract attention to not only the government as a whole, but also specifically the courts. Therefore, in the signaling theory, courts signal the NGOS and INGOs to place pressure on the governments.

Although unable to measure the Warren’s court exposure to international courts as they were just coming into existence in the aftermath of World War II, the Warren Court’s landmark decision in *Brown v. Board of Education* (1954) provide a good example of the “signaling” theory at work. By holding that segregation in school systems violated the Equal Protection Clause of the Fourteenth Amendment by writing in the opinion that, “in the field of public education the doctrine of “separate but equal has no

place,” the Supreme Court was issuing a signal to the United States’ legislative branch to strike down racial classification entirely. The decision ultimately led to the enactment of the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968 (History of the Supreme Court). Although not applicable to the *Brown v. Board of Education* (1954) decision, subsequent Supreme Court decisions of mandating racial equality were inspired by international treaties mandating equality. Finally, Chief Justice Warren stated that his success as Chief Justice was made possible by the American government, not in spite of it. The Court was a branch of the American government, not a backdrop (History of the Court – The Warren Court).

Although the NAACP, an NGO, played a major role in granting racial equality, the Warren Court made their advancements possible. *Brown v. Board of Education* (1954) was an inspiration rather than reaction to the group’s demonstrations and protests. In fact, the NAACP is frequently considered a legal campaign, and thus implies that government defenders and representatives were supporting the movement. As such, this exemplifies the signaling theory because it demonstrates how court decisions are a means of a branch of government signaling to the government as a whole to adhere to developed international norms.

Finally, the Warren Court expanded civil rights by guaranteeing due process of the law to all citizens. Similar to the Civil Rights Act of 1964, Voting Rights Act of 1966 and the Fair Housing Act of 1968, this issue made the Court’s agenda after the establishment of significant international treaties requiring access to equal trial and greater exposure to international courts and governing bodies. Prior to *Gideon v. Wainwright* (1963) and *Miranda v. Arizona* (1966), minority accused persons were

frequently denied access to a legal counsel and often uninformed of their legal rights. *Gideon v. Wainwright* (1963) ruled that states must provide attorneys at state expense for accused persons unable to procure their own legal defense, and *Miranda v. Arizona* (1966) expanded the rights of the accused by mandating they must be informed of their rights upon arrest. These rulings signify the Warren Court's willingness to address controversial issues to protect the rights of individuals, and international treaties and governing systems were arguably used as guidelines.

While a dense civil society and popular sentiment cause domestic governments to give into pressure, a domestic court's "socialization" with the international community and its "insulation" from government violence are necessary preconditions for the signaling theory to be successful. Co-equal power within a government structure keeps domestic courts from being overruled by other government branches and therefore their decisions (via rulings) considered legitimate. Its very "legitimacy" may also "insulate" the courts from attacks, including physical violence, by other branches. Socialized courts can lead to the greater protection of due process rights only when it is "insulated" from the regime's attacks by the "protective belt" of INGOs, NGOs and public opinion.

Figure 1: “Pressuring” Theory

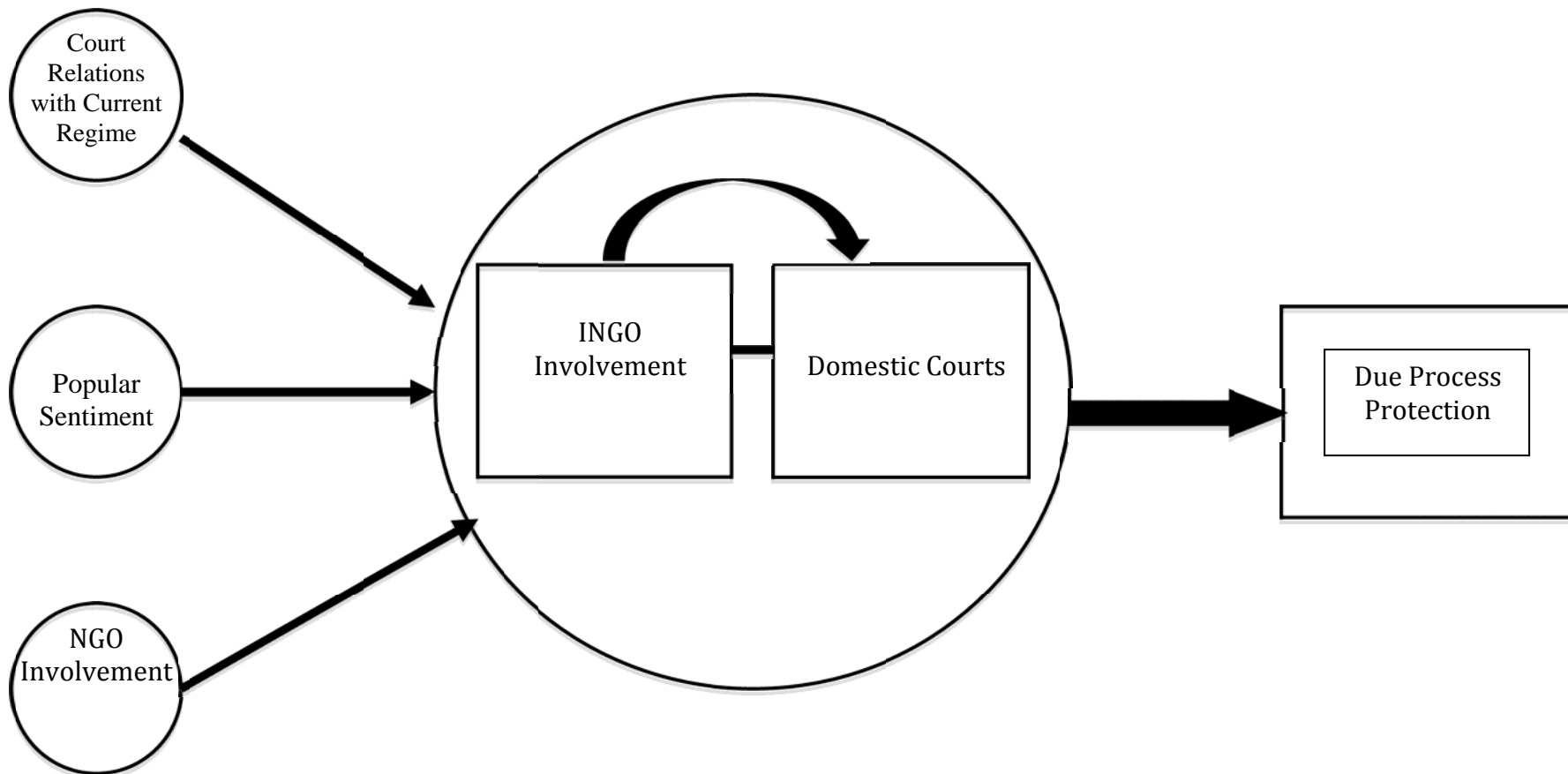
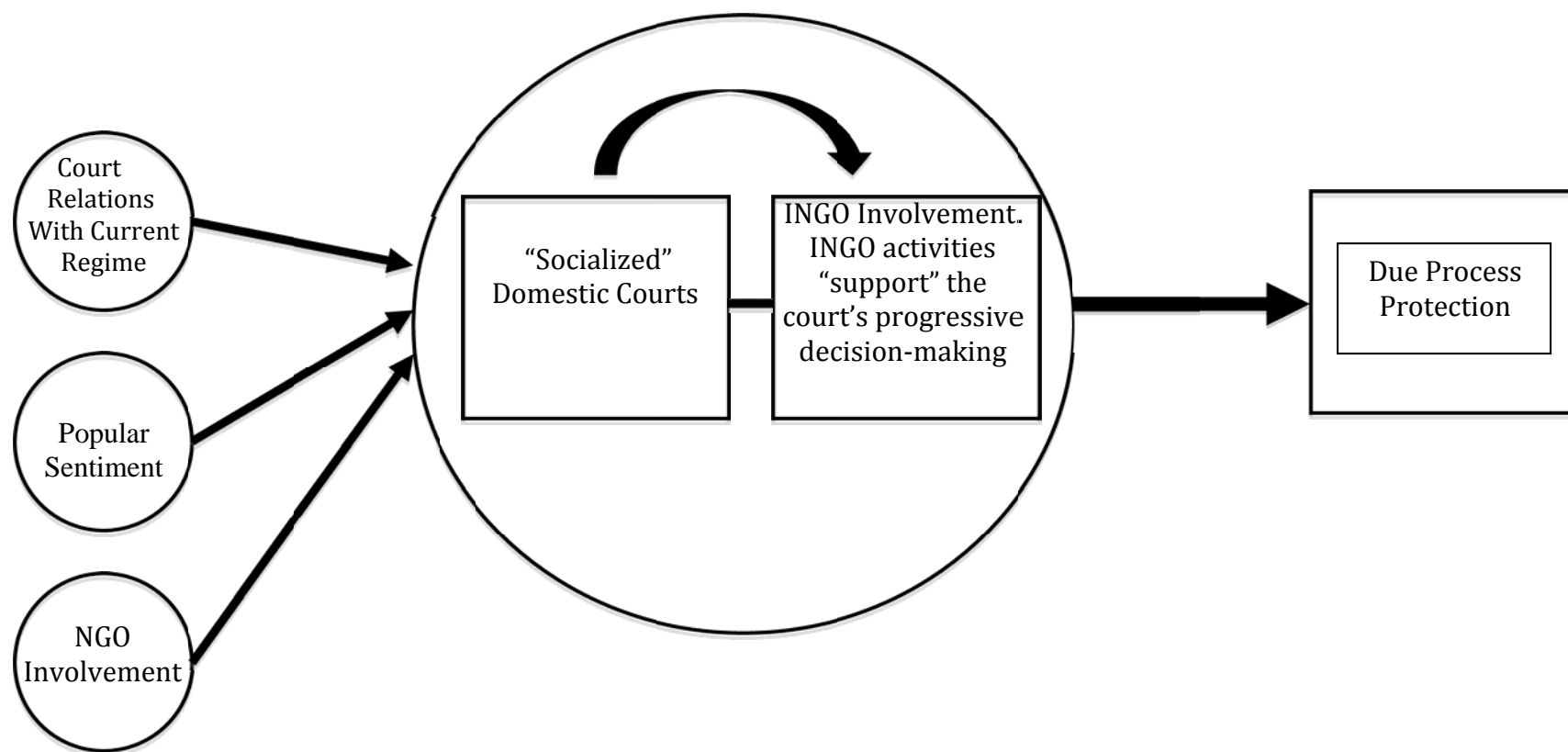


Figure 2: “Signaling” Theory



IV. Justification of Case Selection

Table 1: Comparison of Cases

Factors	The United States	United Kingdom
Region	North America	Western Europe
Regime Type	Democracy	Democracy
Legal System	Common Law	Common Law
GDP Per Capita (Adj. PPP)	\$49, 800	\$37, 500

Source: CIA Factbook (2012)

Following a most similar design (MSS) system, this research compares INGO involvement to protect a suspected terrorist's right to due process in the United States and the United Kingdom. Amongst others, the two states equalize on their level of economic development, regime type and liberal culture. Beyond structural similarities, the United States and the United Kingdom have similar legal frameworks defining due process protection. The countries were chosen because of recent history of immediately responding to large-scale terrorist attacks by withholding due process protection. This analysis is limited to democracies because the democratic emphasis on the rule of law

expects states to adhere to civil liberties guaranteed through legal codes, constitutions and common law. Thus, this research seeks to prove that the interaction and balance of power among democratic political institutions determines the due process protections of suspected terrorists.

A. The Case of the United States and its “War on Terror”

Immediately following 9/11 and the subsequent heightened sense of threat to national security, the United States’ separation of powers system allowed the Bush Administration to capitalize on unilateral executive authority. Bush’s unilateral executive authority facilitated the administration’s selection of a laws-of-war paradigm to protect national security that enabled indefinite detention without due process. A Republican-controlled Congress continued to validate indefinite detention through the paradigm, but eventual Supreme Court intervention led to inclusion of minimal due process for suspected terrorists. Although initially resistant to adopting international norms into American law and defying the executive, the United States Supreme Court, through its judicial decisions, revealed that it evidenced responsiveness to INGO pressure in *Hamdi (2004)*, *Rasul (2004)* and *Boumediene (2008)*.

Following the 9/11 terrorist attacks, President Bush declared a “War on Terror,” and the Bush Administration introduced the Authorization of the Use of Military Force (AUMF) in order to “authorize the use of...armed forces against those responsible for the recent attacks.” Congress quickly passed the resolution and articulated that President Bush had constitutional authority to take action to protect the nation from further acts of

terrorism. As such, the Office of Legal Counsel designed a strategy for prosecuting captured terrorists through the authorization of a Military Order establishing military commissions to try suspected terrorists (Toner 2001). Suspected terrorists were labeled “enemy combatants” who could be detained “at an appropriate location designated by the secretary of defense outside or within the United States.” The order and commissions enabled the Bush Administration to deny suspected terrorists due process by disqualifying them from prisoner-of-war (POW) protections under the Geneva Conventions (United States Department of Defense 2003).

According to U.S. Attorney General Alberto Gonzales, these enemy combatants were captured *soldiers* or *saboteurs* who may be detained for the *duration of hostilities*. They need not be guilty of anything; they are detained simply by virtue of their status as enemy combatants in war. Since wartime authority remained exclusively with the executive branch, the Bush Administration harnessed the laws-of-war framework to carry out unchecked extralegal powers, namely indefinite detentions. Deputy Assistant Attorney General John Yoo defended the indefinite detainment of suspected terrorists: “[T]he Geneva Convention deals only with state parties and al Qaeda is not a state. As for Taliban soldiers, Afghanistan under the Taliban was a ‘failed state’ to which the convention does not apply” (Yoo 2002). In the years immediately following this expansion of executive power over the detention process, no case addressing suspected terrorist detainees was brought to the Supreme Court.

Following Guantánamo Bay’s establishment off the coast of Cuba in January 2002, the Bush Administration received continued and increasing pressure to grant suspected terrorists access to fair trials. Since its establishment, the International

Committee of the Red Cross (ICRC) has regularly visited the detention facility. As the origin of the Geneva Conventions, the exclusive humanitarian mission of the ICRC is “to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance” (ICRC 2013, 1). In late 2003, after having the opportunity to conduct interviews with the detainees, the INGO charged the American military commissions with psychologically torturing terrorists (Lewis 2004).

As explained by Fletcher and Stover (2009), the ICRC considers the indefinite holding of detainees without allowing them knowledge of their fates and subsequent denial of due process psychological torture by causing mental health issues. The ICRC’s exposure of the unlawful detainment led to the Human Rights Watch – an internationally prominent INGO “dedicated to protecting the human rights of the people around the world” to launch a campaign advocating for the protection of suspected terrorists’ due process rights. The HRW’s number of publications increased from 36 in 2003 to 80 in 2004 (Human Rights Watch 2013).

In November 2003, the Human Rights Watch urged British Prime Minister Tony Blair to insist in his meeting with President Bush that every Guantanamo detainee should be tried in proceedings that meet the international standards of due process, and that the “military commissions promised by the Bush administration will not provide a fair trial” (HRW 2003d). The INGO continued by publishing an article in December 2003 declaring that Bush’s legitimization of the “war” on terror endangers “us all” by threatening basic due process rights (HRW 2003c). The HRW continued its criticisms, claiming that, “in Bush’s America, rules of war trump civil law” and that his state was “absent moral authority” (Ibid). As the publications became increasingly frequent, the international

community began to focus on the champion of democracy's abandonment of basic civil protections. The judiciary, though, continued to defer to the executive by not resisting the expansion of his executive power. Indeed, no case was brought to the Supreme Court dealing with detainees.

By March 2004, the HRW published a report outlining how the treatment of the Guantánamo prisoners violated international law. In the report, entitled "Enduring Freedom," the HRW recommended the following to the United States government:

As the sovereign authority, the Afghan government is ultimately responsible for protecting the legal rights of those detained by the United States. The United States must take immediate measures in conjunction with the Afghan Ministry of the Interior to ensure that detainees at Bagram airbase and other U.S. detention sites are charged and prosecuted, or released, in accordance with international due process standards. This includes access to counsel, and the right to a fair and public trial before a competent, impartial and independent court HRW 2004a, 36).

Shortly after, the HRW wrote a letter to Defense Secretary Donald Rumsfeld encouraging the Bush administration to allow human rights organizations to monitor detention facilities as a means of ending torture – physical and psychological – in U.S. detention facilities (HRW 2004b). In the letter, the human rights organizations referenced the leading American newspapers quoting U.S. intelligence officials supporting the denial of due process protections. Following increased mobilization and HRW campaign efforts, the Supreme Court attempted to constrain executive authority in June of 2004.

In late June 2004, the Supreme Court issued opinions in two cases that challenged the Bush Administration detention policy: *Hamdi (2004) v. Rumsfeld (2004)* and *Rasul v. Bush (2004)*. In *Hamdi (2004)*, the Court held that Mr. Hamdi, an American citizen captured in Afghanistan and considered an "enemy combatant," and enemy combatants of the like were to be given the chance to challenge their detention. In the plurality

opinion, Justice O'Connor wrote that, "a state of war is not a blank check for the president." In the ruling, the Court reflected susceptibility to the INGO pressure by requiring that U.S. citizens' due process protections be protected regardless of combatant status. The assurance of the right of appeal was critical because it was the way the judiciary could assess the executive authorized indefinite detainment of suspected terrorists.

O'Connor, unlike most of her colleagues, was a vigorous defender of foreign law.

In fact, she was quoted as saying:

There is talk today about the "internationalization of legal relations." We are already seeing this in American courts, and should see it increasingly in the future. This does not mean, of course, that our courts can or should abandon their character as domestic institutions. But conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts – what is sometimes called "transjudicialism" (O'Connor 2003).

Justice O'Connor's opinion in *Hamdi* (2004) reflects her understanding of how international law should be applied in domestic courts. O'Connor's opinion directly responded to the human rights organizations, particularly the HRW, by serving as the important judicial check on President Bush's America in which "rules of war trump civil law." On the other hand, Justice Scalia's dissent contends that only citizens detained through the criminal justice system are entitled to due process protections. Whereas Justice O'Connor embraces international law, Justice Scalia has a conservative approach to foreign and international legal sources (Waters 2004).

In reaching the *Hamdi* ruling, the Court focused on the rights on individuals afforded in the Constitution, particularly in relation to the suspension clause: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of

rebellion or invasion, the public safety may require it.” In reference, the Court asserted, “absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.” The Court duly noted the importance of constraining expansive executive power by expressing the writ’s importance: “The Great Writ allows the Judicial Branch to play a necessary role in maintaining the delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”

In so holding, the Supreme Court rejected the argument that the separation of powers principles mandated a restricted role for the courts in national security crisis. Thus, the Court was beginning to give into international pressure requesting their appearance in Bush’s laws of war paradigm. Of the two U.S. citizens held without due process at Guantánamo, one was transferred to federal custody for trial on criminal charges and the other was extradited to Saudi Arabia, but there was no change in policy.

Immediately following *Hamdi*, the Court heard *Rasul (2004)*. In *Rasul*, the lack of judicial review for foreign nationals held at Guantanamo was challenged. The Courts had the jurisdiction to consider challenges to the detention of foreign nationals by relying on the reasoning that judicial review applies to executive-held detainees in territories where the U.S. exercises “plenary and exclusive jurisdiction,” such as Guantánamo Bay. Once again, the Court referred to the Writ of Suspension stating, “application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ.” In both cases, the Supreme Court “checked” the executive’s institutional power to protect the rule of law.

In response to the Court's narrow rulings, the Department of Defense issued an order creating Combatant Status Review Tribunals (CSRTs), a forum where detainees could contest their status as an enemy combatant before a panel of military judges within thirty days of capture. The DOD claimed that they were modeled after those in Article 5 of the Geneva Conventions, but the international community found them inadequate to meet the sufficient due process requirements as detainees continued to lack a right to appeal, their status was not periodically reviewed and termination dates were not provided. The Department of Justice then filed a brief stating, that the [*Rasul* Court] expressly declined to address whether and what further proceedings would be appropriate" (Senate of the United States 2007)

After first declining and then slowly rising after 2004, the Human Rights Watch's publications on Guantanamo boomed in 2008. After newly elected President Obama's promise to immediately "shut down" Guantánamo after his inauguration, the HRW sought to *mobilize* the international community to campaign for the end of the military commissions established by the Bush Administration. Particularly notable was the HRW's early letter to Obama that warned the US that although countries have previously "looked to the US for leadership and guidance in the promotion of human rights," Obama's current blanket promise to close the detention facility denying due process as "a lack of accountability for past abuse, codification of indefinite detention and the militarization of law enforcement instead of seeing adherence to the rule of law and respect of human rights." The letter articulates the HRW's belief that, despite difficulty, because military detention systems undermine US values and opposition to detention practices that are inconsistent with basic principle of due process, Congress' "strong

bipartisan opposition” indicates ultimate support provision’s repeal because of its inherent denial of freedom (Roth 2008, 1). As in 2004, the Supreme Court would prove receptive to INGO pressure to abandon domestic practices and subscribe to international norms in the *Boumediene* (2008) ruling.

In *Boumediene v. Bush* (2008), the majority held that the military commission procedures established by the Bush Administration were not a sufficient substitute for judicial review of habeas petitions and held that citizens and foreign nationals held at Guantánamo as enemy combatants had a right to habeas review in federal courts. The Court also held that the CSRT procedures were not a sufficient substitute for judicial review. In the majority opinion, Justice Kennedy wrote:

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law (Kennedy 2008).

Like Justice O’Connor, Justice Kennedy had an appreciation for and interest in international law. According to Toobin (2008), Justice Kennedy is a leading proponent of the use of foreign and international law as an aid to interpreting the United States Constitution. Kennedy’s incorporation of international law in the *Boumediene* (2008) opinion not only reflects his reliance on international law in interpreting the Constitution, but also that the Supreme Court proved receptive to international norms in the face of international pressure through INGO mobilization and intervention.

Ultimately, the Court ruled that the denial of judicial review undermines the most fundamental tenet that distinguishes separation of powers – the Court’s authority to determine habeas corpus. Responding to whether the President had Congressional

authorization to determine if habeas corpus applies to terrorist suspects, the Court affirmed:

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to the regime in which they, not this Court, say “what the law is”...the habeas writ is itself an indispensable mechanism for monitoring the separation of powers (Kennedy 2008).

The Court then located the due process rights of terrorist suspects within constitutional law, and found that habeas review was more applicable for those detained by executive order than when held within the criminal justice system. In doing so, the Court enforced the nation’s basic notions of justice and due process rights to terrorist suspects by affording minimal due process to enemy combatants. Similar to the previous decisions, however, the Court avoided ruling on the legality of indefinite detentions, and thus the executive continues to use the laws-of-war-paradigm to justify indefinite detention for enemy combatants.

As indicated by the HRW’s publications, in 2004 and 2008, HRW publications were at record highs, and the year following years had a decrease in publications. From 2001-2003, the HRW published a total of 116 reports on Guantánamo Bay. After being relatively silent from July – October and not publishing any reports in August and September, the HRW published sixteen reports in November and December, and most of the reports concerned terrorist suspects’ right to trial, including “Walk the Freedom talk, Mr. Bush” (11/25/2003), “America’s Guilt: the Prisoners in a Legal Black Hole” and “United States: Bush-Blair Talks Must Ensure Fair Trials at Guantánamo.” All were published in November 2003. In 2004, the HRW published 124 publications, fifty of which were published prior to the Supreme Court’s rulings on *Hamdi* and *Rasul*. Prior to

the June rulings, most of the publications blamed the United States of derogating from its international obligations. Of particular interest is that in the month prior to the rulings (May), on behalf of the HRW, human rights groups wrote two individual letters to both President Bush and Secretary of Defense Donald Rumsfeld mostly regarding the continued lack of fair trial under the established military commissions (HRW 2003b). Publications throughout the year, though, indicate the district courts began to move toward fair hearings by halting military commissions. After rising by 238% from 2003 to 2004, the HRW's publication rate on Guantánamo dropped by twenty-five percent to ninety-two in 2005 (HRW 2013).

Since the *Hamdi* and *Rasul* rulings, the HRW's publications have yet to return to the low rates seen in 2001-2003, but 2008 maintains the highest number of publications. Matching the trend in 2004, the HRW significantly increased the number of publications (152 rulings in 2007, 234 in 2008, a 65% increase) in years the United States Supreme Court rendered rulings determining due process protections for terrorist suspects. *Boumediene* (2008) issued a "new legal victory" for terrorist suspects when the United States Supreme Court answered if there can be justice in Guantanamo by issuing a landmark ruling advising Bush that he is "not above the law," thus restoring checks and balances to US government detentions after seven years of the Bush administration's claim of unchecked authority to detain ("Can there be Justice in Guantánamo?" (2/2008); "Landmark Ruling in Guantánamo Case" (6/2008); "SC to Bush: You're not above the Law" (6/2008); "US: New Legal Victory Guantánamo" (7/2008). A slight decrease from 2008 to 2009 can be explained by the inauguration of new president promising to close

the camps were he elected as publication rates from 2010-2013 are similar to those of 2005-2007.

Ultimately, the eight years of the Bush Administration began and ended with indefinite detention, but the Supreme Court ultimately achieved limited due process through the 2004 and 2008 rulings. As suggested by the theoretical framework, the opinions expanding a suspected terrorist's access to due process were written by internationally "socialized" judges. Furthermore, justices proud of never attending international conferences, namely Justice Scalia, wrote the strongest dissents. In fact, in the concurring judgment of *Sosa v. Alvarez-Machain et al* (2004), Scalia wrote, "for over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law." Although heavily reliant on the international socialization of justices, the success of the pressuring theory is not limited to it.

As the only outside organization authorized unrestricted visits to Guantánamo Bay, the ICRC provides the international community with much of its information through conducting on-site research (ICRC 2013). As early as November 2004 after having the opportunity to conduct interviews with detainees, the INGO charged (in confidential reports to the US government) that the American military was psychologically torturing terrorist suspects by denying them the right to a fair trial (Lewis 2004). By combining the ICRC's going-going research with that of states and other INGOs, the HRW began communicating, via letter, to American Presidents and Secretaries of Defense urging the country to extend international due process protections to terrorist suspects. As practices on Guantánamo worsened, the HRW published detailed

accounts and memorandums at increasing levels, and joined with other human rights INGOs to mobilize campaigns to protest against the practices on Guantánamo. In doing so, the INGO participated in the most basic and most intense INGO intervention methods.

By employing the most interactive and therefore intense intervention methods, the HRW was able to exert enough pressure on the Supreme Court to issue limited due process rights to terrorist suspects. Maintaining the authority to rule the executive's declaration of unilateral authority on detainment unconstitutional, terrorist suspects' potential access to a fair trial lies with the Supreme Court. Through mobilizing information and campaigning, the INGO's effort was able to gain domestic personality.

In the process of mobilizing international attention, domestic NGOs began researching terrorist suspects' access to a fair trial as well. Domestic NGO intervention efforts are similar to those of INGOs, but lack the audience of an INGO. Although capable of attracting INGO attention, NGOs typically join an INGO's cause, particularly one concerning international law (Khagram, Riker and Sikkink 2002).

Regarding terrorist suspects' due process rights, NGOs largely joined the INGO's actions, as INGOs are generally more educated on the rights on which the terror suspects were denied. In this case, NGOs intervene in the same manner as INGOs but do so by joining INGOs. Domestic NGOs can play an integral role in pressuring theory as it expands those exerting pressure. For example, rather than appealing to the national political figures, they can appeal to their state representative or senator. For a further and more complete analysis of domestic NGO participation, recommended organizations to consider are the American Civil Liberties Union, the Center for Justice and

Accountability and Center for American Progress. They are worth considering because each has a focus on human rights and as domestic NGOs, are likely equally or more familiar with domestic law than international organizations.

Popular sentiment can enhance INGO efforts to exert pressure on a government system, but it does not determine its success. Perhaps the biggest obstacle INGOs face in guaranteeing complete due process rights protection to terrorist suspects in the United States is the Court's tendency to defer to the executive. After Guantánamo failed to close following the *Boumediene* (2008) ruling and Obama's inauguration, Jones (2009) analyzed popular sentiment in closing Guantánamo and allowing prisoners to move to the United States. Moving the prisoners to the United States would almost guarantee them access to the US court systems. As he discovered:

By a better than 2-to-1 margin, Americans are opposed to closing the Guantanamo Bay prison that houses terror suspects and moving some of those prisoners to the US. Americans express even more widespread opposition to the idea of moving the prisoners to prisons in their own states if Guantanamo is closed (Jones 2009, 2).

Although Obama gave a highly publicized address on terrorism arguing that maintaining the prison at Guantánamo has weakened U.S. national security, as it became an important symbol of denying the fundamental liberties the country is built upon, only eighteen percent of Americans believed that the prison weakened U.S. national security. Although the United States court is proving receptive to international pressure, particularly the internationally "socialized justices," the American public appears to be supporting efforts to continue the suspension of due process rights to terrorist suspects (Jones 2009).

Saad (2009) conducted a more specific poll measuring whether Americans would prefer trying 9/11 mastermind in a military court in New York. Results followed the trend found in the study conducted by Jones (2009). By fifty-nine to thirty-six percent,

more Americans believe that Khalid Sheikh Mohammed should be tried in a military court, rather than in a civilian criminal court. The poll was conducted a week after U.S. Attorney General Eric Holder announced that Mohammed's case would be moved from a military tribunal in Guantánamo, where the admitted terrorist was originally charged, to a federal court in New York City. The split popular sentiment in the United States indicates that it is not a strong enough force to exert pressure for change, particularly in a democratic regime. Because the democratic regime aims to represent the people, a split popular sentiment requires groups to be satisfied at the expense of others' dissatisfaction.

The international socialization of some of the Supreme Court justices, especially those who penned the decisions, may have contributed to the Court making judgments that are aligned with the calls of international human rights groups. Because the Court routinely deferred to the executive to continue validating the denial of due process for terrorist suspects, INGOs had to exert maximum pressure through campaigns and protests. In doing so, INGOs garnered the support of domestic NGOs, despite a split popular sentiment. The involvement of domestic INGOs was supported by a fraction of the population, and thus domestic NGOs took interest and joined INGO efforts to pressure the US government to extend due process protections to terrorist suspects.

B. The Case of the United Kingdom

In the United Kingdom, the judiciary reacted more quickly to executive measures to protect national security than the United States Court. Initially, the executive used a security-based framework to indefinitely detain suspected terrorists. After being struck down by the court, the "fusion of powers" required the executive to extensively engage in

consultations with the legislatures to derive a new means of protecting national security, and eventually due process protections were guaranteed. Analysis of the process reveals that the internationally socialized judges used their opinions to signal the mobilization of INGOs to intervene to grant due process protections to suspected terrorists in the United Kingdom.

Whereas the United States relied on war-powers framework to validate indefinite detentions, the United Kingdom relied on an immigration law framework to deny due process rights to suspected terrorists. Following 9/11, Home Secretary David Blunkett introduced the Anti-Terrorism, Crime and Security 2001 (ATCSA) Act enhancing police powers to investigate and prevent terrorist activity in Parliament. Included in the act was a measure allowing for the indefinite detention of foreign nationals suspected of terrorism, inherently derogated from Article 5 of the ECHR and Article 9 of the ICCPR. Both of the articles protect individuals' right to liberty.

The act, however, provided limited due process. On the other hand, it guaranteed the right to appeal one's detention with the assistance of counsel through a national security tribunal established under UK immigration law (SIAC). Due process, though, was not complete because the SIAC excluded the detainee and counsel from proceedings, and suspected terrorists consequently lacked legitimate judicial review by a court and could be held indefinitely given the heightened threat to national security (Bianchi and Keller 2008).

In defending the act, Blunkett (2009) elaborated, "Circumstances and public opinion demanded urgent and appropriate action after the...attacks...I would have thought, universal call for even more draconian measures than those that I am accused of

introducing” (*Judicial Work* 2011, 13) . In his defense, Blunkett concedes that the SIAC’s indefinite detention measure was more generous than what the government should have introduced. Blunkett appeared Parliament in the SIAC measurement by contending that it provided “sufficient safeguards,” and established an annual review of the legislation to determine whether it was still necessary. As for citizens, the Criminal Justice Act 2003 extended the pre-charge detention time from seven to fourteen days (*Judicial Work* 2011).

The *Belmarsh Detainees* case (2004), however, challenged the legality of ATCSA’s indefinite detention provision. In *Belmarsh*, the Law Lords found the provision an infringement on one of the most fundamental rights protected by Article 5 of the ECHR because it violated “the right to individual liberty, one of the most fundamental of human rights.” More specifically, the ATCSA was incompatible with ECHR Article 15, which reads “indefinite detention without trial wholly negates that right for an indefinite period.” By citing international obligations, the Court acknowledged its role in protecting the rights of the individuals (“Judicial Work” 2011).

Following *Belmarsh*, the HRW commended the direction of the UK High Court. In fact, the HRW argued that England’s continued compliance with international law regarding suspected terrorists “is a real victory.” Regarding torture specifically (psychological included), the HRW wrote that the “Law Lords have affirmed a core tenet of our values – that torture evidence is never acceptable.” The HRW specifically cites the *Belmarsh (2004)* case and explains that, “Britain’s highest court has sent a clear signal to the government that torture is wrong” (HRW 2005). Not only does this HRW

publication reveal the High Court's signaling to the government branches, but also that INGO mobilization efforts can be used as a vehicle for signaling to the government.

The ICRC also commended the High Court's ruling in restoring the practice of liberty. The ICRC's memo referred to military manuals, national legislation and national case law to support the High Court's decision. Beginning with the SIAC, the ICRC warned the United Kingdom of sacrificing its liberty to conform to policies as those similar to the United States. To keep from doing so, the ICRC recommended that the United Kingdom refer its international obligations when protecting national security in the state of emergency (ICRC 2004).

In response to the Court's *Belmarsh (2004)* ruling, the Government repealed Part 5 of the ATCSA and introduced the Prevention of Terrorism Act 2005 (PTA). The Act required a control order reviewed by a court upon arrest, but extended pre-charge detention for a maximum of twelve months. The act recognized that the heightened threat from terrorism required flexibility to derogate from existing due process obligations, but complied with the High Court's judgment. The PTA "illustrates both the desire to comply with the Lords' judgment and the desire to maintain a balance between security and liberty during public emergencies" (HL Deb 2005).

Shortly after the enactment of the PTA, London suffered a terrorist attack on the public transport system, an attack killing fifty-two people and injuring seven hundred (Cowell 2005). As a response, Prime Minister Tony Blair tried to increase pre-charge detention for citizens to ninety days. The Parliament, however, remained in accordance with the Court and rejected Blair's extension. To compromise, Parliament passed the Terrorism Act 2006 extending the detention to a maximum of 28 days (Ibid n/d).

As the Law Lords began to hear *Secretary of State for Home Department v. MB and AF* (2007), Amnesty International advised the UK to “prosecute don’t persecute.” In other words, AI called on the Law Lords to put the accused on trial rather than persecuting them indefinitely on the basis of information that has been withheld from them and their lawyers of choice. If sufficient evidence exists that the terrorist suspect has been involved in “terrorism-related” activity, Amnesty International wrote, then they should be charged with a recognizable criminal offense and tried in proceeding in accordance with international fair trial standards.

In *Secretary of State for Home Department v MB and AF* (2007), the Court ruled that there were some instances of heightened security, to be decided on a case-by-case basis, when executive authority could be expanded to infringe upon due process to protect national security. Unless the circumstances were compelling enough not to do so, due process had to be afforded. Likewise, in line with Article 6 ECHR, the Court ruled that the PTA could provide a fair hearing with due process because:

In ordinary civil proceedings it is appropriate to give weight to the interests of each side...[T]he state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy...But the judge is also public authority for the purpose of the HRA and thus under a duty to act compatibly with the Convention rights unless precluded from doing so by primary legislation which cannot be read in any other way.

Thus, the PTA would only be in effect when it was “fair for them do so” (Ibid n/d). The judiciary’s late ruling on the PTA encouraged the Parliament to draft and pass the Counterterrorism Bill 2008, extending the pre-charge detention time to forty-two days. As with the PTA, the bill was only to apply in emergency situations.

In 2009, the HRW issued a letter to the UK Parliament, requesting it to support the Court’s decisions to align UK law with international standards of due process

protections for terrorist suspects. The letter was written in advance of the debate on the renewal of the control order regime under sections 1 through 9 of the PTA and detailed the HRW's concerns and recommendations for bringing the control order regime completely in line with the United Kingdom's human rights obligations (HRW 2009). Of particular concern was that the UK Secretary of State would impose restrictions of the ECHR and consequently impose indefinite detention periods on the basis of a low standard of proof and secret evidence.

While appreciating the Law Lords' view that the absence of a realistic prospect of prosecution is not a necessary pre-condition for imposing a control order, the HRW warned against the interpretation that the PTA imposes an obligation on the Secretary of State to keep the possibility of prosecution under review. The HRW cited the Law Lords' previous ruling that control orders based solely on secret evidence violated the right to a fair hearing, and urged the Law Lords to maintain their ruling in upcoming appeals.

Moreover, along with detailing human rights violations the control order was likely to impose, the HRW acknowledged the Law Lords' signal to protect a terrorist suspect's due process rights by invalidating a policy of indefinite detention of foreign terrorism suspects as a human rights law violation. As HRW noted, this control order was one of a number of orders the courts struck down because the restrictions taken were incompatible with ECHR article 5. By striking down policies and control orders, the Court was signaling to the legislative and executive that new regulations on a terrorist suspect's access to trial must be developed. The Law Lords not only required an establishment of new policies and control orders, but also signaled to INGOs such as the

HRW that previously established policies violated international human rights law to which they were bound. In conclusion, the HRW placed the opportunity for due process protections for suspected terrorists in the judicial branch by writing that, “effective use of the criminal justice system is the appropriate way to deal with those suspected of involvement in terrorism.”

The HRW’s actions were generally supportive of the signals and direction that the Law Lords have undertaken. In practical terms, its letters served as extensions of influence of the Court. Although the letter to Parliament issued recommendations to the Law Lords, their recommendations to the legislative body (in summary) were to uphold the Law Lords decisions in previous cases. The letter clearly demonstrates a signaling approach where the Court leads the way toward international law compliance, goading the legislature to follow accordingly, with INGOs and domestic NGOs serving as external “support belts” to its chosen body of jurisprudence.

Beginning with *Belmarsh (2004)*, the United Kingdom’s High Court System communicated to the executive and legislative branches that the Court would foster international norms. As seen in the multiple publications directed towards the United States, the United Kingdom was a common reference to encourage the United States to adopt similar measures. In the UK case, the INGOs were the handmaidens of the Law Lords (Dyzenhaus 2011).

It is important to note, however, the inherent international socialization of the United Kingdom’s Law Lords. As part of the European Union (EU), regional law is automatically applicable in domestic court systems because of European Conventions. Most of the European states also have a monistic structure with regards to international

law (Slaughter and White). These Conventions are built upon international law, and thus international law is automatically considered part of domestic law. Furthermore, the intense cooperation amongst the branches throughout the “War on Terrorism” has protected due process rights for suspected terrorists. Although initially calling for executive power, the Court quickly balanced the power by regulating the act limiting due process. The international socialization of judges, interaction and cooperation amongst the government branches and stability of the government allows the United Kingdom to exemplify the signaling theory.

In the United Kingdom, INGO intervention efforts were almost exclusively limited to more moderate efforts. Because the United Kingdom is highly socialized internationally, it is greatly influenced by states in which they align with regularly with in order to maintain peace, such as the European Union. Consequently, INGOs can exert a significant amount of influence with less intense intervention efforts, such as conducting research and communicating with political bodies. Arguably, less intensive efforts are more valuable in states that are internationally socialized. Because the UK interacts with and relies on European allies, it is more likely to conform to international law. In other words, because of the UK’s extreme international socialization and geographic proximity with the majority of its allies, INGOs can exert arguably exert equal amounts of influence without its most intense efforts, such as campaigning and protest.

Likewise, the limited INGO efforts pose less opportunity for domestic NGOs to be heavily involved. As a strongly internationalized country, domestic NGOs are not as prominent in European countries as in countries that are geographically more isolated. Since international law is integrated in the UK’s legal system, there is less need for

domestic NGO involvement because English law is developed on the existing international law. When present, though, domestic NGOs are likely to join INGOs when the opportunity is available, because as in the United States, as international organizations, INGOs have a broader audience and larger allotment of resources. . Finally, the Court' willingness to hear cases regarding the due process rights of terrorist suspects gives domestic NGOs less opportunity to organize efforts because of its tendency to swiftly ask. Therefore, the presence of domestic NGOs in establishing due process rights for suspected terrorists are not as present because they are likely to be adopted by international organizations.

A public opinion poll generated by the Euro Barometer Index (2012) revealed that the popular sentiment in the United Kingdom supports the Court's efforts to extend due process rights to terrorist suspects by voting – eighty-two to eighteen percent – that all kinds of torture should be prohibited. The measurement proved standard among other states in the European Union. This, however, is unsurprising based on England's recent history with terrorism and their integration of international law into their domestic legal system. Because the United Kingdom recognizes international law as part of its domestic system, popular sentiment is likely to support the law. Additionally, the UK's recent history (to an extent) reduces the "shock factor" of terrorist attacks. Because the state has been subject to terrorist attacks more frequently, it is less willing to claim a prolonged state of an emergency. Instead, the UK government has begun adopted and sophisticating its counterterrorism policies.

The United Kingdom's international integration politically, economically and socially makes the state more likely to adhere to international norms. The inherent

international socialization of the Supreme Court along with its recent familiarity with terrorism allow it to be more receptive to international norm adherence by signaling INGO mobilization through their judgments. The intensity of INGO participation, domestic NGO participation and public sentiment are relevant, but allow the success of the signaling theory because of the shared inherent international socialization with the Court.

V. Summary of Findings and Conclusion

	“Internationally Socialized” Judges	Intensity of INGO Participation	Domestic NGO Participation	Court Relations with Regime	Popular Sentiment	Pathway
United States	<i>Minimal</i>	<i>High</i> (Activities 1-4 present ¹)	Supported INGO actions	Tends to be Deferent to Executive on Security Issues	Split	<i>Pressuring</i>
United Kingdom	<i>Majority</i>	<i>Low</i> (Activities 1,2)	Mostly Background support	Non-Deferential	Split	<i>Signaling</i>

Since the Terrorism Act of 2000, Britain’s preventative detention regime has increased from seven days to twenty-eight hours and judicial review every seven days after the initial forty-eight hours. Despite the executive’s attempts to extend pre-charge detention, the preventative detention regime has remained limited and grants a degree of protection to terrorist suspects’ international and domestic right to due process. Although the United Kingdom’s executive has exercised attempts of executive authority, Britain has “never asserted such authority in the war on terror.” The Court has not abandoned its duty of judicial review in a state of emergency, but instead has acted in preserving civil liberties defined by international law while considering national security. Likewise, Parliament continues to work with the Court to protect its citizens by continuing to openly debate the issue of indefinite detention for terrorist suspects. The open debate

¹ Refer to Table 1 on page 16 again for the list of INGO involvement efforts.

keeps Parliament from abdicating its responsibilities to its citizens while also maintaining its balance with the judicial branch.

By contrast, the United States has allowed executive usurpation of power to abandon international norms protecting individual civil liberties, namely due process protections. Although the Supreme Court has ruled that terrorist suspects are to be allowed a “modicum of judicial review to challenge the factual assertion that they are enemy combatants,” the Court has yet to establish a time frame (Blum 21). Consequently, indefinite detention is legally persisting by the failure to provide a timeframe for how long terrorist suspects can be denied due process protections, including access to counsel.

Precisely stated by Tom Malinowski of Human Rights Watch in an address to Congress in June 2008, “the U.S. Congress has never in its history formally established a system of preventive detention without trial to deal with national security threats.” The United States, though, has not had to, and the resulting detention policies from 9/11 represent the state’s insecurity in handling terrorism. Where as the United Kingdom recently had frequent experience with the IRA, this was a relatively unfamiliar domain for the United States. Even though the United Kingdom’s approach to due process for terrorist suspects does not completely protect due process rights, the approach protects the due process rights to a degree by providing a measure of judicial review, some access to counsel, congressional oversight and some balance of unilateral executive authority. The protections granted have been granted by the judicial system, further protected by the legislative, and relatively respected by the executive. The United States, on the other hand, has largely relied on unilateral executive authority.

While the Bush Administration used unilateral executive power to invoke a laws-or war-paradigm and deny due process protections to alien and citizen terrorist suspects, the United Kingdom's Court continued to protect the right to liberty despite the Blair Government's attempts to implement indefinite detention for foreign nationals. Eventually, INGOs were able to successfully pressure the United States Supreme Court to afford terrorists minimal due process protections. The United Kingdom interacted with INGOs, but in a different manner. The High Court of the United Kingdom used judicial decisions as a "signal" to INGOs to mobilize protection of due process for suspected terrorists. As determined in this paper, states with internationally socialized judges, along with frequent and cooperative interactions amongst government branches, signal INGOs. Governments with domestically focused judges are more likely to operate internally (not only in the international realm, but in the domestic realm as well), and face INGO intervention pressure later on. As epitomized by the United States, however, a strong government allows a state to reform existing measures.

Finally, the state's level of international socialization proves to be a determining factor for intensity of INGO and domestic NGO participation and popular sentiment levels. As previously described, in highly socialized states, INGOs are able to exert significant through less intense campaigns because of the reliability of those states on their geographically proximate allies. Domestic [human rights law] NGOs are not only less represented in states with higher levels of international socialization, but also less effective because these states abide by international law as part of their domestic legal regimes. Popular sentiment follows the same pattern, because if domestic law is international law, the popular sentiment is going to be to protect the law because that is

what preserves security. In a state where international law and national law are separated, like the United States however, citizens are likely to measure national security with the application of domestic law.

This research serves as a base study for how the relationship between judicial socialization and INGO mobilization foster greater adherence to international norms. This research is also limited to one international norm: the increased protection of a suspected terrorist's right to due process. Recommendations for further study include, the application of the theoretical framework to other issue areas like the death penalty, torture or socio-economic rights. Furthermore, an in-depth analysis of INGO-NGO collaborations can illuminate further the relationship between these entities on issues involving human rights. Finally, it would be most interesting to track the different ways in which judges are "internationally socialized" (Slaughter and Burke-White 2004).

The great jurist Benjamin Cardozo once said that "Justice is not to be taken by storm. She is to be wooed by slow advances." (1924, 33). In domestic settings that involve due process for terrorists, they are "slow advances" that can be led by transnational civil society, or by the trumpet call of internationally-socialized judges.

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