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A HUMAN RIGHTS APPROACH TO COUNTER- TERRORISM

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I. INTRODUCTION

Although terrorism utilizes unlawful methods for intimidation and the promotion of fear, the response to it should be directed at ensuring the rule of law.¹ As Secretary-General Kofi Annan has stated:

Terrorist acts . . . constitute grave violations of human rights. Our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essen-

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1. See The Secretary-General, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 1, delivered to the General Assembly, U.N. Doc. A/58/266 (Aug. 8, 2003) [hereinafter *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*] (referring to G.A. Res. 57/219, ¶ 1, U.N. Doc. A/RES/57/219 (Dec. 18, 2002)).

tial tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension.²

Similarly, the U.N. High Commissioner for Human Rights, Louise Arbour, opined that in the long run, “a commitment to uphold respect for human rights and rule of law will be one of the keys to success in countering terrorism—not an impediment blocking our way.”³

These observations suggest that rather than fall victim to terrorism, human rights should be used affirmatively to conquer it. In this endeavor, twenty-first century policy-makers have sought unsuccessfully to delimit and identify the meaning of terrorism and to determine the role international human rights law should play. The links between terrorism and human rights pose many questions: What acts constitute terrorism? What sensitivity should framers of a definition of terrorism have concerning the self-determination of peoples within a state? Should terrorism be looked upon solely as a law enforcement issue, as a military issue, as a reflection of disparate social and wealth distribution, or as all three? Is a solution to the pandemic of terrorism grounded in international human rights law and, if so, how does it reflect the changing worldview of the role of human rights? What are the underlying conditions and root causes of terrorist behavior, and how can they be diminished? As the world’s lone superpower, what role does the United States play in combating terrorism, and what are the consequences of human rights failures in the United States’ “war on terrorism”? Most importantly, how do policy-makers stop the violence and bloodshed without compromising accepted norms or reversing positive global trends in human rights?

To address the scourge of terrorism, a consensus on its basic elements and an acknowledgement of the applicability of human rights jurisprudence are necessary. In addition, addressing terrorism will require universal adherence to human rights norms even in the face of extremist violence and political pressure. To analyze the questions posed here, this article will examine the problem of terrorism from a human rights perspective. This examination will entail describing the direct and indirect impact of terrorism on human rights. It will also require a review of the historical impediments to a solution to terror-

2. Press Release, The Secretary General, All Must Work Together to Counter Terrorism, Prevent Spread of Weapons of Mass Destruction, Secretary-General Says, U.N. Doc. SG/SM/8624-SC/7680 (Mar. 6, 2003) [hereinafter Press Release, The Secretary General], available at <http://www.un.org/News/Press/docs/2003/sgsm8624.doc.htm>.

3. Louise Arbour, U.N. High Comm’r for Refugees, Security Under the Rule of Law, Keynote Address Before the Biennial Conference of the International Commission of Jurists (Aug. 27, 2004), available at <http://www.hchr.org.co/publico/comunicados/2004/cp0431.pdf>.

ism, including the tension between those who consider terrorism to be a reflection of greater sociopolitical-economic disparities and those who consider it strictly as a law enforcement or military issue. Moreover, this article will discuss the emerging role of human rights jurisprudence and counter-terrorism initiatives, seek a direction modeled after the template of the U.N. Comprehensive Plan to Combat Terrorism, discuss alternatives to fashioning an immutable definition of terrorism, and analyze both stand-alone human rights strategies for addressing terrorism and the incorporation of strict adherence to human rights norms into more traditional models of counter-terrorism.

II. THE LINK BETWEEN HUMAN RIGHTS AND TERRORISM

In response to growing concerns over mounting discord among states, U.N. Secretary-General Kofi Annan formed the High-level Panel on Threats, Challenges and Change (High-level Panel).⁴ On December 2, 2004, the High-level Panel proffered “a new vision of collective security for the 21st century” in a report that included 101 recommendations for revitalizing the United Nations in order to make it capable of addressing modern threats.⁵ These efforts include a proposed definition of terrorism⁶ and a comprehensive global strategy for combating it.⁷ Certain key recommendations of the report call upon the United Nations to:

4. See Kofi A. Annan, *Foreword* to SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY vii (2004) [hereinafter A MORE SECURE WORLD], available at <http://www.un.org/secure-world/report2.pdf>.

5. SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, EXECUTIVE SUMMARY 1 (2004) [hereinafter EXECUTIVE SUMMARY], available at <http://www.un.org/secureworld/brochure.pdf>; Horst Rutsch, *A More Secure World: Our Shared Responsibility, High-Level Panel Presents New Vision of Collective Security*, U.N. CHRON. ONLINE EDITION, <http://www.un.org/Pubs/chronicle/2004/issue4/0404p77.html> (last visited Apr. 10, 2006). The threats identified by the report were broken down into six “clusters” as follows: “war between States; violence within States, including civil wars, large-scale human rights abuses and genocide; poverty, infectious disease, and environmental degradation; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime.” EXECUTIVE SUMMARY, *supra*, at 2.

6. A MORE SECURE WORLD, *supra* note 4, ¶¶ 157-64, at 51-52.. The Panel proposes that the definition include:

[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and the Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Id. ¶ 164(d), at 52.

7. *Id.* annex 1 ¶¶ 38-44, at 103-04.

- a) . . . [R]everse the causes or facilitators of terrorism . . . [by] promoting social and political rights, the rule of law and democratic reform[,] . . . address major political grievances[,] . . . reduc[e] poverty and underemployment[,] and stop[] State collapse;
- b) . . . [C]ounter extremism and intolerance . . . through education and fostering public debate;
- c) Develop[] . . . better instruments for global counterterrorism cooperation . . . within a legal framework that is respectful of civil liberties and human rights . . . ;
- d) Build[] State capacity to prevent terrorist recruitment and operations; [and]
- e) Control . . . dangerous material and public health defense.⁸

These key recommendations were later reflected in the Secretary-General's keynote speech at the International Summit on Democracy, Terrorism, and Security on March 10, 2005, in his articulation of five strategies, which he called the "five D's."

They are:

- first to *dissuade* disaffected from choosing terrorism as a tactic to achieve their goals;
- second, to *deny* terrorists the means to carry out their attacks;
- third, to *deter* states from supporting terrorists;
- fourth, to *develop state capacity* to prevent terrorism;
- and fifth, to *defend* human rights in the struggle against terrorism.⁹

The "five D's" and the High-level Panel's key recommendations can loosely be categorized into three distinct models for combating terrorism: military, law enforcement, and human rights. The first model, military intervention in response to terrorist acts or their imminent threat, is grounded in Article 51 of the Charter of the United Nations (U.N. Charter).¹⁰ The military model, as limited by certain con-

8. *Id.* ¶ 38, at 103.

9. Kofi A. Annan, The Secretary-General, United Nations, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security (Mar. 10, 2005) [hereinafter Annan, Global Strategy], *available at* <http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html#transcription>; UNITED NATIONS FOUND., FACT SHEET: THE UN'S CONTRIBUTIONS TO COUNTER-TERRORISM I, http://www.unfoundation.org/files/pdf/2005/UN_Counterterrorism_Fact_Sheet.pdf (last visited Dec. 19, 2005) [hereinafter UNITED NATIONS FOUND.].

10. See EXECUTIVE SUMMARY, *supra* note 5. Article 51 of the U.N. Charter states: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Na-

ditional prerequisites,¹¹ includes peacekeeping tasks, deterring state support for terrorism by threat of military intervention, developing state preventive capacity by providing military aid, and assisting in the orderly distribution of humanitarian aid.¹² This model can also be effective in preempting imminent threats of attacks and correcting ongoing terrorist activities when civilian authorities are unwilling or unable to intercede.

Law enforcement, the second model, is grounded in international criminal law and extant core anti-terrorism conventions.¹³ In contrast

tions, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51. On December 3, 2004, Secretary-General Kofi Annan acknowledged that the Panel explicitly "reaffirms the right of states to defend themselves, including preemptively when an attack is imminent . . ." Kofi Annan, Editorial, *A Way Forward on Global Security*, <http://www.un.org/secureworld/oped.html> (last visited Mar. 13, 2006) (this editorial, reportedly published in the Dec. 3, 2004 version of the INT'L HERALD TRIB., does not appear actually to have been published there).

11. Kofi Annan, Editorial, *Courage to Fulfill Our Responsibilities*, THE ECONOMIST, Dec. 2 2004, available at <http://www.un.org/secureworld/oped.html>. The High-level Panel's report limits the use of force to imminent threats and postulates five basic guidelines to be considered:

Seriousness of threat: Is the threat serious enough to justify prima facie the use of force?

Proper purpose: Is the primary purpose of the proposed use of force to halt or avert the threat in question?

Last resort: Has every non-military option been explored and exhausted?

Proportional means: Is the force proposed the minimum necessary to meet the threat?

Balance of consequences: Is it clear that the consequences of the action will not be worse than the consequences of inaction?

Id.

12. One example of the use of the military for the distribution of humanitarian aid was the U.S. response to a famine jeopardizing 700,000 people in Somalia during the early 1990s. See RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 84 (2004). Then-President George H.W. Bush sent troops to Somalia to protect relief supplies that were being stolen by armed Somalis. *Id.* Ultimately, President Clinton escalated the military presence and oversight of the relief operation, which resulted in the successful distribution of aid. *Cf. id.* at 85-87.

13. There are a number of United Nations counter-terrorism conventions. United Nations Treaty Collection, Conventions on Terrorism, <http://untreaty.un.org/English/Terrorism.asp> (last visited Mar. 4, 2006); see International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-6, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 30 I.L.M. 721; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 304; International Convention Against the Taking of

to the military model, which employs armed forces and treats terrorism as a military problem, this model is largely carried out by civilian authorities and treats terrorism as a criminal matter, albeit in virulent form. The law enforcement model is addressed by the U.N. strategy to combat terrorism as a mechanism to “[d]eny[] terrorists the means to carry out attacks” and “[d]evelop[] state preventative capacity.”¹⁴ The High-level Panel’s recommendation to develop better instruments for global counter-terrorism within a legal framework fits into a law enforcement model.¹⁵ So, too, does its recommendations for greater cooperation between states with respect to investigation, sharing information, extradition, and freezing financial accounts thought to be tied to terrorism. Moreover, law enforcement as an investigatory instrument is arguably in the best position to control the distribution of dangerous material.

The third model, human rights, consists primarily of preventative measures and is grounded in applicable international and humanitarian law, as well as human rights conventions and jurisprudence. It addresses the causes of terrorism in order to “dissuad[e] the disaffected from choosing terrorist tactics” and “defend[] human rights in the struggle against the scourge of terror.”¹⁶ The High-level Panel speci-

Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

There are also a number of regional conventions that address terrorism. See United Nations Treaty Collection, *supra*; OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism, July 14, 1999, available at http://untreaty.un.org/English/Terrorism/oau_e.pdf; Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, reprinted in U.N. Doc. A/54/637* annex (Oct. 11, 2000); Treaty on the Cooperation Among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, available at http://untreaty.un.org/English/Terrorism/csi_e.pdf; SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism, Nov. 4, 1987, available at <http://untreaty.un.org/English/Terrorism/Conv18.pdf>; Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, available at <http://www.al-bab.com/arab/docs/league/terrorism98.htm>; European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90; Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195 (registered by the Organization of American States (OAS)).

14. UNITED NATIONS FOUND., *supra* note 9, at 1; Annan, Global Strategy, *supra* note 9.

15. See generally *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, *supra* note 1; Press Release, The Secretary-General, *supra* note 2.

16. UNITED NATIONS FOUND., *supra* note 9, at 1; Annan, Global Strategy, *supra* note 9.

fies numerous social and political justice issues, past grievances, and poverty issues that must be addressed in order to foster a new sense of tolerance in communities currently given to extremism.

A human rights approach consists of a two-part initiative, stand-alone and integrated. The first initiative, a stand-alone approach, is designed to relieve the underlying suffering that fosters terrorism. Relief is accomplished by providing real, rather than token, aid to developing nations, by forgiving national debts that strangle local economies, and by building infrastructure to provide public health care, primary education, safe water and sewage, and childhood immunizations. Relief is also accomplished by allowing developing nations to realize a fair, rather than token, profit from their own natural resources and by leveling the playing field to enable them to trade in the international marketplace. In addition to economic relief, this stand-alone approach addresses political grievances and promotes multiculturalism, self-determination of peoples without external interference, and the other civil and political human rights enshrined in the U.N. Declaration of Human Rights and the International Covenant of Civil and Political Rights.¹⁷ By improving the status quo and curing many of these underlying conditions, peoples will have more to protect and, consequently, less reason to fall prey to extremism or to assist those who commit wanton acts of violence.

The second initiative, an integrated approach, calls for establishing human rights norms as an integral component in the other two models. To be effective, the law enforcement and military models must place primacy on human rights norms or the reaction to these models will multiply resistance. Terrorism is indefinitely prolonged when counter-terrorism measures ignite greater violence and tap the reservoir of the disaffected, thus increasing recruitment and creating several new terrorists for each one apprehended. By stemming abuses within the other models, the integrated approach circumvents such terrorist recruitment.

The U.N. global strategy recognizes the importance of these human rights initiatives as well as the need for the other two models and opts for a holistic strategy that incorporates all three models.¹⁸ The key to the U.N. global strategy for combating terrorism is the overlap

17. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

18. See UNITED NATIONS FOUND., *supra* note 9, at 1.

and intra-dependence of each of the models in order to address the problem, comprehensively utilizing all available approaches.

Strategies: the Five “D’s”	Military	Law Enforcement	Human Rights
Dissuading the disaffected from choosing terrorist tactics ¹⁹			X
Denying terrorists the means to carry out attacks ²⁰		X	
Deterring state support for terrorism ²¹	X		
Developing state preventative capacity ²²	X	X	X
Defending human rights in the struggle against the scourge of terror ²³	X	X	X

This chart demonstrates the holistic approach incorporated by the Secretary-General’s “five D’s.” “Dissuading the disaffected from choosing terrorist tactics”²⁴ is the principle strategy of the stand alone human rights model and, while the other models may serve some deterrent value, the use of force has never been an effective tool for changing opinions or curbing overzealous and extremist outlooks. The strategy of “[d]enying terrorists the means to carry out attacks”²⁵ references the availability of weapons and the vulnerability of potential targets and is best addressed by the investigatory capabilities of the law enforcement model. Theoretically, this strategy could be realized under the other models, too. For example, terrorist organizations require people, so curtailing recruitment of, killing, or capturing existing personnel may impede attacks. However, such interaction is too attenuated and is already accounted for in the other strategies.

“Deterring state support of terrorism”²⁶ is a military strategy. The deterrent value of an armed attack is most effective when dealing with state entities. “Developing state preventive capacity”²⁷ is a task that requires an approach employing multiple models. Under the military

19. *Id.*
 20. *Id.*
 21. *Id.*
 22. *Id.*
 23. *Id.*
 24. *Id.*
 25. *Id.*
 26. *Id.*
 27. *Id.*

model, military aid can create state preventive capacity. Under the law enforcement model, the free exchange of information, law enforcement techniques, and technologies can foster increased arrests of terrorists. Under the human rights model, particularly the stand-alone initiative, a more grass-roots approach builds infrastructure and relieves the underlying misery that pushes ordinary people into extremism. The integrated human rights initiative keeps the other two models in check, preventing their excesses from providing terrorist organizations a factual basis for pro-terrorist propaganda.

The strategy of “[d]efending human rights in the struggle against the scourge of terror”²⁸ involves all three models, both in terms of preventing terrorist attacks and in ensuring that counter-terrorist measures conform to acceptable standards. This tripartite structure is designed to maximize the effectiveness of each of the three models and to provide a synergy that exceeds the sum of the component parts. Each model is less effective by itself; alone, the military model lacks prevention and moral certainty, the law enforcement model lacks strength to act globally against state-sponsored terrorism, and the human rights model lacks enforcement capability. The human rights model implied by the High-level Panel’s recommendations increases the effectiveness of the other models and represents a break from traditional counter-terrorism policy.²⁹ It does so by ensuring that both law en-

28. *Id.*

29. Traditionally, human rights played little role in U.S. counter-terrorism policy. During the 1980s, U.S. counter-terrorism policy was concerned with fostering cooperation between federal agencies including the Federal Bureau of Investigation, the Department of State, and the Federal Aviation Administration. The policy acknowledged the threat posed by state-sponsored terrorism and “outlined guidelines for preventing and responding to acts of terrorism.” Ctr. for Arms Control & Non-Proliferation, History of U.S. Counter-terrorism Policy, <http://www.armscontrolcenter.org/terrorism/101/history.html> (last visited Jan. 20, 2006). In the 1990’s, President Clinton issued a series of Presidential Decision Directives (PDDs), which established a ten-element U.S. counter-terrorism policy:

1. Apprehension, Extradition, Rendition and Prosecution of Terrorists
2. Disruption of Terrorist Operations
3. International Cooperation
4. Preventing the Acquisition of [Weapons of Mass Destruction]
5. Consequence Management
6. Transportation Security
7. Protection of Critical Infrastructure
8. Continuity of Government
9. Countering Foreign Terrorist Group Threat in the US
10. Protecting Americans Overseas

Roger Cressey, Dir., Transnational Threats, Nat’l Sec. Council, U.S. Counter-Terrorism Policy & Org., Remarks Before the Massachusetts Institute of Technology’s Security Studies Program Seminar (Sept. 27, 2000), available at <http://web.mit.edu/ssp/fall00/cressey.htm>; see also Presidential Decision Directive 39, U.S. Policy on Counterterrorism (U) (June 21, 1995),

forcement and military actions are performed in accordance with accepted human rights norms, thus limiting the negative consequences. Conscientious and compassionate performance of duty by law enforcement and military personnel helps to avoid the conditions that promote terrorist recruitment. Because the integrated human rights initiative not only engenders more widespread human rights practices, but also serves to defuse anger and prevent the resort to extremism, it is integral to the struggle against terrorism.

Additionally, many of the High-level Panel's 101 recommendations, such as the key recommendation that the United Nations build state capacity to prevent terrorist recruitment and operations, imply the importance of utilizing all three counter-terrorism models. The High-level Panel's other key recommendations also imply the use of multiple models. Preventing state collapse implies the military model, whereas the control of dangerous material and developing better instruments for global counter-terrorism within a legal framework both imply the law enforcement model. Building public health defense, reducing poverty and underemployment, disabling the causes and facilitators of terrorism by promoting social and political rights, rule of law

available at <http://www.fas.org/irp/offdocs/pdd39.htm>; Presidential Decision Directive 62, Combating Terrorism (May 22, 1998), available at <http://www.fas.org/irp/offdocs/pdd-62.htm>; Presidential Decision Directive 63, Protecting America's Critical Infrastructures (May 22, 1998), available at <http://www.fas.org/irp/offdocs/pdd-63.htm>; Presidential Decision Directive 67, Enduring Constitutional Government and Continuity of Government Operations (U) (Oct. 21, 1998), available at <http://www.fas.org/irp/offdocs/pdd/pdd-67.htm>.

Currently, the U.S. State Department Counter-terrorism Office postulates its counter-terrorism policy as fourfold:

- First*, make no concession to terrorists and strike no deals;
- Second*, bring terrorists to justice for their crimes;
- Third*, isolate and apply pressure on states that sponsor terrorism to force them to change their behavior; and
- Fourth*, bolster the counterterrorism capabilities of those countries that work with the U.S. and require assistance.

U.S. Dep't of State, Counter-Terrorism Office, <http://www.state.gov/s/ct/> (last visited Feb. 6, 2006). The ten elements of counter-terrorism policy under the Clinton administration did reference "[p]rotection of [c]ritical [i]nfrastructure" and "[c]ontinuity of [g]overnment," which could be looked upon as human rights issues. However, they are contextually necessary for the maintenance of the other law enforcement and military strategies as infrastructure and government continuity are critical for investigation, apprehension, and extradition, as well the protection of U.S. citizens overseas. Cressey, *supra*. Moreover, this policy analyzes neither the human rights record of the government whose continuity is to be assured, nor the possibility of discriminatory or prohibited practices created by the infrastructure to be protected, either of which could lead to greater disaffection among the citizens and heightened terrorist activity. Both the Clinton administration's policy and the current policy articulated by the U.S. State Department lack any specific prioritization or reference to the underlying causes of terrorism or calls for social, political, or economic reform of those regions most at risk for terrorist recruitment. See *id.*; U.S. Dep't of State, *supra*. Instead, the response to terrorism has traditionally been grounded in law enforcement and military responses, rather than in human rights initiatives. See Cressey, *supra*; U.S. Dep't of State, *supra*.

and democratic reform, and addressing major political grievances all imply the stand alone human rights model. Respect for civil liberties and human rights implies the integrated human rights model. These recommendations not only call for a holistic approach, they also express the importance of human rights as a tool for fighting terrorism.

A review of the links between human rights jurisprudence and terrorism reveals the importance of the human rights model. In much the same way as international criminal law emerged in the last half of the twentieth century "built on developments in international law . . . particularly in the fields of human rights and humanitarian law,"³⁰ the twenty-first century struggle against terrorism requires a solid foundation in human rights. The links between human rights jurisprudence and terrorism include the effects of terrorism on human rights, the classification of terrorism as a human rights violation, the human rights implications of defining terrorism, the value of a holistic approach toward terrorism, and the applicability of human rights norms to traditional strategies to combat terrorism.

III. THE EFFECTS OF TERRORISM ON HUMAN RIGHTS

The relevance of terrorism to human rights is profound. Even viewed under competing conceptual schemata, terrorism has a detrimental impact on human rights. Kalliopi Koufa, the Special Rapporteur for the U.N. Sub-Commission on the Promotion and Protection of Human Rights (Special Rapporteur) has stated, "[T]here is probably not a single human right exempt from the impact of terrorism."³¹ Not only do terrorist groups deprive individuals of their human rights, they drive states to take counter-terrorism measures, which also serve to denigrate human rights.³² Thus, the pervasive impact of terrorism on human rights can be seen both directly and indirectly.³³

The direct impact of terrorism is clearly illustrated by its immediate consequences. These consequences usually fall into three categories of violations: the right to "life, liberty, and dignity of the individ-

30. Philippe Sands, *Preface* to FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE, at x (Philippe Sands ed., 2003).

31. U.N. Econ. & Soc. Council, Sub-Comm. on Promotion & Prot. of Human Rights, *Terrorism and Human Rights: Progress Report*, ¶ 102, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001) [hereinafter *Progress Report*] (prepared by Kalliopi K. Koufa).

32. See U.N. Econ. & Soc. Council, Sub-Comm. on Promotion & Prot. of Human Rights, *Terrorism and Human Rights: Second Progress Report*, ¶¶ 52-58, U.N. Doc. E/CN.4/Sub.2/2002/35 (July 17, 2002) [hereinafter *Second Progress Report*] (prepared by Kalliopi K. Koufa).

33. *Progress Report*, *supra* note 31, ¶¶ 104-120.

ual; . . . [the right to a] [d]emocratic society; and . . . [rights relating to] [s]ocial peace and public order.”³⁴ Terrorist acts include, but are not limited to, murder, kidnapping, and seriously injuring innocent parties, which all deny victims their human rights to life, liberty, and dignity.³⁵ Terrorists seek to impose their will not only on states but also upon the individuals in those states.³⁶ The unwillingness of terrorists to submit to the democratic process and their attempts to thwart or disrupt that process are attempts to overthrow the democratic rights of the individuals in that state.³⁷ The actions of terrorists not only deprive individuals of their rights to life, liberty, dignity, and democracy, but also foster an atmosphere of fear and dread that devastate social peace and public order.³⁸ In this atmosphere, countermeasures and other precautions, which are perceived as safeguards, impede the essential functions of the social order and lead to inefficiency, lower standards of living, mutual distrust, and a fearful, brutish lifestyle.

The global community has not failed to take note of the rise in terrorism. Specifically in response to the egregious terrorist attacks of September 11, 2001 (9/11), the United Nations has recognized:

[T]he need to strengthen international cooperation among States and international and regional organizations to prevent, combat and eliminate international terrorism in all its forms and manifestations, wherever it is committed and whoever the perpetrators, since no nation on its own is in a position to fight and eliminate the global evil of terrorism.³⁹

In this light, the United Nations passed Resolution 1373, establishing the Counter-Terrorism Committee.⁴⁰ In addition to the United Nations, states and other intergovernmental organizations have stepped up their counter-terrorism law enforcement activities. For example, Interpol established the 9/11 Clearinghouse to facilitate coop-

34. U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Terrorism and Human Rights: Preliminary Report*, ¶ 18, U.N. Doc. E/CN.4/Sub.2/1999/27 (June 7, 1999) [hereinafter *Preliminary Report*] (prepared by Kalliopi K. Koufa).

35. *See id.* ¶ 53.

36. *See id.* ¶¶ 24, 32.

37. *Id.* ¶¶ 32, 36.

38. *Id.* ¶ 33.

39. The Secretary-General, *Strengthening International Cooperation and Technical Assistance in Preventing and Combating Terrorism*, ¶ 1, delivered to the General Assembly, U.N. Doc. A/59/187 (July 30, 2004).

40. S.C. Res. 1373, ¶ 6, U.N. Doc. S/RES/1373 (Sept. 28, 2001); *see also* Counter-Terrorism Comm., Mandate, <http://www.un.org/Docs/sc/committees/1373/> (last visited Jan. 20, 2006). The Counter-Terrorism Committee (CTC) consists of the fifteen members of the U.N. Security Council and “tries to increase the capability of States to fight terrorism.” *Id.*

eration and information sharing between national law enforcement agencies and adopted a resolution calling for improved information sharing between member countries.⁴¹ The European Union (EU) passed a plethora of post 9/11 anti-terrorist measures,⁴² and the United Kingdom enacted the Anti-Terrorist Crime and Security Bill.⁴³ However, terrorism can have another, indirect impact as a consequence of such counter-terrorist law enforcement measures when the measures themselves pose a principle threat to human rights.

The indirect impact of terrorism stems from overly intrusive, reactionary, counter-terrorist measures. Terrorist acts frequently provoke states into overreacting by implementing serious breaches of human rights and freedoms. These terrorist-instigated state actions may be

41. Interpol, *Terrorist Attack of 11 September 2001*, G.A. Res. AG-2001-RES-05 (Sept. 28, 2001), available at <http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN70/Resolutions/AGN70RES5.asp>. The resolution also reiterates its commitment to the Cairo Declaration Against Terrorism "and calls for enhanced international police and judicial collaboration to tackle terrorism . . . by exploring opportunities to co-ordinate legal, judicial and operational approaches . . ." *Id.*

42. See generally European Union, Counter-Terrorism: The European Union's Actions in 2006, <http://www.eurunion.org/partner/EUUSTerror/EURespUSTerror.htm> (last visited Feb. 25, 2006); European Union, Counter-Terrorism: The European Union's Actions in 2001, <http://www.eurunion.org/partner/EUUSTerror/2001EURespUSTerror.htm> (last visited Feb. 25, 2006). Shortly after 9/11, the EU adopted four acts to combat terrorism. European Union, Fight Against Terrorism, <http://www.eurunion.org/partner/EUUSTerror/CounActsDec27.htm> (last visited Apr. 5, 2006) (referring to Council Regulation 2580/2001, 2001 O.J. (L 344) 70 (EC), Council Decision 2001/927, 2001 O.J. (L 344) 83 (EC), Council Common Position 2001/930, 2001 O.J. (L 344) 90 (EU), and Council Common Position 2001/931, 2001 O.J. (L 344) 93 (EU)). In addition, the EU engaged scientific experts "to combat biological and chemical terrorism;" provided for greater information sharing between Europol and the United States; reviewed the balance of security and refugee rights; coordinated civil protection, including the formation of a European Chief of Police Task Force; provided emergency insurance aid to airlines; created new security rules for air transportation; and addressed issues such as arrest warrants and money-laundering. *Id.* The EU also examined anti-Islamic reactions to 9/11 and the impact of terrorism on financial services. See *id.* Furthermore, the EU increased security at ports, airports, and power plants. See *id.*

43. Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 1-129, scheds. 1-8 (Eng.). See also *id.* explanatory n. ¶ 1. This legislation was passed in direct response to 9/11 and was intended to:

- Cut off terrorist funding
- Ensure that government departments and agencies [could] collect and share information required for countering the terrorist threat
- Streamline relevant immigration procedures
- Ensure the security of the nuclear and aviation industries
- Improve the security of dangerous substances that may be targeted or used by terrorists
- Extend police powers available to relevant forces
- Ensure that [the U.K. could] meet [its] European obligations in the area of police and judicial co-operation and [its] international obligations to counter bribery and corruption
- Update parts of the UK's anti-terrorist powers[.]

Id.

undertaken in good faith or they may serve as a pretext for states to further their own agendas. For example, on the day after the 9/11 attack, the U.S. National Coordinator for Security and Counter-Terrorism, Richard Clarke, observed:

I expected to go back to a round of meetings examining what the next attacks could be, what our vulnerabilities were, what we could do about them in the short term. Instead, I walked into a series of discussions about Iraq. At first I was incredulous that we were talking about something other than getting al Qaeda. Then I realized with almost a sharp physical pain that Rumsfeld and Wolfowitz were going to try to take advantage of this national tragedy to promote their agenda about Iraq.⁴⁴

In addition, as one commentator has suggested, Palestinian suicide bombers “provide the perfect cover for the Israeli government’s daily incursions into Palestinian territory, the perfect excuse for old-fashioned, nineteenth-century colonialism, dressed up as new-fashioned, twenty-first century war.”⁴⁵

Whether the responses to terrorist activities are sincere or contrived, the impact on human rights is nonetheless widespread. After 9/11, the U.S. and international response was devastating. According to the *Human Rights Watch World Report 2003*:

Government policies adopted after the terrorist attacks of September 11, 2001 profoundly altered the human rights landscape . . . 2002 was marked by significant steps backward on human rights. The arbitrary detention of non-citizens, secret deportation hearings for persons suspected of connections to terrorism, the authorization of military commissions to try non-citizen terrorists [suspects], the failure to abide by the Geneva Conventions in the treatment of detainees held by the United States in Cuba, and the military detention without charge or access to counsel of U.S. citizens designated as “enemy combatants,” were among the U.S. actions that indicated the failure of the Bush administration to respect human rights . . .⁴⁶

These actions also included expanded powers for secret search and seizures by police, detention of suspects for up to seven days without charges, and increased authority for widespread phone tapping.⁴⁷ In the domestic debate between the preservation of civil liberties and the

44. CLARKE, *supra* note 12, at 30.

45. ARUNDHATI ROY, *WAR TALK* 61 (2003).

46. HUMAN RIGHTS WATCH, *WORLD REPORT 2003: UNITED STATES*, <http://www.hrw.org/wr2k3/us.html>.

47. *See* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56 (2001).

use of allegedly more effective means of combating terrorism, the Center for Constitutional Rights opined:

The War on Terror has seriously compromised the First, Fourth, Fifth and Sixth Amendment rights of citizens and non-citizens alike. From the USA PATRIOT Act's over-broad definition of domestic terrorism, to the FBI's new powers of search and surveillance, to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously undermined.⁴⁸

These developments represent a failure to integrate human rights scrutiny within the law enforcement model.

Additionally, 9/11 resulted in a fundamental policy shift with regard to U.S. military aid. The new criteria emphasized the worldwide "war on terrorism" at the cost of international human rights. Previously, countries engaged in massive human rights violations had been denied U.S. military aid, but "[t]he modifications in the U.S. foreign military assistance program make it easier for known violators to acquire the tools of abuse, thus implicating the United States in abuses that result."⁴⁹ Moreover, the United States has drastically enlarged its spending on military aid pursuant to the "war on terrorism." This new policy has "degraded human rights policy by lifting sanctions on arms transfers to countries with poor human rights records and by cutting required approval times for such transfers."⁵⁰ While the United States is cutting military aid to traditional democratic allies,⁵¹ it has been lift-

48. CTR. FOR CONSTITUTIONAL RIGHTS, *THE STATE OF CIVIL LIBERTIES: ONE YEAR LATER, EROSION OF CIVIL LIBERTIES IN THE POST 9/11 ERA 1* (2001), available at http://www.ccr-ny.org/v2/reports/docs/Civil_Liberties.pdf.

49. HUMAN RIGHTS WATCH, *DANGEROUS DEALINGS—CHANGES TO US MILITARY ASSISTANCE AFTER SEPTEMBER 11*, at 2 (2002), available at <http://hrw.org/reports/2002/usmil/USass0202.pdf>. For a detailed accounting of changes in military aid and the human rights abuses attributed to recipients, see Fed'n of American Scientists, "The War on Terrorism" and Human Rights: Aid to Abusers, <http://fas.org/terrorism/at/docs/Aid&Humanrights.html> (last visited Feb. 6, 2006).

50. Press Release, Human Rights Watch, U.S.: Military Aid After 9/11 Threatens Human Right (Feb. 15, 2002) [hereinafter Press Release, Human Rights Watch], available at http://hrw.org/english/docs/2002/02/15/usint3750_txt.htm (referring to HUMAN RIGHTS WATCH, *supra* note 49).

51. The U.S. ban on military aid to traditional allies and the initiation of aid to nations with infamous human rights records is not tied to the "war on terrorism." Instead, it is tied to the latter nations' willingness to endorse bilateral agreements granting immunity from the jurisdiction of the International Criminal Court (ICC). See Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 ANN. SURV. INT'L & COMP. L. 19, 50-51 (2003); cf. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, § 2007 (restricting military aid to states that are parties to the ICC). Ironically, the ICC may be instrumental in the eradication of global ter-

ing bans on military aid to states with particularly heinous human rights records, such as Uzbekistan, Tajikistan, Oman, and the Philippines.⁵² Within the military paradigm, provision of military aid to nations with a common goal of eradicating terrorism is a valid practice for developing state preventive capacity, but not if the aid is be used to perpetrate greater human rights abuses and stimulate greater resentment.

The “war on terrorism” has led to other human rights violations directly attributable to the United States, most notably violations of the Geneva Convention in Iraq. The International Committee of the Red Cross (ICRC) repeatedly warned U.S. military authorities to refrain from serious breaches of the Geneva Convention, issuing a report that documented numerous examples of torture and degradation perpetrated against Iraqi detainees.⁵³ In addition to the humiliating and degrading treatment noted in the world press, the ICRC documented misuses of lethal force that lead to deaths and injuries; confiscation of personal property; deprivation of food and clothing; “threats . . . against members of [detainees’] families (in particular wives and daughters); hooding; tight handcuffing; use of stress positions (kneeling, squatting, standing with arms raised over the head) for three or four hours; striking [detainees] with rifle butts, slaps, punches, prolonged exposure to the sun, and isolation in dark cells.”⁵⁴ One detainee “alleged that he had been . . . urinated on, kicked in the head, lower back and groin, force-fed a baseball which was secured to his

rorism. See Chibueze, *supra*, at 23-24. Moreover, unilateral action by the United States has damaged its relations with other allies and may result in decreased cooperation in the investigation and apprehension of terrorists. See Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 Wis. INT’L L. J. 557, 559-60 (2003).

52. Press Release, Human Rights Watch, *supra* note 50.

53. INT’L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm. The ICRC Report was first printed publicly by the *Wall Street Journal* on May 7, 2004. See David S. Cloud et al., *Red Cross Found Widespread Abuse of Iraqi Prisoners*, WALL ST. J., May 7, 2004, at A1. The ICRC began monitoring the conditions in Iraq beginning in March 2003 and found that “ill-treatment during capture was frequent,” concluding that the abuses took place at multiple times and locations including Baghdad, Basra, Ramadi, and Tikrit. INT’L COMM. OF THE RED CROSS, *supra*. The ICRC conducted twenty-nine visits in fourteen detention facilities, and, at the end of each visit, ICRC personnel “[held] a final talk with the detaining authorities to inform them about the ICRC’s findings and recommendations.” *Id.* In February 2004, the ICRC completed its report, detailing numerous violations, and submitted it to the Coalition Forces. *Id.*

54. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 53.

mouth by a scarf and deprived of sleep for four consecutive days. . . . An ICRC medical examination revealed [the detainee had] hematoma in the lower back, blood in [his] urine, sensory loss . . . and a broken rib."⁵⁵ Some detainees received only women's underwear to wear, and others were "paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women's underwear over the head" and photographed.⁵⁶ Other detainees were kept in compounds where they were vulnerable to shelling or were given hazardous duty.⁵⁷ In one instance, two detainees each had to have both legs amputated and a third detainee had to have one leg amputated after all three were injured by an exploding cluster bomb.⁵⁸ The ICRC also reported abuses by the Iraqi police, including cigarette burns, electric shocks administered to detainees who were doused with water, threats of raping a detainee's wife, and mock executions.⁵⁹ Detainees' allegations of these tortuous practices by the United States were supported by statements from military intelligence personnel and by medical evidence, such as injuries, scars, psychological symptoms, medical reports, and autopsies.⁶⁰

These devastating human rights consequences of the "war on terrorism" have been decried by human rights organizations. In 2005, Amnesty International USA took the unprecedented step of calling upon nations around the world to investigate U.S. officials and, where applicable, prosecute them.⁶¹ Specifically, they called upon 125 states to use their domestic legislation to exercise extra-territorial authority, or universal jurisdiction, to investigate and prosecute Bush administration officials for *jus cogens* violations of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁶² and violations of the Geneva Conventions.⁶³ These allegations stem from U.S. activities in Iraq, Guantanamo Bay, and Afghanistan,

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Press Release, Amnesty Int'l USA, Annual Report: Selective U.S. Prosecutions in Torture Scandal Underscore International Obligation to Investigate U.S. Officials, Charges Amnesty International, <http://www.amnestyusa.org/annualreport/> (last visited Feb. 27, 2005) [hereinafter Press Release, Amnesty Int'l USA].

62. Convention Against Torture and Cruel, Inhuman and Degrading Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

63. See Press Release, Amnesty Int'l USA, *supra* note 61.

as well as the rendition of suspects for interrogation to other states that practice torture.⁶⁴

The domestic and international consequences of the U.S. “war on terrorism” echo some of the findings of the Preliminary Report of the Sub-Commission on the Promotion and Protection of Human Rights, in which the Special Rapporteur has amassed a huge, yet admittedly incomplete, list of the ways in which terrorism indirectly impacts the right to a democratic society. It can:

undermine the legitimate authority of Governments; influence ideological and political factors in order to impose its own model of society; impede citizens in their use of their rights to have a say in the decisions that affect their lives; subvert pluralism and democratic institutions through the creation of negative conditions for the functioning of the constitution; . . . undermine free political, economic, social and cultural development; impair the quality of democratic society for all, even when it does not actually threaten its survival; [and] lead to more terrorism and militancy⁶⁵

Whether the actors are characterized as “terrorists” or “freedom fighters,” regardless of justification or moral equivalence, the acts themselves, directly or indirectly, result in attacks on human rights. Frequently, the counter-terrorism response is equally damaging. This realization is not lost upon the United Nations. The evolution of the United Nations’ understanding of the link between terrorism and human rights is evinced by the actions it has taken in recent years to combat this problem. In addition to the High-level Panel on Threats Challenges and Change and the “five Ds,” the United Nations’ human rights bodies have mobilized against terrorism and the accompanying over-reaching counter-terrorist measures.⁶⁶ It has reactivated the ad hoc body of the Sixth Committee to define terrorism,⁶⁷ and established a Counter-Terrorist Committee to monitor the implementation of Security Council Resolution 1373.⁶⁸ U.N. human rights bodies, as well as relevant non-governmental organizations (NGOs) and activists,

64. Cf. Press Release, Amnesty Int’l USA, Annual Report: Americas Regional Overview 2004, <http://www.amnestyusa.org/annualreport/americas.html> (last visited Apr. 5, 2006) (condemning the United States for failing “to apply the Geneva Conventions to those captured during the international armed conflict in Afghanistan and transferred to the US naval base at Guantánamo Bay, Cuba”).

65. *Preliminary Report*, *supra* note 34, ¶ 32.

66. *See generally Second Progress Report*, *supra* note 32, ¶¶ 21-34.

67. *Id.* ¶ 23. Thus far, despite the proposal of the High-level Panel, the issue of an immutable universally accepted definition remains unresolved and continues to hamper the goal of an inclusive assault on terrorism that combines sensitivity to its root causes as well as its devastating impact on human rights.

68. Counter-Terrorism Comm., *supra* note 40.

have sought to keep counter-terrorist measures in check by addressing such issues as the definition of international terrorism, the scope of humanitarian law, the principle of non-refoulement, and safeguards against impunity.⁶⁹ Secretary-General Kofi Annan stated on January 18, 2002, “While we certainly need vigilance to prevent acts of terrorism, . . . it will be self-defeating if we sacrifice other key priorities—such as human rights—in the process.”⁷⁰

IV. TERRORISM AS A HUMAN RIGHTS VIOLATION

Argentina has stated “that it does not accept the argument that the acts of international terrorism constitute a human rights violation, since, by definition, only States are capable of violating human rights.”⁷¹ This position reflects the traditional positivist legal view of terrorism, which relegates terrorism and human rights issues solely to domestic political scrutiny.⁷² However, due to evolving perspectives on terrorism, this traditional view is changing to reflect a more inclusive understanding not only of how to combat terrorism but also of the scope of human rights law. This change poses the question “whether human rights law is actually moving beyond the traditional dichotomy of individual versus State and towards the creation of obligations applicable also to non-State entities.”⁷³

The controversy over whether human rights law applies to non-state entities stems from disagreements over characterizations of both terrorism and human rights. First, the traditional view does not recognize international terrorism as a human rights violation because it assumes that only non-state actors can be international terrorists.⁷⁴ This approach reflects a positivist doctrine, grounded in a zealous defense of domestic jurisdiction, that consequently places only limited respon-

69. *Second Progress Report*, *supra* note 32, ¶ 24.

70. The Secretary-General, United Nations, Address to the Security Council (Jan. 18, 2002), *quoted in* The Secretary-General, *Report of the Policy Working Group on the United Nations and Terrorism*, annex ¶ 27, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/57/273/S/2002/875 (Aug. 6, 2002), *available at* <http://www.un.dk/doc/documents.htm> (follow “A/57/273/S/2002/875” hyperlink).

71. U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism*, ¶ 2, U.N. Doc. E/CN.4/Sub.2/2003/WP.1/Add.2 (Aug. 8, 2003) (*prepared by* Kalliopi K. Koufa).

72. *See id.* ¶ 4.

73. *Preliminary Report*, *supra* note 34, ¶ 17 (citing U.N. Econ & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Human Rights, *Terrorism and Human Rights: Working Paper*, ¶ 15, U.N. Doc. E/CN.4/Sub.2/1997/28 (June 26, 1997) (*prepared by* Kalliopi Koufa)).

74. *See id.*

sibility on the international community for human rights policing and the control of terrorism. In contrast, the emerging trend embraces changing global circumstances and lends itself to a more inclusive definition that calls for greater international scrutiny and binding state obligations, eschewing a strictly domestic jurisdictional basis. Thus, the traditional view neglects the enigma of state-sponsored terrorism. As disparate terrorist entities forge alliances and address common regional or ideological perceptions, they find refuge within the borders of friendly states that share common perspectives. Though giving aid to terrorism, these states are not actively engaged in human rights violations, and the traditional view fails to account adequately for their complicity.⁷⁵ Dogmatic adherence to the traditional view fails to recognize globalization and the emergence of new power struggles, and is giving way due to these changed circumstances.

The traditional view postulates that human rights violations are domestic in nature because, absent war, states have no capability of authoring such acts on other peoples. Article 2(1) of the U.N. Charter acknowledges the primacy of sovereign equality,⁷⁶ and Article 2(7) mandates that the United Nations shall not interfere with matters within the domestic jurisdiction of any state.⁷⁷ Arguably, these provisions have established jurisdictional distinctions relegating the role of the United Nations to matters of purely international scope and precluding it from intervening in domestic issues. Therefore, states have traditionally had a greater perceived insulation from international

75. However, state exemption from responsibility for state-sponsored terrorism is contradictory even under the traditional scheme. In 1974, the U.N. General Assembly passed Resolution 3314, defining aggression. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974). According to the definition, aggression includes "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." *Id.* art. 3(g). This definition closely resembles modern state-sponsored terrorism. Since aggression may be classified as a human rights violation and state-sponsored terrorism is aggression for which states are responsible, the obvious conclusion is that terrorism is a human rights violation for which states are responsible. The more difficult question concerns the nexus between the state and any terrorism organization it harbors. Even when a terrorist organization acts independently of a sponsoring state, as when it does not specifically receive orders from the state, the state would probably still be liable for a human rights violation under a conspiracy theory, according to the General Assembly's definition of aggression.

76. U.N. Charter, *supra* note 10, art. 2(1) ("The organization is based on the principle of the sovereign equality of all its Members.").

77. *Id.* art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.").

oversight with respect to their domestic adherence to human rights norms. However, Article 2(7) also allows for the fiat of Chapter VII in cases where international security is threatened, as in threats to the peace, breaches of the peace, and acts of aggression.⁷⁸ The emerging trend recognizes that terrorism and human rights have become global issues and therefore their impact transcends national boundaries.⁷⁹ The Executive Summary of the report of the High-level Panel relates, “In today’s world, a threat to one is a threat to all. Globalization means that a major terrorist attack anywhere in the industrial world would have devastating consequences for the well-being of millions in the developing world.”⁸⁰ The Secretary-General reiterated this position by citing World Bank statistics, which assert, “[T]he attacks of September 11th 2001 [sic] cost more than \$80 billion dollars and pushed 11m [sic] people in developing countries into poverty.”⁸¹ Moreover, emerging trends reveal how human rights have taken on global proportions, even when violations occur entirely within the border of a single sovereign state. Events in the former Yugoslavia and Rwanda in the 1990s reveal an expanded notion of the role of international organizations and other states in domestic human rights issues. The High-level Panel’s report further elaborates, “When a State fails to protect its civilians, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure—and with force if necessary, though only as a last resort.”⁸²

Second, by limiting human rights violations to state actors, thereby rendering them domestic issues, the traditional view ensures that the international human rights machinery does not focus on violations perpetrated by international terrorists. Viewing international terrorist activity through a domestic lens and relying exclusively on local law enforcement is a practice that vitiates the primacy of international control and diminishes international authority. Moreover, some states may favor the traditional view for reasons other than positivism. State-sponsored terrorism allows countries to conduct hostilities against other states by encouraging and assisting select international

78. *Id.*

79. A MORE SECURE WORLD, *supra* note 4, at 1.

80. EXECUTIVE SUMMARY, *supra* note 5, at 1.

81. Annan, *Courage to Fulfill Our Responsibilities*, *supra* note 11. The Secretary-General adds, “Given the relationship between poverty and infant mortality, we would count the cost of a . . . terrorist attack in a rich country in two terrible death tolls: in the attacked city, and in poor nations all over the world.” *Id.*

82. EXECUTIVE SUMMARY, *supra* note 5, at 4.

terrorist groups incurring a reduced risk of war and theoretically, without raising the ire and retribution of international institutions.⁸³ Other states, though not sponsoring terrorist groups, may nonetheless be sympathetic to the agendas and ideals that terrorists espouse. It follows that such states might adhere to the traditional view in order to avoid heightened international scrutiny of their complicity in terrorist acts.

However, the evolution of human rights treaty law has partly caused a change to the interpretation and implementation of the safeguard afforded states in Article 2 of the U.N. Charter. This change has also been caused by customary international law, which arguably allows for international oversight, greater access, and authority to investigate allegations of internal human rights violations. “[T]he basic duty of non-intervention in the domestic affairs of states has been subject to a process of reinterpretation in the human rights field since 1945, so that states can no longer plead it successfully as a bar”⁸⁴ In addition to the explosion of human rights jurisprudence in the latter half of the twentieth century and the reinterpretation of the jurisdiction of international organizations, other developments have rendered attempts to divorce terrorist acts from human rights law counterproductive and out of step with contemporary understandings.

The fall of the Soviet Union and the end of the Cold War led to a period of unprecedented international cooperation at the end of the last century. Among other things, this cooperation led to the reaffirmation of the principles of Nuremberg and Tokyo, namely personal liability of state leaders for offenses carried out in their official capacity. The formation of the ad hoc tribunals for Rwanda and the former Yugoslavia, the International Criminal Court, and the hybrid courts in Sierra Leone and East Timor reveal a new commitment to the international exercise of jurisdiction over criminal behavior constituting human rights violations.⁸⁵ By enlarging the role and function of international

83. The 2001 campaign in Afghanistan contradicts previous assumptions regarding the safety of states sponsoring or otherwise providing aid to terrorist groups and reflects a break from traditional practices. It further illustrates the new global trend calling for accountability grounded in collective self-defense under Article 51 of the U.N. Charter.

84. *Progress Report*, *supra* note 31, ¶ 47.

85. The International Criminal Tribunal for Rwanda (ICTR) is located in Arusha, United Republic of Tanzania. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The ICTR assumes jurisdiction over criminal matters involving genocide and serious violations of international humanitarian law that took place in the territory of Rwanda and neighboring states between January 1 and December 31, 1994. United Nations, The International Criminal Tribunal for Rwanda: General Information, <http://65.18.216.88/default.htm> (follow “About the Tribunal” hyperlink, then “General Information” hyperlink) (last visited Feb. 12, 2006).

criminal law, the modern trend favors increasing international scrutiny of terrorism, and, as international criminal law has its genesis in the application of human rights and humanitarian law, human rights scrutiny is equally relevant to terrorism.

Furthermore, the traditional view is inconsistent with the plain language of both the Universal Declaration of Human Rights (Declaration) and the International Covenant on Civil and Political Rights (Covenant). As previously discussed, under the traditional view of human rights, international terrorism is not recognized as a violation *per se*, because only states can violate human rights. As observed by the Special Rapporteur, this notion seems to be at odds with the specific language of both Article 30 of the Declaration and Article 5(1) of the Covenant.⁸⁶ Both provisions contain language that expresses the obligations of “any state, group or person” with respect to abstaining from human rights violations.⁸⁷ Inasmuch as non-state terrorists can

The International Criminal Tribunal for the former Yugoslavia (ICTY) is located in The Hague. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). It has jurisdiction to hear criminal matters occurring in the former Yugoslavia since 1991 that involve egregious violations of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. United Nations, The ICTY at a Glance: General Information, <http://www.un.org/icty/glance/index.htm> (follow “General Information” hyperlink) (last visited Feb. 12, 2006).

The International Criminal Court (ICC) is also located in The Hague. Int’l Criminal Court, ICC at a Glance, <http://www.icc-cpi.int/about/ataglance/history.html> (last visited Jan. 9, 2006). Its jurisdiction over the international crimes of genocide, aggression, war crimes, and crimes against humanity is complementary to the jurisdiction of domestic courts. Rome Statute of the International Criminal Court arts. 1, 5(1), July 17, 1998, 2187 U.N.T.S. 90.

The Special Court for Sierra Leone was established to address “serious violations of international humanitarian and Sierra Leonean Law committed in . . . Sierra Leone since 30 December 1996.” Special Court for Sierra Leone, About the Special Court for Sierra Leone, <http://www.sc-sl.org/about.html> (last visited Mar. 6, 2006); *see also* S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (establishing the Special Court for Sierra Leone).

The Special Panel for Serious Crimes has jurisdiction over crimes against humanity committed in East Timor. *See* Press Release, United Nations Transitional Admin. in East Timor [UNTAET], Fact Sheet 7: Justice and Serious Crimes (Apr. 2002), *available at* <http://www.un.org/peace/etimor/fact/fs7.PDF>; *see also* S.C. Res. 1272, U.N. Doc. S/RES/1272 ¶ 1 (Oct. 25, 1999) (establishing UNTAET as the judicial authority in East Timor).

86. The International Covenant on Civil and Political Rights stipulates, “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” International Covenant on Civil and Political Rights, *supra* note 17, art. 5(1). The Universal Declaration of Human Rights states, “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” Universal Declaration of Human Rights, *supra* note 17, art. 30.

87. International Covenant on Civil and Political Rights, *supra* note 17, art. 5(1); Universal Declaration of Human Rights, *supra* note 17, art. 30.

be groups or persons, by implication they fall under the category of potential human rights violators. The Declaration and the Covenant are widely accepted either as binding treaty law or customary international law and, along with the International Covenant on Economic, Social and Cultural Rights,⁸⁸ are collectively known as the "International Bill of Human Rights."⁸⁹ The language in both the Declaration and Covenant is unambiguous, and, under Article 31(1) of the Vienna Convention on the Law of Treaties, shall be "interpreted in good faith in accordance with the ordinary meaning"⁹⁰

As previously indicated, the traditional view also flies in the face of what contemporary analysis has revealed regarding state-sponsored terrorism. International terrorism is often perpetrated at the behest of state partners, or at least with their tacit approval. This form of terrorism is consistent with the states' perceived foreign policy objectives. State-sponsored terrorism is an example of states exporting human rights violations to other countries under the guise of international terrorism. Such activity may be a form of unconventional warfare between states.⁹¹ However, this approach is criticized by others, as it allows terrorist groups refuge under humanitarian law and the law of warfare.⁹² In any event, state-sponsored international terrorism blurs the distinction between criminal activity and warfare.

88. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

89. Press Release, Office of the High Comm'r for Human Rights, The International Bill of Human Rights: Fact Sheet No.2 (Rev.1), <http://www.unhcr.ch/html/menu6/2/fs2.htm> (last visited Mar. 6, 2006).

90. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 21 U.S.T. 77, 1155 U.N.T.S. 331.

91. See Press Release, White House, Remarks by the President in Photo Opportunity with the National Security Team, (Sept. 12, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html> (last visited Jan. 9, 2006) (taking the position that the 9/11 attacks were acts of war). On September 12, 2001 President Bush declared, "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." *Id.* This statement was more than emotionally charged hyperbole, as it also appears on an official U.S. Department of State web page under the subtitle, "These terrorist attacks were an act of war against the United States." Press Release, U.S. Dep't of State, Fact Sheet: Frequently Asked Questions About the War on Terrorism at Home and Abroad (June 11, 2002), <http://www.state.gov/s/ct/rls/fs/2002/10992.htm>.

92. In the United States, the fear that terrorists could use humanitarian law to claim protection as prisoners of war was laid to rest by the U.S. Court of Appeals for the District of Columbia in the case of Salim Ahmed Hamdan, a Guantanamo Bay detainee who was purportedly the driver for Osama bin Laden. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35, 40 (D.C. Cir. 2005). The court found that Hamdan was not a prisoner of war as defined under the Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. *Hamdan*, 415 F.3d at 40. The court found the protections of the Third Geneva Convention are generally inapplicable to

The history of the United Nations is consistent with a changing worldview, as the need for international cooperation has been documented in a series of U.N. treaties and covenants since the 1950s. In response to state-sponsored terrorism, the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.⁹³ This resolution specifically requires states “to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.”⁹⁴ The United Nations has also recognized the efficacy of international cooperation in law enforcement procedures against terrorism in the adoption of several instruments concerning aviation and maritime safety, bombing, hostage taking, plastic explosives, and the protection of nuclear material.⁹⁵ These instruments testify to an international consensus regarding the necessity and propriety of international scrutiny of terrorist acts and the removal of such acts from purely domestic jurisdiction.

There are three distinct periods of U.N. counter-terrorist activity relevant to human rights enquiry. These periods are from 1972 to 1993, from 1993 to 2001, and post 9/11. Prior to 1972, the United Nations primarily focused on the safety of aircraft.⁹⁶ The first stage of significant U. N. interest in terrorism began in response to the kidnapping and massacre of Israeli athletes at the Munich Olympics of 1972.⁹⁷ Worldwide publicity of this raid galvanized the international

al-Qaeda because al-Qaeda is neither a state, nor has it accepted the Geneva Conventions. *See id.* at 41.

93. *Cf.* Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, pmbl., U.N. GAOR, 25th Sess., Supp. No. 18 at 339, U.N. Doc. No. A/5217 at 121 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

94. *Id.* § 1. Additionally, the Friendly Relations Declaration calls upon states “to refrain from “organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.” *Id.*

95. *See supra* note 13.

96. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 13, Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 13; Convention on Offences and Certain Other Acts Committed on Board Aircraft, *supra* note 13.

97. *Preliminary Report*, *supra* note 34, ¶ 8. During the 1972 Summer Olympics, members of the Israeli Olympic team were kidnapped by a Palestinian group called Black September. Absolute Astronomy Reference, *Munich Massacre*, http://www.absoluteastronomy.com/encyclopedia/m/mu/munich_massacre.htm (last visited Jan. 9, 2006). Eleven of the athletes were killed along with five kidnapers and one German police officer. *Id.* Later, a German jet was hijacked with demands for the release of the three surviving Black September mem-

community where three wars and a quarter-century of strife had failed. In response, the General Assembly passed Resolution 3034⁹⁸ as well as several subsequent conventions, including those concerning diplomats,⁹⁹ hostage taking,¹⁰⁰ the physical protection of nuclear material,¹⁰¹ the safety of maritime navigation,¹⁰² and plastic explosives.¹⁰³ During this period, the question of a definition of terrorism was relegated to the Sixth Committee of the General Assembly, a legal body, which dealt with it primarily as a criminal matter.¹⁰⁴ The link of terrorism to human rights was obscure and metaphorical.

Notwithstanding the traditional one-dimensional treatment of terrorism, Resolution 3034 was provocatively titled Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes.¹⁰⁵ This title evinces sympathy for the accused and foreshadows both the linkage of terrorism and human rights and the continuing debate over a definition of terrorism. However, Resolution 3034 fails to take either international terrorism or state-sponsored terrorism into account.¹⁰⁶ It also deals with terrorism as a domestic issue, wrestling with the question of balancing the competing interests of domestic self-determination with the orderly rule of legitimate government.¹⁰⁷

bers. *Id.* Israel retaliated to the Munich Massacre by bombing Palestine Liberation Organization (PLO) bases in Syria and Lebanon and by setting up a special Mossad hit team that "eliminated" members of Black September and the PLO in Algeria, Cyprus, Denmark, France, Germany, Greece, Lebanon, Libya, Norway, and Sweden. *See id.*

98. *See* G.A. Res. 3034, U.N. GAOR, 27th Sess., Supp. No. X, U.N. Doc. A/8730 (Dec. 18, 1972). Resolution 3034 was noticeably sensitive to the root causes of terrorism. *Id.* art. 2. It also reflected a pronounced sympathy for the self-determination of people and called for states to recognize human rights and become parties to international conventions relating to terrorism. *Id.* arts. 4-6.

99. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 13.

100. International Convention Against the Taking of Hostages, *supra* note 13.

101. Convention on the Physical Protection of Nuclear Material, *supra* note 13.

102. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 13.

103. Convention on the Marking of Plastic Explosives for the Purpose of Detection, *supra* note 13.

104. *See, e.g.*, Sixth Committee Draft Resolution, U.N. Doc. A/C.6/44/L.2 (Sept. 26, 1989).

105. G.A. Res. 3034, *supra* note 98.

106. *See id.*

107. *See id.* ¶¶ 3-4.

The second period of U.N. counter-terrorist activity resulted from the remarkable world conference on human rights that took place in 1993 and produced the Vienna Declaration and Programme of Action (Vienna Declaration).¹⁰⁸ Paragraph 17 of the Vienna Declaration explicitly asserted the link between terrorism and human rights for the first time by affirming that terrorist acts “aim[] at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments.”¹⁰⁹ This assertion mandates that terrorism is a political and international issue and no longer merely a domestic criminal matter. Some of the conventions and resolutions ratified during this period reflect a more sophisticated approach to terrorism, such as the Declaration on Measures to Eliminate International Terrorism¹¹⁰ and the International Convention for the Suppression of the Financing of Terrorism.¹¹¹ Another signature development during this period was the proliferation of conventions adopted by the regional organizations in developing areas, such as the League of Arab States¹¹² and the

108. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*]. The Vienna Declaration expressed the exuberance of a post-Cold War optimism when it recognized “the major changes taking place on the international scene and the aspirations of all the peoples . . .” *Id.* The Vienna Declaration not only cemented the link between human rights and terrorism but also reemphasized the universality of human rights. See *id.* ¶ 1 (“The universal nature of these rights and freedoms is beyond question.”) The Declaration states, “All human rights are universal, indivisible and interdependent and interrelated,” and “[t]he international community must treat human rights globally . . .” *Id.* ¶ 5. These provisions recognize expanded international jurisdiction and thereby inexorably lead to heightened international scrutiny of domestic human rights issues. By also linking human rights to terrorism, the Vienna Declaration calls for heightened international scrutiny of terrorist activities. *Id.* ¶ 17. Thus, the Vienna Declaration represents a combination of previously independent trends in counter-terrorism and human rights that collectively strengthen and mature.

109. *Id.* ¶ 17.

110. See Declaration on Measures to Eliminate Terrorism, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994). This resolution “encouraged [States] to urgently review the scope of existing international legal provisions on the prevention, repression and elimination of terrorism . . . with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter. *Id.* ¶ 5(e).”

111. International Convention for the Suppression of the Financing of Terrorism, *supra* note 13.

112. Arab Convention for the Suppression of Terrorism, *supra* note 13. The Arab Convention for the Suppression of Terrorism asserts that Islamic Shari’a law condemns terrorism and reiterates the parties’ commitment to their obligations under the U.N. Charter, the Pact of the League of Arab States, and other international agreements. *Id.* pmb1. The Convention distinguishes between terrorist activities and struggles for self-determination. See *id.* art. 2. It also pledges member state cooperation and coordination in investigation and extradition of terrorists. *Id.* arts. 3-38.

Organization of African Unity (OAU), now known as the African Union (AU).¹¹³

The third period of U.N. counter-terrorism activity resulted from the dramatic and tragic attacks that occurred in the United States on 9/11. After the attacks, the Security Council passed Resolutions 1368¹¹⁴ and 1373¹¹⁵ and the General Assembly adopted Resolution A/56/1.¹¹⁶ Resolutions 1368 and 1373 designated acts of international terrorism threats to international peace and security as defined in Chapter VII of the U. N. Charter.¹¹⁷ Articles 41 and 42 of that Chapter authorize the Security Council to call on states to sever diplomatic ties, to impose economic sanctions, and to intervene militarily in re-

113. Convention on the Prevention and Combating of Terrorism, *supra* note 13. According to the current chairperson of the AU Commission, this convention reflects “the imperative need to combat and eradicate the phenomenon of terrorism through a comprehensive approach that addresses its root causes.” Alpha Oumar Konaré, *Preventing and Combating Terrorism in Africa*, <http://www.africa-union.org/Terrorism/terrorism2.htm> (last visited Mar. 6, 2006).

114. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

115. S.C. Res. 1373, *supra* note 40.

116. Condemnation of Terrorists Attacks in the United States of America, G.A. Res. 56/1, U.N. Doc. A/RES/56/1 (Sept. 18, 2001).

117. *See id.*; S.C. Res. 1368, *supra* note 114; S.C. Res. 1373, *supra* note 40. Unlike General Assembly Resolution 56, Security Council Resolution 1368 implies that terrorist actions may rise to the level of “threats to the international peace and security” and recognizes “the inherent right of individual or collective self-defense in accordance with the Charter.” S.C. Res. 1368, *supra* note 114. *Compare id. with* G.A. Res. 56/1, *supra* note 116. These provisions refer to Chapter VII of the U.N. Charter, Articles 39 and 51. U.N. Charter, *supra* note 10, arts. 39, 51. Article 39 empowers the Security Council to make a determination regarding threats to peace and security and acts of aggression. In conjunction with Articles 41 and 42, it empowers the Security Council to take steps to remove the threat, including severing diplomatic relations, imposing economic sanctions, and initiating military action. *See id.* arts. 39, 41-42; *infra* note 118. Therefore, by articulating the 9/11 terrorist attack as a threat to international peace and security, Security Council Resolution 1368 authorizes the potential use of military force against its perpetrators, al-Qaeda and its potential conspirators. Moreover, Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations” U.N. Charter, *supra* note 10, art. 51. Thus, Resolution 1368 arguably also allowed the United States to take unilateral military action in response to 9/11.

However, Article 51 only permits unilateral military action “until the Security Council has taken measures necessary to maintain international peace,” U.N. Charter, *supra* note 10 art. 51, and would scarcely serve as a justification for the largely unilateral attack of Iraq nearly two years later, particularly as there has never been any demonstrable nexus between 9/11 and Iraq. Nevertheless, Article 51 might have served to justify an attack on Afghanistan, individually or collectively, a few months after 9/11, because Resolution 1373, adopted approximately two weeks after 1368, reaffirmed both the categorization of the 9/11 attacks as threats to international peace and security and the right to individual and collective self-defense. *See* S.C. Res. 1373, *supra* note 40. Resolution 1373 also asserts the need to “combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,” referring to the diplomatic, economic, and military “means” laid out in the Charter’s Articles 41 and 42. *Id.*; U.N. Charter, *supra* note 10, arts. 41-42; *infra* note 118.

response to threats to the peace.¹¹⁸ In addition, Resolution 1368 stresses the responsibility of states that host terrorist organizations, stating, “[T]hose responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable”¹¹⁹ When read in conjunction with Resolution 1373, which includes a long list of counter-terrorist measures, including freezing assets, refraining from assisting terrorist groups, exchanging pertinent information, and assisting in enforcement procedures, this resolution creates an affirmative duty on member states to not only refrain from supporting terrorist activities, but also to actively participate in the struggle against terrorism.¹²⁰ Moreover, these resolutions not only strengthen the law enforcement model but also validate the limited use of military force for counter-terrorism efforts under Chapter VII of the U.N. Charter.

118. U.N. Charter, *supra* note 10, art. 41-42. Article 41 of the U.N. Charter states, “The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.” *Id.* Article 42 states, “Should the Security Council consider the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations.” *Id.* art. 42.

119. S.C. Res. 1368, *supra* note 114, ¶ 3.

120. *Compare id. with* S.C. Res. 1373, *supra* note 40. Resolution 1373 mandates “that all States *shall* . . . prevent and suppress financing of terrorist acts;” criminalize collection of funds for terrorist activities, freeze funds of persons who participate in terrorist activities, and prohibit the donation of funds to terrorist groups. *Id.* ¶ 1 (emphasis added). Furthermore, Resolution 1373 states “that all States *shall* . . . refrain from providing any form of support” to terrorists, “take necessary steps to prevent the commission of terrorist acts, . . . deny safe haven” to terrorists or those who conspire with them, ensure that conspirators are also brought to justice, provide assistance in connection with terrorist investigations, and provide effective border control to prevent movement of terrorists or terrorist groups. *Id.* ¶ 2 (emphasis added). By using the language “shall,” these provisions create an affirmative obligation on U.N. member states that precludes any claims of neutrality. U.N. member states must conform their domestic legislation to adhere to Resolution 1373. The language in Resolution 1373 is in sharp contrast to other declarations and resolutions that “call upon States” to combat terrorism or “encourage, support or affirm” counter-terrorism measures. *See, e.g.,* Measures to Eliminate International Terrorism, G.A. Res. 54/110, ¶¶ 3-5, U.N. Doc. A/RES/54/110 (Feb. 2, 2000). By using the imperative, Resolution 1373 carries an implicit threat and suggests that failure to comply with its mandate may result in punitive action. What kind of punitive action, if any, remains to be seen. However, reference to President Bush’s refrain of “either you’re with us or you’re against us” certainly leads to the conclusion that States who opt for neutrality may be treated comparably to States who sponsor terrorism. *See* Eric Schmitt, *A Nation Challenged: Bush Tells Iran Not to Undercut Afghan Leaders*, N.Y. TIMES, Jan. 11, 2002, at A1.

Parallel to the adoption of instruments regarding terrorism, the United Nations has developed a body of human rights law consisting of six core treaties and the Universal Declaration of Human Rights, which recognize all of the rights and freedoms terrorists seek to trample.¹²¹ In addition, regional organizations have established human rights courts in the Americas, Europe, and Africa.¹²² These courts re-view human rights cases and have the authority to overturn the domestic courts of the states that have accepted their contentious jurisdiction.¹²³ Together, these courts have established a body of case law and legal opinions that have exponentially enriched the recognized jurisprudence of international human rights law. Furthermore, the U.N. Human Rights Committee has rendered its own legal opinions in cases brought before it by complainants,¹²⁴ and the International Court of Justice has rendered opinions at the behest of both states and the U.N. General Assembly regarding human rights law.¹²⁵ All of these sources

121. United Nations, Human Rights in Action, <http://www.un.org/rights/HRToday/action.htm> (last visited Jan. 9, 2006). The six core human rights treaties are the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, the Convention Against Torture and Cruel, Inhuman and Degrading Punishment, *supra* note 62, the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, the International Covenant on Civil and Political Rights, *supra* note 17, the International Covenant on Economic, Social and Cultural Rights, *supra* note 88, and the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195.

122. See Council of Eur., European Court of Human Rights, <http://www.echr.coe.int/> (last visited Mar. 6, 2006); Afr. Comm'n on Human and People's Rights, History, http://www.achpr.org/english/_info/history_en.html (last visited Mar. 6, 2006); Inter-Am. Court of Human Rights, General Information, http://www.corteidh.or.cr/general_ing/index.html (last visited Mar. 6, 2006).

123. See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and People's Rights art. 3, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III); American Convention on Human Rights art. 62(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), Sept. 3, 1953, Europ. T.S. 5, 213 U.N.T.S. 222.

124. See generally International Covenant on Civil and Political Rights, *supra* note 17, arts. 28-45; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302; Office of the United Nations High Comm'r for Human Rights, Human Rights Committee, <http://www.ohchr.org/english/bodies/hrc/index.htm> (last visited Mar. 6, 2006). In addition to the Human Rights Committee, three other U.N. human rights bodies, the Committee Against Torture (CAT), the Committee on Migrant Workers (CMW), and the Committee on the Elimination of Racial Discrimination (CERD) are competent to hear individual complaints. Office of the United Nations High Comm'r for Human Rights, Human Rights Bodies—Complaints Procedures, <http://www.ohchr.org/english/bodies/petitions/index.htm> (last visited Mar. 6, 2006).

125. Int'l Court of Justice, General Information, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Mar. 6, 2006). The International Court of Justice is a principle organ of the United Nations. U.N. Charter, *supra* note 10, arts. 92-96; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

transcend national boundaries and have contributed to the development and enlargement of international human rights jurisprudence.

In 1993, the Vienna Declaration served as a junction between international counter-terrorist law and human rights law. Paragraph 17 of the Vienna Declaration explicitly linked terrorism with human rights and reflected emerging acceptance of greater international scrutiny and state responsibility.¹²⁶ International criminal tribunals, formed since the 1990s, further evince the development of the link between terrorism and human rights law in that they have competence to hear such matters as crimes against humanity.¹²⁷ In addition, regional human rights bodies, such as the Inter-American Commission on Human Rights of the Organization of American States (OAS), have concluded that terrorism should be addressed by the jurisprudence of international law, international human rights law, and international humanitarian law.¹²⁸ More recently, the link between terrorism and human rights has been reflected in the High-level Panel's recommendations. The fight against terrorism is no longer a domestic criminal matter, but a global human rights issue. The report of the High-level Panel reflects another milestone in the convergence between human rights instruments and counter-terrorism and re-asserts the necessary commitment to human rights when addressing terrorism.

The sharp increase in international terrorism in the last thirty years, the sponsorship of terrorism by at least some so-called "rogue" states and the nefariously efficient and deadly means modern technology has provided to terrorist factions have led to a new emerging worldview. Coupled with dramatic advances in the law of human rights, this emerging worldview recognizes terrorism as an international scourge against human rights and allows for a global response that imposes greater scrutiny and state responsibility. Unfortunately, the domestic response to terrorism has been largely based on the law enforcement and military models, frequently at the cost of human rights. While some discussion of "winning the hearts and minds" of the disaffected has been expressed, it is not a bedrock assumption of counter-terrorism policy. A human rights model, integrated or stand-alone, has not been incorporated into policy consistent with modern trends and the changing worldview. In light of the human rights alle-

126. *Vienna Declaration*, *supra* note 108, ¶ 17.

127. See Amnesty Int'l, International Criminal Tribunals, <http://web.amnesty.org/pages/ict-index-eng> (last visited Feb. 27, 2006).

128. INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS ¶ 18, OEA/Ser.L/V/116/Doc. 5 rev. 1 corr., (2002), available at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm>.

gations recently made against the United States, and absent a real financial and tactical commitment to human rights, the “war on terrorism” may prove counterproductive. Furthermore, as the debate concerning a definition of terrorism has lagged and failed to reflect the predominant role of human rights, terrorism continues to be defined in law enforcement and military terms. As a result, the definition mirrors the immature policies that have failed to keep in step with the emerging worldview.

V. THE QUEST FOR A DEFINITION OF TERRORISM

In reviewing the potential benefit of defining terrorism, it is advisable to determine if such a definition is necessary or desirable. An inflexible, binding definition may be counterintuitive as a prejudiced reflection of the will of the authors, or even a propaganda tool used as a wedge to ensure the futility of compromise. If the task is impossible, then the endeavor constitutes a pointless waste of resources. Definitions can be problematic because actors seek to postulate them in accordance with their particular dogma without accepting or recognizing the potential validity of other points of view. Currently, a generally accepted definition eludes the international community, but consensus may be both desirable and ultimately necessary.

Some commentators suggest that, “the price of consensus on terrorism has been a far-going reduction of complexity.”¹²⁹ Achieving agreement results in a definition based on the lowest common denominator that is too general to be of any practical consequence.¹³⁰ However, definitions containing differing elements affect cooperation between states. The doctrine of dual criminality requires that the act be criminal in both states, which turns on the specific, common elements of the crime.¹³¹ Without some consensus on a definition of terrorism, extradition, exchange of information, and domestic prosecutions of extraterritorial acts are therefore complicated.¹³²

On a larger scale, the lack of a definition diminishes the word’s use to a watered-down expression that can mean virtually anything. Allegorically speaking, the terrorist is the new nameless enemy, which to some may include all foreigners, immigrants, welfare recipients, or

129. Alex Schmid, “*Terrorism on Trial*”: *Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 381 (2004).

130. See Leonard Weinberg et al., *The Challenges of Conceptualizing Terrorism*, 16 TERRORISM & POL. VIOLENCE 777 (2004).

131. Schmid, *supra* note 129, at 380.

132. See *id.*

democrats, to name only a few. Terrorist has become the twenty-first century equivalent of communist, a generic term of derision whether the target perpetrates violence or just maintains a different point of view.¹³³ It has entered the lexicon as a propaganda tool to label competing ideologies and promote fear and bigotry. "Accusing one's political opponents of being 'terrorists' whose claims and movements 'we' in the 'civilized world' cannot afford to engage politically is an old rhetorical device used to uneven effect by numerous colonial regimes over the decades."¹³⁴ "Conveying criminality, illegitimacy, and even madness, the application of [the word] *terrorist* shuts the door to discussion *about* the stigmatized group or *with* them, while reinforcing the righteousness of the labelers, justifying their agendas and mobilizing their responses."¹³⁵ Furthermore, the dilution of the term not only diminishes it, but also marginalizes terrorist acts and consequently the victims of terrorism themselves. It also marginalizes the desperate underlying conditions that lead to terrorism.

In his article, *International Legal Responses to Terrorism*, Michael Reisman recognizes the desirability of a definition in order to "establish a focus."¹³⁶ Reisman articulates the core difficulty of arriving at a generally accepted definition by acknowledging that "[d]efinitions of terrorism are particularly outcome sensitive precisely because they tend to delimit the range of lawful responses to them."¹³⁷ Accordingly, definitions reflect the values and goals of the authors and mandate the type of responses those authors intuitively support rather than responses arrived at through objective analysis.

Industrialized states tend to define terrorism with an emphasis on terrorist acts while developing nations tend to focus on the causes of terrorism. Industrialized states wish to "arrest, prevent and deter" terrorist acts through strict and efficient enforcement while the developing countries wish to alleviate the miserable underlying conditions that lead to terrorism.¹³⁸ These latter goals are inconsistent with the industrialized nations' aims as they necessarily call for a redistribution of wealth and power. Poverty and aggression, along with religious

133. PHILIP HERBST, *TALKING TERRORISM: A DICTIONARY OF THE LOADED LANGUAGE OF POLITICAL VIOLENCE* 164 (2003).

134. Helena Cobban, *Unintended Consequences: A Forum on Iraq and the Mideast*, *THE NATION*, Aug. 15-22, 2005, at 22.

135. HERBST, *supra* note 133, at 164.

136. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT'L L.* 3, 9 (1999).

137. *Id.*

138. *Id.* at 7-8.

motivations, are the root causes of most contemporary terrorism. This dichotomy renders the expression “one man’s terrorist is another man’s freedom fighter” particularly meaningful.¹³⁹

The Special Rapporteur has indicated her “leaning towards [a working definition of terrorism] . . . in order to delimit the subject matter with greater precision”¹⁴⁰ While acknowledging the ambitiousness of such an enterprise, she specifically conceded the utility of a generally accepted definition.¹⁴¹ It appears that much of the dissension in the U.N. Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) concerns whether the enterprise is possible at all.¹⁴² In light of the hopeless deadlock of some U.N. initiatives,¹⁴³ this consideration has some merit. Fueling the pessimism about achieving consensus is the current atmosphere generated by a purportedly conservative, commerce-driven U.S. administration dealing with the impact of 9/11. In a world quickly becoming polarized again (economically divided between the “haves” and the “have-nots” instead of by ideology), it is easy to concede the impossibility of arriving at a definition of terrorism. To suggest that the industrialized nations will accept responsibility for terrorist acts owing to wealth and power disparities may be an exercise in futility.

On the other hand, the hopelessness and desperation of the “have-nots” carry an intractable mandate that can brook no compromise. The passionate Indian writer Arundhati Roy eloquently describes the hardship of the Palestinian people in appraising “suicide bombing [as] an act of individual despair, not a revolutionary tactic.”¹⁴⁴ In contrast, Article 27 of the Covenant of the Islamic Resistance Movement (Hamas) states, “[W]e will become its soldiers and fuel for its fire that will burn the enemies.”¹⁴⁵ Therein lies the dichotomy: one side pos-

139. *Progress Report*, *supra* note 31, ¶ 25.

140. *Id.* ¶ 26.

141. *Id.*

142. *See id.* ¶¶ 24-29.

143. *See A MORE SECURE WORLD*, *supra* note 4, ¶¶ 157, 159-60.

144. ROY, *supra* note 45, at 61.

145. Hamas, *Covenant of the Islamic Resistance Movement*, art. 27, Aug. 18, 1988, available at <http://www.mideastweb.org/hamas.htm>. Hamas was established in 1988 as a movement independent of the PLO and called for more radical change and means to obtain change than the PLO. *See* MidEast Web, *The Covenant of the Islamic Resistance Movement (Hamas)*, <http://www.mideastweb.org/hamas.htm> (last visited Jan. 9, 2006). “The Hamas has a ‘military’ wing . . . that engages in terrorist acts,” and the organization is dedicated to the obliteration of Israel and the destruction of Zionism. *Id.* Article 10 of the Covenant proposes, “As the Islamic Resistance Movement paves its way, it will back the oppressed and support the wronged with all its might. It will spare no effort to bring about justice and defeat injustice, in word and deed, in this place and everywhere it can reach and have influence therein.” Hamas, *supra*, art. 10. Conversely, Article 11 states, “the land of Palestine is an Islamic Waqf

sesses unprecedented power and wealth that it refuses to relinquish, whereas the other possesses the desperation of peoples with nothing left to lose, and where compromise equals death. In this postmodern lion's den, it is understandable how consensus has eluded the United Nations.

The High-level Panel on Threats, Challenges and Change has proffered the following definition:

[T]errorism [is] any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council Resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹⁴⁶

However, this definition is at once too narrow and too broad. It is too broad because it includes not only terrorist acts, but also counter-terrorist actions modeled on the military approach as in the Balkans, Afghanistan, and Iraq. In each case, the coalition involved sought to intimidate or compel a population, government, or international organization to act or abstain from acting, such as refraining from terrorist activity or support. While the coalitions' actions were ostensibly directed at armed forces, they necessarily resulted in civilian casualties, rendering the distinction small and, to the victims, meaningless. Furthermore, except in response to state-sponsored terrorism, the use of a military model is usually directed at scattered targets that, rather than being neatly organized in armed militias, are camouflaged within the community, in effect ensuring a campaign directed at innocent civilian populations as much as at the terrorists. This net effect also holds true for occupations; in Iraq, military intelligence officers estimate that seventy to ninety percent of all detainees have no connection to terrorism and were arrested by mistake.¹⁴⁷

consecrated for future Moslem generations until Judgment Day This is the law governing the land of Palestine in the Islamic Sharia (law) and the same goes for any land Moslems have conquered by force, because during the times of (Islamic) conquests, the Moslems consecrated these lands to Moslem generations till the Day of Judgment." *Id.* art. 10. The measures endorsed by Hamas to ensure the Moslem maintenance of the land of Islamic conquests eschew peaceful resolution, and Hamas describes peaceful solutions and international conferences as contradictory to the Islamic Resistance Movement. *Id.* art. 13. "These conferences are only ways of setting the infidels in the land of the Moslems as arbitrators. When did infidels do justice to the believers?" *Id.* However, Hamas does not speak for the entire Islamic community and, in Article 27, concedes that the PLO is a secular organization that contradicts the religious ideology of Hamas. *Id.* art. 27.

146. A MORE SECURE WORLD, *supra* note 4, ¶ 164.

147. INT'L COMM. OF THE RED CROSS, *supra* note 53, ¶ 7.

The High-level Panel's definition is too narrow in the sense that it is insensitive to the root causes of terrorism. In this respect, the definition reverts to previous reactionary models favoring law enforcement and military responses over proactive ones.¹⁴⁸ Admittedly, the High-level Panel includes numerous prevention devices and human rights sensitivities in its 101 recommendations, such as social, political, and economic justice issues, but fails to provide an institutional foundation for those initiatives. Without reference to human rights issues in the definition, those recommendations will be seen as supplemental rather than reflective of core counter-terrorism policy and, consequently, will be the first to be abandoned. Accordingly, this definition does not break any new ground. It does not distinguish between terrorists and freedom fighters or between terrorists and governments engaged in counter-terrorism initiatives. It also does not address the underlying conditions that promote terrorism and is ambivalent toward modern trends in human rights jurisprudence. Thus, this definition does nothing to bridge the chasm between a causal treatment of terrorism and a reactionary one.

According to Walter Laqueur, Chairman of the International Research Council at the Center for Strategic and International Studies, "It can be predicted with confidence that the disputes about a comprehensive, detailed definition of terrorism will continue for a long time, that they will not result in a consensus, and that they will make no noticeable contribution towards the understanding of terrorism."¹⁴⁹ Notwithstanding this seemingly hopeless stalemate, steps toward a universal definition can be taken. Héctor Fix Zamudio, an expert advising the Sub-Commission,¹⁵⁰ believes that a definition is possible "as had happened in the case of the concepts of indigenous populations and minorities."¹⁵¹ While deadlocked on the issue of self-determination, arriving at a definition of "indigenous peoples" was

148. These models have some deterrent value, which can be credited as a device of prevention. However, that value is hardly operative against suicide bombers and populations without recourse to conventional institutions for resolving grievances and providing for basic necessities, or those who seek ever-greater publicity for their cause.

149. Walter Laqueur, *THE AGE OF TERRORISM* 79 n.* (1987), *quoted in* Schmid, *supra* note 129, at 396.

150. See Office of the High Comm'r for Human Rights, Working Groups of the Sub-Commission, <http://www.ohchr.org/english/bodies/subcom/groups.htm> (last visited Feb. 4, 2006) (indicating that Mr. Zamudio is the Latin American member of the Sessional Working Group on the Administration of Justice); Office of the High Comm'r for Human Rights, Working Group on the Administration of Justice, <http://www.unhcr.ch/html/menu2/2/subwgaj.htm> (last visited Feb. 4, 2006) (indicating that members of the Sessional Working Group are subject matter experts).

151. *Progress Report*, *supra* note 31, ¶ 27.

equally political but was arguably circumvented by adhering to a transitional format where the working group considered a number of principles.¹⁵² This template, which can be referred to as “principles among those to be considered,” calls for greater flexibility and a case-by-case analysis.¹⁵³ Though the template does not provide a uniformly dispositive definition, it still represents an improvement on the status quo and blends well into a holistic format for countering terrorism. A more inclusive definition would allow more varied counter-terrorism measures and approaches to be included in policy.¹⁵⁴ Furthermore, a universally accepted, transitional format consisting of “principles among those to be considered” in delimiting and focusing on the problem of terrorism would not constitute too broad an approach, as each analysis would hinge upon a multi-prong test giving certain principles greater or lesser weight or relevance in accordance with individual circumstances.

The Sub-Commission has already set parameters within which it conceptualizes terrorism and “scrutiniz[es] its essential elements and manifestations, with a view to obtaining and drawing together basic definitional components”¹⁵⁵ These parameters include delineations along the line of the actors (state, state-sponsored, and sub-state or individual terrorism) and of the manifestations¹⁵⁶ (direct manifestation, by threatening “the right to life, liberty and dignity of the individual;” the right to a democratic society; and rights relating to “social peace and public order;”¹⁵⁷ and indirect manifestation, such as in counter-terrorist measures). Additionally, “principles among those to be considered” is broad enough to account for the widely acknowledged elements of terrorism, such as the fear, violence, and intimidation it produces, the fact that its immediate victim is not usually its ultimate target, and the randomness that it employs in order to convey its message. Equally important are the root causes of terrorism, which include the misery, frustration, and hopelessness of the disenfran-

152. See U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Working Paper: The Concept of “Indigenous People,”* ¶ 9, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) [hereinafter U.N. Econ. & Soc. Council, *The Concept of “Indigenous People”*] (prepared by Erica-Irene A. Daes). See generally U.N. Dep’t of Econ. & Soc. Affairs, Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples*, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19, 2004).

153. Cf. U.N. Econ. & Soc. Council, *The Concept of “Indigenous People,”* *supra* note 152, ¶ 68.

154. See *Progress Report*, *supra* note 31, ¶ 30.

155. *Id.*

156. *Id.* ¶ 35.

157. *Preliminary Report*, *supra* note 34, ¶ 18.

chised who may be outnumbered or kept in check through modern technology, and the corruption of national leaders, their powerful foreign allies, and the multinational corporations and military-industrial complex that empowers them. Moreover, a set of “principles among those to be considered” would also recognize that those who engage in terrorist activities, and their supporters, employ historical, religious, traditional, nationalistic, and ideological norms to justify their acts.

Can these parameters and essential elements, organized into a transitional format, constitute a working definition that can acquire general acceptance? The answer may depend upon the principles employed. For example, principles could include the political motives for terrorism, the widespread disparity of wealth and power distribution, and religious fanaticism. The principles must be broad enough to include both the terrorist acts and their underlying root causes. However, the purpose of such a definition must be clear: it would serve merely as a transitional device with the ultimate goal of arriving at a more clearly articulated definition. The transitional medium creates an environment that allows for a more holistic response, at least in the short term, in order to address widespread terrorist activity comprehensively. Such a framework would not only allow for combating terrorism under traditional methodologies, but also would minimize traditional constraints, thereby stemming recruitment by addressing cause and effect. As a step in arriving at a universal definition, the transitional method engenders concessions and recognizes conflicting political claims. A new dialectic must replace the older dichotomy between the law enforcement, military approach and the causal, human rights approach. This new model, fueled by a universally accepted transitional format and grounded in a human rights focus, if successful, could render the previous dichotomy irrelevant and, as a policy matter, result in a greater net synergy of human rights than that merely attributable to the eradication of terrorism. Additionally, as discussed above, such a result would be consistent with recent international trends in the development of human rights mechanisms and jurisprudence, counter-terrorism initiatives, and many of the 101 recommendations of the High-level Panel.

Furthermore, the concerns arising from the dual criminality doctrine with respect to the need for a uniformly agreed upon definition are overblown. The substantive acts constituting terrorism, such as mass murder and kidnapping, are still prohibited in virtually every country. They are therefore actionable for purposes of accountability and transnational cooperation, such as extradition. The use of a transitional format without a precise immutable definition will not nega-

tively affect international law enforcement efforts. Rather, it may allow greater flexibility by providing a wider expanse of core common elements.

In order to realistically deal with the threat of terrorism and the miserable conditions that give rise to it, a more precise delimitation of the problem must become generally accepted. As a multi-faceted dilemma that is subject to competing political ideologies, the task of defining terrorism seems to grow more distant and elusive. With each new counter-terrorism measure that ignites new terrorist attacks, polarizes communities, and justifies the terrorists in the eyes of the more moderate, driving them to extremism, the need for quick, unified action becomes apparent. If an immutable definition is not presently feasible, then a transitional format needs to be approved, and a holistic response adopted. Moreover, since the current framework is already mired by division, almost entirely without structure or consensus and given to dilution, the inclusive transitional format provides a point of reference and greater clarity. Thus, a transitional format narrows the focus, but simultaneously expands the available options for a solution and therefore establishes a holistic basis for combating both the effects and causes of terrorism. If a transitional format is not adopted, the camps will remain polarized and continue to rattle sabers while innocents suffer desperate and humiliating conditions and pointless violence. The process of consensus is slow, but adherence to a transitional format may provide at least rudimentary structure and hasten cohesion. The polarized dichotomy of the post 9/11 world offers less than fertile soil for compromise but new transitions and events may create new priorities and eventually allow for the de-polarization of a definition of terrorism.

VI. THE FLAWS OF A MONOLITHIC STRATEGY

“During the presidential campaign, vice-president Dick Cheney contemptuously criticised the application of law enforcement [to terrorism] as effeminate ‘sensitivity.’ In June of this year [2005], Bush’s deputy chief of staff, [sic] Karl Rove, attacked the very idea of ‘indictments’ [of terrorists] as a symptom of liberal weakness.”¹⁵⁸ These observations seemingly reject all other counter-terrorism models solely in favor of a military treatment. In context, however, these as-

158. Sidney Blumenthal, Editorial, *Above the Rule of Law*, THE GUARDIAN (U.K.), Aug. 5, 2005, at 23.

sions constitute little more than political rhetoric¹⁵⁹ as the United States has never rejected the law enforcement model and, as previously discussed, the Bush administration has taken unprecedented steps in strengthening that approach since 9/11. In a speech to the National Press Club on July 22, 2005, General Richard B. Myers, Chairman of the Joint Chiefs of Staff, indicated that he had “objected to the use of the term ‘war on terrorism’ before, because if you call it a war, then you think of people in uniform as being the solution.”¹⁶⁰ Despite the current intensive role of the military, Myers said that solutions will require “all instruments of our national power, all instruments of the international communities’ national power” and are “more diplomatic, more economic, more political than [they are] military.”¹⁶¹ These observations reveal awareness that multiple approaches or models beyond military responses are necessary, and, despite the rhetoric, are borne out by the official U.S. Department of State’s *National Strategy for Combating Terrorism (National Strategy)*.¹⁶² The *National Strategy* calls for multiple initiatives in combating terrorism and relates counter-terrorism policy in terms of a “4D strategy.”¹⁶³ The four Ds stand for:

1. “Defeat Terrorists and Their Organizations”;¹⁶⁴
2. “Deny Sponsorship, Support, and Sanctuary to Terrorists”;¹⁶⁵
3. “Diminish the Underlying Conditions that Terrorists Seek to Exploit”;¹⁶⁶ and
4. “Defend U.S. Citizens and Interests at Home and Abroad.”¹⁶⁷

159. Indeed, in July 2005 administration and Pentagon officials announced a re-branding of the slogan “war on terror” asserting the proposition that “the long-term struggle is as much an ideological battle as a military mission,” thus backing off from the military metaphor. Eric Schmitt & Thom Shanker, *New Name for “War on Terror” Reflects Wider U.S. Campaign*, N.Y. TIMES, July 25, 2005, at A7. Soon thereafter, the Bush administration reversed its position and reinstated the slogan, Blumenthal, *supra* note 158, leading to the conclusion that such statements are only political rhetoric and not policy. This type of rhetoric can be very dangerous however, as it belittles the value of a human rights approach, and irresponsibly fosters a climate of intolerance, particularly in the Armed Forces.

160. Schmitt & Shanker, *supra* note 159.

161. *Id.*

162. U.S. DEP’T OF STATE, THE NATIONAL STRATEGY FOR COMBATING TERRORISM (2003) [hereinafter NATIONAL STRATEGY], available at http://usinfo.state.gov/is/international_security/terrorism.html (follow “National Strategy for Combating Terrorism (PDF)” hyperlink).

163. *Id.* at 15.

164. *Id.*

165. *Id.* at 17.

166. *Id.* at 22.

Remarkably, both General Myers and the *National Strategy* not only take the importance of both the law enforcement and military models as given, but seem to evince empathy toward the human rights model. When discussing economic and political solutions, General Myers seems to be referring to wealth disparities and political disenfranchisement consistent with the human rights model. He even suggests that they are more important to arriving at a solution than the military option.¹⁶⁸

The *National Strategy* calls for “[d]iminish[ing] the [u]nderlying [c]onditions that [t]errorists [s]eek to [e]xploit.”¹⁶⁹ Similarly, the new U.N. initiative calls for “[d]issuading the disaffected from choosing terrorists tactics,” but it also calls for “[d]efending human rights in the struggle against the scourge of terror,”¹⁷⁰ which is missing from the *National Strategy*. As discussed previously, defending human rights from terrorism is two-fold—guarding against direct attacks by terrorists and indirect assaults resulting from the imposition of overly harsh counter-terrorist measures.¹⁷¹ The *National Strategy* addresses direct attacks by terrorists under the rubric of “defeat[ing] terrorists” and “defend[ing] U.S. citizens and interests at home and abroad,” but fails even to allude to the indirect impact of terrorism.¹⁷² Thus, it is missing sensitivity to the human rights implications of the other models. Specifically, the *National Strategy* fails to explicitly mandate the application of human rights norms on law enforcement and military models. Without a foundation of strict adherence to human rights norms as official policy, the norms become impotent guidelines to be followed only if the situation and circumstances allow. Excesses in the “war on terrorism,” at home and abroad, testify to the effects of a failure to institutionalize human rights norms. This failure is also reflected in contemporary debates over safety versus civil liberties, the Patriot Act, the attempted justification of the use of torture, and the development of a torture warrant.¹⁷³ It is also partly responsible for the United States’ poor reputation abroad and for Amnesty International USA’s call for the exercise of universal jurisdiction to prosecute

167. *Id.* at 24.

168. *Cf.* Schmitt & Shanker, *supra* note 158.

169. NATIONAL STRATEGY, *supra* note 162, at 22.

170. UNITED NATIONS FOUND., *supra* note 9, at 1.

171. *See* discussion *supra* Part III.

172. NATIONAL STRATEGY, *supra* note 162, at 15, 24.

173. *See, e.g., Legal Torture?*, CBS NEWS, Sept. 20, 2002, available at <http://www.cbsnews.com/stories/2002/01/17/60minutes/main324751.shtml>. *See generally* Alan M. Dershowitz, *The Case for Torture Warrants*, 2002, <http://www.law.harvard.edu/faculty/dershowitz/Articles/torturewarrants.html>.

Bush administration officials for torture. Moreover, this failure is counterproductive because lax or nonexistent compliance with human rights norms in the U.S. military and law enforcement models promotes terrorist recruitment.

Additionally, the *National Strategy* goal of “[d]iminish[ing] the [u]nderlying [c]onditions that [t]errorists [s]eek to [e]xploit”¹⁷⁴ fails to provide a convincing commitment to human rights. While it acknowledges “that there are many countries and people living with poverty, deprivation, social disenfranchisement, and unresolved political and regional disputes,”¹⁷⁵ it proposes nothing more than continuing “[o]ngoing U.S. efforts to resolve regional disputes, foster economic, social, and political development, market-based economies, good governance, and the rule of law,” along with “win[ning] the ‘war of ideas’”¹⁷⁶ If previous, under-funded U.S. efforts were insufficient to stem the growing tide of global terrorism, continuing those same unsuccessful measures cannot be expected to improve the status quo. The *National Strategy* also stipulates, “[W]e will wage a war of ideas to make clear that all acts of terrorism are illegitimate”¹⁷⁷ Thus, the U.S. human rights initiative apparently consists of continuing failed efforts. On one hand, the United States continues to finance a public relations campaign naively designed to convince poor, starving, dying, and disenfranchised people that terrorism is illegitimate. On the other, it unrealistically attempts to intimidate future suicide bombers by showing that acts of terrorism will be dealt with firmly.

The *National Strategy* poignantly illustrates that the United States has no significant human rights policy specifically earmarked for combating terrorism. Essentially, U.S. policy consists of military and law enforcement initiatives. Indeed, in Iraq, U.S. policy consists almost entirely of a military model, as might be expected in a war zone, and reveals the dangers and counterintuitive initiatives of a monolithic strategy. Even a cursory view of developments in Iraq brings the need for a holistic policy into focus. Despite misleading official statements to the contrary,¹⁷⁸ the U.S. efforts in Iraq seem to have increased the

174. NATIONAL STRATEGY, *supra* note 162, at 22.

175. *Id.* at 22.

176. *Id.* at 23.

177. *Id.*

178. A U.S. State Department report released on April 29, 2004 reported global terrorism was at its lowest level since 1969. *Oops: State Dept. Reports Record Drop in Terrorism*, WORLD TRIBUNE.COM, June 13, 2004 http://216.26.163.62/2004/ss Terror_06_13.html. After critics in Congress objected, the State Department issued a retraction admitting that the report seriously distorted the threat. *Id.* In response, Colin Powell stated on NBC’s “*Meet the Press*” that this statement was “very embarrassing” and that “we were wrong.” *Id.*; see also Powell:

resistance in Iraq and terrorism globally and the resulting threat instead of reducing it. U.S. commanders estimated the number of insurgents at the end of 2003 at approximately 5,000.¹⁷⁹ However, by the end of 2004 Iraqi intelligence estimated the number as 40,000 active, full-time fighters with an additional 160,000 “part-time fighters and supporters who provide food, shelter, funds and intelligence.”¹⁸⁰ By January 9, 2006, the number of U.S. casualties in Iraq was 2,209 killed with an additional 16,379 wounded¹⁸¹ and the estimated number of Iraqi civilians killed in the first two years of the war range from 25,000 to 128,000.¹⁸² The number of Iraqi wounded is undoubtedly

Terrorism Report was a “Big Mistake,” MSNBC.COM, June 14, 2004, <http://www.msnbc.msn.com/id/5183158/>. The corrected June 23, 2004 version of the State Department’s report PATTERNS OF GLOBAL TERRORISM revealed that 2003 had “the largest number of terror-related incidents deemed ‘significant’ at any time since the U.S. began issuing these figures” PHYLLIS BENNIS ET AL., A FAILED “TRANSITION”: THE MOUNTING COST OF THE IRAQ WAR 9 (2004), available at <http://www.ips-dc.org/iraq/failedtransition/> (follow “Full report with citations” hyperlink) (referring to U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 (2004), available at <http://www.state.gov/s/ct/rls/pgtrpt/2003/>). Moreover, in an interview on CNN’s *Larry King Live*, U.S. Vice President Dick Cheney stated, “I think they’re in the *last throes*, if you will, of the insurgency.” *Iraq Insurgency in “Last Throes,” Cheney Says*, CNN.COM, May 31, 2005, <http://www.cnn.com/2005/US/05/30/cheney.iraq/> (emphasis added). Yet, soon thereafter, U.S. Secretary of Defense Donald Rumsfeld stated that the insurgency “could go on for any number of years” and could even last 12 years. *Rumsfeld Braces for More Violence in Iraq: Says Insurgency Could Endure “for Any Number of Years,” Perhaps Until 2017*, MSNBC.COM, June 26, 2005, <http://www.msnbc.msn.com/id/8366705/>.

179. Tom Lasseter & Jonathan S. Landay, *Analysis: U.S. Losing Ground in War*, SEATTLE TIMES, Jan. 23, 2005, at A8.

180. *Id.* Additionally, this does not include the number of insurgents actually captured or killed, which is estimated to be approximately 24,000 by August 2004 (as noted in MICHAEL E. O’HANLON & ADRIANA LINS DE ALBUQUERQUE, IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ 8 (2004)), bringing the total to at least 64,000 to 74,000. BENNIS, ET AL., *supra* note 178, at i.

181. Press Release, U.S. Dep’t of Defense, U.S. Casualty Status (Jan. 9, 2006), <http://www.defenselink.mil/news/casualty.pdf> (on file with author).

182. A report by Iraq Body Count published on July 18, 2005, claimed that nearly 25,000 Iraqi civilians were killed in the two years following the start of the U.S.-led invasion. *Survey: 25,000 Civilians Killed in Iraq War*, CNN.COM, July 20, 2005, <http://edition.cnn.com/2005/WORLD/meast/07/19/iraq.bodycount/>. Other estimates of the number of civilians killed in the same period vary widely. For example, in July 2005 the Geneva-based Institute of International Studies estimated that 39,000 Iraqis had been killed as a direct result of combat or armed violence since March 2003. Irwin Arief, *39,000 Iraqis Killed in Fighting, New Study Finds*, REUTERS.COM, July 11, 2005, <http://today.reuters.com/News/CrisesArticle.aspx?storyId=N11220315>. In contrast, according to the October 2004 issue of the medical journal THE LANCET, “at least 100,000 Iraqi civilians may have died because of the U.S. invasion.” Rob Stein, *100,000 Civilian Deaths Estimated in Iraq*, WASH. POST, Oct. 29, 2004, at A16 (referring to Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq*, THE LANCET, Oct. 29, 2004). Critics suggest that the study figures are inflated but LANCET researcher Les Roberts claimed that the real numbers “could be much higher.” *Id.*; Roberts, *supra*. In addition, Iraqiyyun, an Iraqi-based humanitarian organization, reported that 128,000 Iraqis had been killed as of July 12, 2005, and that fifty-five percent of

many times greater than those killed, and if consistent with the ratio of the American troops, would range between 185,000 and 850,000. Moreover, the majority of these civilian casualties have been women and children.¹⁸³ The monetary cost of the wars in Iraq and Afghanistan has been over \$314 billion, and estimates place the total projected price at approximately \$700 billion by the end of the occupation.¹⁸⁴ The diplomatic and public relations costs are almost incalculable but include the loss of foreign allies due to the largely unilateral attack, the retreat from the Geneva Conventions,¹⁸⁵ the use of torture in at least fourteen prisons in Iraq,¹⁸⁶ and the rendering of suspects to be tortured in other countries. The perception of the United States as a human rights leader has been ruined. This monolithic approach to combating terrorism results in swelling, and potentially arming,¹⁸⁷ the ranks of terrorist organizations and, many contend, has done vastly greater harm than good.¹⁸⁸

them were children under the age of twelve or women. *Iraqi Civilian Casualties*, WORLD PEACE HERALD, July 12, 2005, <http://www.wpherald.com/storyview.php?StoryID=20050712-122153-5519r>; see also David Cortright, *Iraq: The Human Toll*, THE NATION, July 24, 2005, available at <http://www.thenation.com/doc.mhtml%3Fi=20050801&s=cortright>.

183. Press Release, Johns Hopkins Bloomberg School of Pub. Health, *Iraqi Civilian Deaths Increase Dramatically After Invasion* (Oct. 24, 2004), available at http://www.jhsph.edu/PublicHealthNews/Press_Releases/PR_2004/Burnham_Iraq.html (referring to statistics reported in Roberts, *supra* note 182).

184. James Sterngold, *Casualty of War: The U.S. Economy*, S.F. CHRON., July 17, 2005, at A1. Additionally, if these projections prove correct, the costs of this conflict will exceed the adjusted cost of the Korean War or the Vietnam War. "The Center for Strategic and Budgetary Assessments . . . has estimated that the Korean War cost about \$430 billion and the Vietnam War cost about \$600 billion, in current dollars," well below the estimated \$700 billion projection. *Id.*

185. Former White House Counsel Alberto Gonzales has described the Geneva Conventions as "quaint" and advised against following some of their provisions because "this new paradigm [the war on terrorism] renders obsolete Geneva's strict limitations on questioning of enemy prisoners . . ." Draft Memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), available at <http://www.msnbc.com/id/4999148/site/newsweek>; see also Michael Isikoff, *Memos Reveal War Crimes Warnings*, MSNBC.COM, May 19, 2004, <http://www.msnbc.msn.com/id/4999734/site/newsweek/>.

186. See INT'L COMM. OF THE RED CROSS, *supra* note 53, ¶¶ 1, 24-25, 59.

187. In October 2004 news stories began to surface concerning the disappearance of a 380-ton stockpile of sophisticated explosives at the Al Qaeda arms depot, see *Disappearance of Explosives in Question*, CNN.COM, Oct. 27, 2004, <http://www.cnn.com/2004/WORLD/meast/10/26/iraq.explosives/>, which may have fallen into the hands of the insurgents.

188. See, e.g., BENNIS, ET AL., *supra* note 178, at 8. According to the International Institute for Strategic Studies (IISS), "the war in Iraq has accelerated recruitment to al Qaeda and made the world less safe." *Id.* (citing INT'L INST. FOR STRATEGIC STUDIES, STRATEGIC SURVEY 2003/4 169 (2004) (U.K.)). The IISS estimates the total "al Qaeda membership . . . at 18,000 with 1,000 active in Iraq," and concluded that the occupation has provided a "potent global

Conversely, strict adherence to an integrated human rights model would probably have prevented the war,¹⁸⁹ particularly as there was no

recruitment pretext” and thereby “weakened the ‘war on terrorism.’” *Id.* (citing and quoting INT’L INST. FOR STRATEGIC STUDIES, *supra*, at 6-7). According to Richard Clarke, “The Iraq war took resources away from the fight against al Qaeda, which was able to survive and morph into a hydra-headed monster.” Trudy Rubin, *Iraq Prison Scandal: Arab Hearts and Minds May Be Lost Forever*, MILWAUKEE J. SENTINEL, May 6, 2004, at 21A, quoted in BENNIS, ET AL., *supra* note 178, at 8. The lessons of Iraq have inspired hundreds of Muslims to radicalize, “dramatically strengthening [al Qaeda’s] recruitment efforts.” BENNIS, ET AL., *supra* note 178, at 9 (citing Patrick E. Tyler & Don Van Natta, Jr., *Militants in Europe Openly Call for Jihad and the Rule of Islam*, N.Y. TIMES, Apr. 26, 2004, at A1). The nexus between the Iraq war and occupation and the increase in terrorist attacks is demonstrated by a study of what motivates the terrorists who carry out the attacks. In *Dying to Win, the Strategic Logic of Suicide Terrorism*, author Robert Pape conducted a study of suicide bombings from 1983 to 2003 (“315 attacks carried out by 462 bombers . . . involving 18 different organizations”), Fred Kaplan, *It’s Not Who We Are, It’s What We Do: What Can Terrorists Teach Us?*, SLATE, July 20, 2005, <http://slate.com/toolbar.aspx?action=print&id=2123010>, and found what they had in common was “a specific secular and strategic goal: to compel modern democracies to withdraw military forces from territory that the terrorists consider to be their homeland.” ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM 4 (2005), quoted in Kaplan, *supra*.

Hussain Osman, one of the men alleged to have participated in London’s failed bombings on July 21[, 2005], recently told Italian investigators that they prepared for the attacks by watching “films on the war in Iraq,” *La Repubblica* reported. “Especially those where women and children were being killed and exterminated by British and American soldiers . . . of widows, mothers and daughters that cry.”

Naomi Klein, *Terror’s Greatest Recruitment Tool*, THE NATION, Aug. 29, 2005, available at <http://www.thenation.com/docprint.mhtml?i=20050829&s=klein> (quoting Claudia Fusani, “Non volevamo colpire l’Italia” la lunga confessione nella notte, LA REPUBBLICA (Ital.), July 20, 2005). A study published in March 2005 conducted by the Global Research in International Affairs Center, found that “the vast majority of Arabs killed in Iraq have never taken part in any terrorist activities prior to their arrival in Iraq.” Reuven Paz, *Arab Volunteers Killed in Iraq*, 3 PROJECT FOR THE RESEARCH OF ISLAMIST MOVEMENTS (PRISM) OCCASIONAL PAPERS 5 (2005) (Isr.), available at http://www.e-prism.org/images/PRISM_no_1_vol_3_-_Arabs_killed_in_Iraq.pdf, quoted in Kaplan, *supra*. The author of another study conducted by the Center for Strategic and International Studies, Nawaf Obaid, stated that of 250 Saudis who went to fight in Iraq, many were from prominent families, “watched the destructive images of the war on Arabic satellite TV, and . . . read the jihadist Web sites’ urgings to go repel the infidel’s occupation.” Kaplan, *supra* (referring to the then-as-yet-unpublished report NAWAF OBAID & ANTHONY CORDESMAN, SAUDI MILITANTS IN IRAQ: ASSESSMENT AND KINGDOM’S RESPONSE 9 (2005), available at http://www.csis.org/index.php?option=com_csis_pubs&task=view&id=1442 (follow “Download PDF” hyperlink)). Obaid also stated, “Abu Ghraib was just a disaster, . . . a resounding call to these kids.” *Id.*; see also OBAID, *supra*, at 9.

189. An integrated human rights model fashioned after the template suggested by the U.N. High-level Panel would have distinguished the Iraq War from the invasion of Afghanistan. Because Afghanistan was demonstrably a state sponsor of terrorism, military intervention furthered the legitimate goal of deterring state sponsored terrorism consistent with the military counter-terrorism model. Moreover, the Afghan conflict arguably met the conditional criteria for authorized use of force laid out in the High-level Panel’s report. See A MORE SECURE WORLD, *supra* note 4, ¶ 207 at 67. These criteria permit the use of force for a proper purpose, in the face of a serious threat, as a last resort, when the means employed are proportionate and the balance of consequences favors action. *Id.* The Iraq war, on the other hand, did not meet these prerequisites because the perceived threat was not serious enough to warrant military intervention, the primary purpose of the invasion was at issue, all non-

connection between the 9/11 attacks and the Hussein regime and thus, no creditable claim of state-sponsored terrorism.¹⁹⁰ By spending less than half of the money already spent on the military model, a stand-alone human rights approach in the developing world could have significantly reduced hunger, supplied immunizations for children and medicine for people with HIV/AIDS, and provided clean water and sanitation for over two years.¹⁹¹ Essentially, instead of increasing the terrorist threat exponentially, the United States could have saved half of the money and all of the lives while simultaneously authoring a twenty-first century Marshall Plan.¹⁹² Such a plan would have eradicated most of the sources of terrorism, thereby minimizing terrorist recruitment, support, and sympathy on the ground.¹⁹³ While the post 9/11 political climate was inhospitable to a massive foreign aid

military options had not yet been explored and exhausted, the means used were disproportionate to the threat, and the foreseeable consequences of action were far worse than the foreseeable consequences of inaction.

190. Despite numerous claims and allusions to the contrary, the definitive admission that there were no ties between the Hussein regime and al Qaeda came during the 2004 Vice-Presidential debate in remarks by Vice-President Cheney. See Dick Cheney, U.S. Vice President, John Edwards, N.C. Senator, & Gwen Ifill, PBS, Vice Presidential Debate at Case Western Reserve University (PBS television broadcast Oct. 5, 2004), available at http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1005.html.

191. BENNIS, ET AL., *supra* note 178, at 54; cf. Dick Bell & Michael Renner, *A New Marshall Plan? Advancing Human Security and Controlling Terrorism*, WORLD WATCH INST., Oct. 9, 2001, <http://www.worldwatch.org/press/news/> (follow "A New Marshall Plan? Advancing Human Security and Controlling Terrorism" hyperlink). "The U.N.'s Food and Agriculture Organization (FAO) estimates that it would only need \$24 billion annually to cut world hunger in half. That would translate to 400 million people currently malnourished gaining access to sufficient food, many for the first time in their lives." *Id.* (citing Press Release, United Nations Food and Agr. Org., FAO Unveils Global Anti-Hunger Program (June 4, 2002), available at <http://www.fao.org/english/newsroom/news/2002/5500-en.html>). "The director of UNAIDS needs only \$10 billion annually to launch a truly global, comprehensive program to respond to HIV/AIDS." *Id.* (citing Peter Piot, Executive Dir., UNAIDS, & Under Secretary-General, United Nations, AIDS: The Need for an Exceptional Response to an Unprecedented Crisis, Presidential Fellows Lecture at the World Bank (Nov. 20, 2003), available at http://www.unaids.org/html/pub/Media/Speeches02/Piot_WorldBank_20Nov03_en_pdf.pdf). "The UN Children's Organization UNICEF estimates that it would take a mere \$2.8 billion annually to provide immunization for every child in the developing world." *Id.* (citing UNICEF, IMMUNIZE EVERY CHILD: GAVI STRATEGY FOR SUSTAINABLE IMMUNIZATION SERVICES 16 (2000), available at http://www.unicef.org/immunization/immunize_every_child.pdf). "To provide clean water and functioning sewage systems to the world's population, the World Water Council estimates an annual cost of \$37 billion." *Id.* (citing JAMES WINPENNY, FINANCING WATER FOR ALL 3 (2003), available at http://www.worldwaterforum4.org.mx/uploads/TBL_DOCS_35_17.pdf (suggesting that between \$10 and \$49 billion in additional investments are needed annually)). These programs total to \$74 billion a year, *id.*, or \$148 billion for two years, *see id.*, less than half of the \$314 billion cost of the military campaign, *see* Sterngold, *supra* note 184.

192. Cf. Bell & Renner, *supra* note 191.

193. *See id.*

agenda, as the climate cools greater emphasis may be placed on prevention consistent with a human rights model.

Alternatively, an integrated human rights model would have prevented excesses that have further exacerbated global polarization. For example, both rendition to other states and the atrocities at Abu Ghraib and other detention facilities would have been strictly prohibited had military and civilian personnel been adequately trained in human rights principles.¹⁹⁴ Under an integrated human rights model, suspects would not have been rounded up en masse, in a net cast so widely that it apprehended a supermajority of innocent detainees.¹⁹⁵ Moreover, the nexus between human rights law and humanitarian law would have precluded Bush administration officials from eschewing the Geneva Conventions, leading to different treatment at Guantanamo Bay, Bagram Air Force Base, and Iraqi detention facilities.¹⁹⁶ It is axiomatic that information obtained under torture is inherently unreliable;¹⁹⁷ yet, even if it were helpful, the public relations impact and bad faith that the use of torture ignites create the potential for far greater harm and spread terrorism more widely. Correctly applied, a military model with a human rights structure built in as a governor can be beneficial against global terrorism, where reliance on a single

194. Cf. INT'L COMM. OF THE RED CROSS, *supra* note 53, ¶¶ 23, 37, 44, 63.

195. Cf. *id.* ¶¶ 5-8.

196. Cf. *id.* ¶¶ 23, 37, 44.

197. E.g., DEP'T OF THE ARMY, FIELD MANUAL 34-52 (FM 34-52): INTELLIGENCE INTERROGATION 1-8 (1992), available at <http://www.fas.org/irp/doddir/army/> (follow "FM 34-52, Intelligence Interrogation" hyperlink). The U.S. Senate unanimously denounced and recognized the unreliability of torture and in 2004 offered bi-partisan legislation in the form of the anti-torture amendment to the Defense Department authorization bill. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, S. 2400, 108th Cong. § 1057 (as passed by the Senate, June 23, 2004); *Nomination of The Honorable Alberto R. Gonzales, Counsel to President George W. Bush, to Be the Attorney General of the United States: Hearing Before the S. Judiciary Comm.* 109th Cong. (2005) (statement of Sen. Richard J. Durbin) [hereinafter Durbin], available at <http://talkleft.com/Gonzaleshearingstatementfinal.htm>. Though the Senate bill was passed over the objections of the Bush administration, Durbin, *supra*, that version was not enacted. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1756 (enacting H.R. 4200, rather than S. 2400). While the House of Representatives version that was enacted does condemn torture, it does not acknowledge the inherent unreliability of torture. Compare *id.* § 1091 with S. 2400 § 1057.

THE ARMY FIELD MANUAL ON INTELLIGENCE INTERROGATION states, "Use of torture or any other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It may also place U.S. and allied personnel in enemy hands at greater risk of abuse by their captors." DEP'T OF THE ARMY, *supra*, quoted in Durbin, *supra*.

model, especially without an integrated human rights structure, has resulted in a backlash and left the struggle far more desperate.

VII. CONCLUSION

Professor Susan Tiefenbrun's article, *A Semiotic Approach to a Legal Definition of Terrorism*, concludes:

It is possible to de-center this paradox and to reduce the definitional difficulty by proposing a categorical prohibition on the use of terrorism, no matter how lofty the purpose may be, no matter how worthy the political or ideological cause may seem to those oppressed by tyrannical regimes. There is no justification for terrorism. It is not defensible to argue that terrorism needs to be viewed from a political context and that the "motivation" of the actor and the sociological context in which the act occurs must be taken into consideration. Such an approach would legitimize terrorist acts by claiming that the ends justify the means. The Machiavellian principle that the ends justify the means simply does not comport with the generally accepted principles of the rule of law.¹⁹⁸

Though it seeks to reduce the bloodshed, this proposed solution is ill advised as it fails to reflect either the moral or the practical imperatives encountered by those who are "oppressed by tyrannical regimes." Rather than delimit terrorism, it reinforces the validity of a double standard. To those whose homes are bombed and loved ones maimed or killed by state actors, a categorical prohibition against terrorism has a hollow ring, as the subtle distinction between the application of Machiavellian principles by state actors and by non-state actors is lost. Moreover, it presupposes the validity of the status quo, to some a horrible reality, and assumes that terrorism itself ultimately can be stopped by resorting to force. Force is ineffective against peoples whose children are starving, whose homes are bombed, and who live under the yoke of political or economic tyranny. Iraq provides vivid testimony to the proposition that force only begets more force. The ends do not justify the means and the innocent should not be made to carry the burden of sociopolitical economic disparities. However, to ignore the "motivations" for terrorism is to deny the validity of the suffering of those innocents.

The United Nations has recognized that the solution to terrorism is more complex than an artificial prohibition and the use of a military or law enforcement approach. The High-level Panel's observations and

198. Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 INT'L L. STUDENTS ASSOC. J. INT'L & COMP. L. 357, 388-89 (2003).

recommendations make this recognition apparent. Terrorism is a human rights issue, and the model for a solution should be grounded in a human rights approach using human rights techniques, sensitivities, and jurisprudence. Terrorism has a tremendous effect on human rights, both directly and indirectly and thus, the moral, if not legal, jurisdiction of the human rights mechanisms is manifest. Without a counter-terrorism solution grounded in human rights, the cure will result in greater deprivation of civil liberties and in a Pandora's Box of atrocities. Developments in the "war on terror" support this prediction.

Additionally, a human rights approach is consistent with the emerging understanding that massive human rights abuses may justify piercing national boundaries. Increased globalization creates a greater ripple effect with respect to human rights violations. Universal adherence to human rights norms and two generations of human rights efforts have resulted in increased international scrutiny and allow for jurisdiction over egregious human rights deprivations. The recent convergence of human rights instruments with counter-terrorism instruments further cements the link between human rights and terrorism and allows for jurisdiction over state sponsors of terrorism and the activities of non-state actors. Thus, there is a legal, intellectual, moral, and historical grounding for a human rights approach to counter-terrorism. The suggestions of the High-level Panel can be read to imply a tripartite initiative including law enforcement and military models as well as a manifold human rights model consisting of stand alone and integrated components.

This multifaceted approach requires a transitional format for defining terrorism as the current deadlock precludes a holistic counter-terrorism policy. A "principles among those to be considered" framework allows for the flexibility of initiatives that address both cause and effect. The High-level Panel's proposed definition is unfortunate and unnecessary. It contradicts the other initiatives extant in the recommendations and relies on a traditional, outmoded, and incomplete treatment of counter-terrorism. Without a definition grounded in human rights, counter-terrorism efforts will revert to purely military and law enforcement models.

Moreover, a tripartite model that seeks to address terrorism on all relevant levels requires a massive expansion of the role of human rights, human rights organizations, and human rights bodies. Governments, particularly amongst the industrialized states, need to make a significant, long-term commitment to both relieving inequities and strictly conforming national efforts to human rights norms. This ex-

pansion of the primacy of human rights bodies would serve to scrutinize and arrest the conditions that create hopelessness as well as abate overzealous counter-terrorist activities by states. Human rights machinery may also be marshaled in the actual law enforcement process, through both the International Criminal Court and ad hoc or hybrid tribunals. The use of human rights mechanisms brings a transparency to the process that is counter-intuitive, and therefore lacking, in other models. Naturally, as law enforcement and military models rely, in part, on secrecy, some of their operations would remain opaque, but an integrated human rights policy would preclude clandestine transgressions. The tripartite model calls for a massive departure from the initiatives currently in place in terms of allocation of funds. A twenty-first century Marshall Plan, and a military confined to addressing state sponsors of terrorism, peacekeeping, and ensuring the orderly distribution of aid would require a huge transfer of funds from military operations to humanitarian assistance.

The establishment of a human rights model complete with a transitional definition format is desirable for four reasons. First, such an approach could render the current deadlock on a definition of terrorism meaningless. This deadlock only serves to deplete scarce resources and diminish the world focus on eradicating terrorism. The consequences of endless debates sounding in perceived national interests result in competing national methodologies, which are often at odds with each other and with accepted principles of human rights. The status quo serves to increase the ability of some authorities to conduct witch-hunts and further nationalistic goals or to quell political dissent. Enthusiastic Russian acquiescence to the U.S.-led "war on terrorism" could be attributable to the goal of employing harsh methods of silencing Chechen dissent¹⁹⁹ and there are authoritative views that the 9/11 attacks were used as a pretext for the Iraq war.²⁰⁰ A human rights model would circumvent the status quo and decrease the ability of some actors to usurp the debate while allowing for broader international cooperation in developing a comprehensive counter-terrorism approach.

Second, this model calls for the empowerment of extant human rights organs by substantially increasing their jurisdiction and size. These enlarged human rights organs would not only serve to decrease terrorist atrocities and violence, they would synergistically relieve

199. See CLARKE, *supra* note 12, at 136 (referring to the relationship between Bin Laden and oppressed Muslims seeking independence in Chechnya).

200. See, e.g., *id.* at 30.

many of the underlying human rights violations that constitute the root causes of terrorism and prevent the excesses carried out in the name of counter-terrorism. Given the ripple effect of modern globalism, this initiative would spill over into regions, which though not currently involved in terrorist activities, are nonetheless disadvantaged and susceptible. Moreover, an empowered human rights model could have precluded U.S. torture practices in the contemporary “war on terror” and reinforced the Geneva Conventions and domestic civil liberties. Furthermore, massive expansion of human rights organs is a desirable end in itself as the need to combat terrorism could morph into a greatly expanded global observation of human rights and thus give some meaning to the death of the innocent victims. A human rights model is far superior to one modeled on war. Where the former may empower and expand existing human rights organs, the latter will likely lead to greater violence and polarization and ultimately will undermine them. The United States’ “war on terrorism” has had the unintended result of creating more terrorism and insurgency and diminishing the role of human rights. Egypt’s President Hosni Mubarak warned against invading Iraq stating, “If there is one (Osama) bin Laden now, there will be 100 bin Ladens afterward.”²⁰¹ Revelations of U.S. policy regarding the Geneva Conventions and its justifications for using torture substantially lower the bar and encourage other states to turn away from previously accepted norms, thus causing the opposite result of a human rights model and ushering in a net loss of human dignity worldwide.

Additionally, a model fashioned after war instead of human rights requires adherence to the law of warfare. Under the Third Geneva Convention, combatants are required to be released at the conclusion of the hostilities.²⁰² Therefore, at the conclusion of the war, the “terrorists,” as combatants, must be released and arguably would pose a substantial threat to international security and safety. Under the Fourth Geneva Convention, non-combatants are subject to civil protections and are entitled to basic due process.²⁰³ If the “terrorists” were classified as civilians or non-combatants, then they would have

201. Hosni Mubarak, President of Egypt, Address to Egyptian Army Commanders in Suez (Mar. 31, 2003), *quoted in Egypt’s Mubarak Warns “100 Bin Ladens,”* CBS NEWS, Mar. 31, 2003, www.cbsnews.com/stories/2003/03/31/world/main547033.shtml.

202. Third Geneva Convention, *supra* note 92, art. 118. Article 118 of the Third Geneva Convention states, “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” *Id.*

203. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

to be accorded due process and civil protection rights.²⁰⁴ This latter treatment is extremely unlikely, because classifying “terrorists” as non-combatants in a “war on terrorism” is counterintuitive. Amid harsh criticism, the United States has established a third class of detainees called “enemy combatants,” in order to hold suspects with neither the civil protections afforded civilians nor the guarantee of release at the conclusion of hostilities afforded to combatants.²⁰⁵ This practice is criticized as unauthorized, without precedent,²⁰⁶ amounting to illegal detention and a war crime in violation of the Third and Fourth Geneva Conventions.²⁰⁷ While a detailed analysis of the designation “enemy combatant” is beyond the scope of this article, it nonetheless serves to illustrate the constraints of the military model, and the extent to which administration officials have gone to vitiate those constraints. Absent the “enemy combatant” designation and assuming that the “terrorists” are treated as combatants in the conventional sense, the only practical means to indefinitely detain them and not violate the Geneva Convention is by maintaining a permanent state of war. Such a conclusion is unacceptable and illustrative of the defects of a military model.

Third, the inclusive nature of a human rights model presents the advantage of increased international cooperation and tolerance that can lead to better organized efforts to apprehend terrorists. The United Nations and other international organizations have taken steps to begin the process of transnational cooperation such as the 9/11 Clearinghouse and treaties involving the financing of terrorist

204. *Id.* art. 5. Article 5 of the Fourth Geneva Convention does allow for derogation of some protections of non-combatants if they are suspected of or engaged in activities hostile to the security of the state or if they are detained as spies or saboteurs in occupied territory. *Id.* However, such persons shall be “treated with humanity, and in the case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.” *Id.*

205. See AMNESTY INT’L, *APPEALING FOR JUSTICE: SUPREME COURT HEARS ARGUMENTS AGAINST THE DETENTION OF YASER ESAM HAMDY AND JOSE PADILLA 1* (2004), <http://web.amnesty.org/library/index/engamr510652004>. Among the chorus of voices criticizing the designation “enemy combatant” is Amnesty International USA, which describes the indefinite detentions of suspects as a violation “[of] fundamental principles of international human rights and humanitarian law, in particular the prohibition against arbitrary detention.” *Id.* at 4.

206. See Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1420-10 (2002). The case of *Ex parte Quirin*, 317 U.S. 1 (1942), has been widely cited as precedent for the “enemy combatant” designations proffered by the Bush administration. See *id.* at 1420. Critics argue that this case had a much narrower construction than its current application and that this designation was only authorized if “Congress declared war and specifically authorized [military] commissions in its Articles of War.” See *id.* Moreover, Dickinson suggests that the “enemy combatant” designation is a violation of the War Crimes Act, 18 U.S.C. § 2441 (2000 & Supp. II 2002). See *id.* at 1421.

207. See, e.g., AMNESTY INT’L, *supra* note 205, at 6.

groups.²⁰⁸ However, commitment to a human rights model would bring these efforts under one banner with a consistent set of rules, perhaps with the International Criminal Court taking an active role. Such a commitment would result in a truly international effort, rather than one posited in disorganized domestic responses. The Group of Eight (G8) and the U.N. Global Compact are examples of two international initiatives designed to relieve underlying suffering and promote sustainable development.²⁰⁹ As evidenced by the “war on terrorism,” relying on domestic resolutions, unilateral initiatives, and law enforcement and military responses alone creates division amongst traditional allies and fails to adequately shepherd international commitment.

Finally, a human rights model encourages transparency. Transparency is vital to expose the underlying conditions and human rights violations that give rise to terrorism. It also reveals the methods of interrogation and other practices used in the apprehension of prisoners and curtails overzealous responses by states. A transparent human rights model would have prevented the torture dealt at the hands of the United States in Iraq and Afghanistan by ensuring the reasonable treatment of detainees by a multinational force under the scrutiny of organs dedicated to the promotion of human dignity.

A multilateral response to terrorism utilizing a tripartite approach is pragmatic, morally desirable, and consistent with ongoing efforts of the United Nations and trends in international public law, international counter-terrorism, and international human rights law. The burden of countering international terrorism is not borne by the United States alone, but as the world’s sole superpower, it must carry a large portion of the responsibility. However, the people of the United States are faced with an unprecedented deficit, due in part to the Iraq War, and with the graphic images of 9/11 still fresh in their minds. They are therefore unlikely to embrace a massive international aid program or to give priority to integrating human rights norms into counter-terrorism policy. Yet, failure to do so may result in a continuation of the violence, short-term fixes, and worsening conditions. As illustrated by the extraordinary implementation of international and domestic law enforcement measures enacted in response to 9/11, international cooperation in reversing the pandemic of terrorism is available.

208. See *supra* notes 39-42 and accompanying text.

209. See Univ. of Toronto, What Is the G8?, http://www.g7.utoronto.ca/what_is_g8.html (last visited Jan. 9, 2006); see United Nations Global Compact, What is the Global Compact?, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Jan. 9, 2006).

Much of this support should be directed at conquering terrorism by eliminating its root causes instead of fanning the fires of hatred via a monolithic, reactionary approach.

A U.S.-led multilateral coalition dedicated to reversing the conditions exploited by terrorist groups conforms to many U.N. initiatives. In addition to the recommendations of the High-level Panel, the United Nations has developed the Millennium Development Goals (MDGs).²¹⁰ These goals consist of eight objectives: “1. Eradicate extreme poverty and hunger[,] 2. Achieve universal primary education[,] 3. Promote gender equality and empower women[,] 4. Reduce child mortality[,] 5. Improve maternal health[,] 6. Combat HIV/AIDS, malaria and other diseases[,] 7. Ensure environmental sustainability[, and] 8. Develop a global partnership for development.”²¹¹ It is the objective of the United Nations and all 191 Member States to achieve these goals by 2015.²¹² Additionally, pursuant to U.N. reorganization goals specifically regarding human rights, the Action 2 Initiative has been put into place in order to integrate “sustainab[le] . . . national human rights protection systems” and to promote the MDGs.²¹³

By fully funding these initiatives, promoting human rights, and promoting sustainable development, the United States and the other industrialized states could make significant progress toward preventing terrorism and eradicating its source. These efforts, along with military and law enforcement initiatives that scrupulously observe human rights norms, constitute the best chance of wiping out terrorism. Although a human rights approach may be currently unpopular in the United States, public opinion and U.S. leadership tend to be cyclical. Given emerging trends in international counter-terrorism and human rights law, change that may facilitate greater human rights sensitivity and a holistic approach to counter-terrorism is foreseeable.

210. United Nations, What Are the Millennium Development Goals? <http://www.un.org/millenniumgoals/> (last visited Jan. 9, 2006).

211. *Id.*

212. *Id.*

213. United Nations, Action 2: Introduction, <http://www.un.org/events/action2/> (last visited Jan. 9, 2006). The Action 2 Initiative was formulated from a report by the Secretary-General. *Id.*; The Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change*, ¶ 51, delivered to the General Assembly, U.N. Doc. A/57/387 (Sept. 9, 2002), available at <http://www.un.org/events/action2/A.57.0387.pdf>.