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A Regime in Need of a Balance: The UN Counter-terrorism Regime between Security and Human Rights

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A Regime in Need of a Balance: The UN Counter-terrorism Regime between Security and Human Rights¹

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ABSTRACT

Abstract: Since 9/11, the UN's counter-terrorism regime has developed two distinct approaches on combating international terrorism. The Security Council follows a traditional security doctrine that focuses on how to best protect states from the threat posed by international terrorists. This is largely due to the centrality of the state in Security Council thinking and attitudes. The General Assembly and the various UN human rights organs, influenced by the human security doctrine, have taken a more holistic, human rights-based approach to the threat of international terrorism. This paper offers a review of how the dichotomy above affects the application of UN policy vis-à-vis the UN's counter-terrorism regime. This paper calls for a bridging of the gap between these two approaches, advocating an interdisciplinary approach that combines traditional security with human security considerations.

¹ The opinions, and conclusions of this paper and its faults, are solely those of the author. I also wish to thank Professors Lauryn Gouldin, Todd Berger, Syracuse College of Law, Professor William C. Banks, Director of the Institute for National Security and Counterterrorism(INSCT); Professor Corri Zoli, Senior Researcher, INSCT, for helpful comments and conversations.

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Table of Contents

INTRODUCTION1

I. **STATES, NATIONAL SECURITY, HUMAN SECURITY, UN ORGANS, 9/11 AND SECURITY STUDIES**.....7

A. States, National Security, International Law and the United Nations 8

B. Human Security, the United Nations, and 9/11..... 13

II. **UNDERSTANDING THE AL QAEDA TERRORIST THREAT**.....15

III. **THE UN COUNTER-TERRORISM REGIME**.....22

A. The 1267 Committee: Addressing Threats from Individuals. 24

B. The Counter-Terrorism Committee, States, and Domestic Counter-terrorism 26

 1. Security Council Resolution 1373 (2001).....26

 2. Security Council Resolution 156629

C. The General Assembly, Human Security, and Counter-terrorism 31

 1. The United Nations Global Counter-Terrorism Strategy and the Counter-terrorism Implementation Task Force.32

 2. The Secretary-General, Human Security, and Terrorism 34

 3. The Special Rapporteurs, Human Rights, and Counter-terrorism.....35

IV. **A NATIONAL SECURITY-HUMAN RIGHTS SYNERGY FOR THE UN COUNTER-TERRORISM REGIME**.....38

INTRODUCTION

The destruction of the Twin Towers was a defining moment in world history; not only because it was the first act of mass terrorism by a non-state actors, but because it was seen live across the world.² The reaction of the international society³ was incredibly swift. It began with mass condemnation,⁴ and a call for action,⁵ exemplified by President George W. Bush's speech before Congress:

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning.⁶

The declaration of war against Al Qaeda, and by extension against militant, radical Islam—Islamism⁷—led to legislation intended to help governments counter the threat that Al Qaeda and its affiliates⁸ pose.⁹ Significantly, across

² See, e.g., William Branigin, *When Terror Hits Close to Home; Mix of Emotions Sweeps over County Residents*, WASH. POST, Sept. 20, 2001, at FE.3.

³ HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* S 13 (1977) (defining an international society as something that “. . . exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the working of common institutions”).

⁴ See, e.g., Jean-Marie Colombani, *We Are All Americans*, LE MONDE (Sept. 12, 2001), http://www.worldpress.org/1101we_are_all_americans.htm (declaring to its French readership, “We are all Americans”).

⁵ See, e.g., Judy Dempsey & Andrew Parker, *NATO Call to Fight Terrorism Scourge*, FIN. TIMES, Sept. 12, 2001, at 5 (NATO Secretary-General, Lord Robertson, stating “I condemn in the strongest possible terms the attacks which have just been perpetrated against the United States of America. My sympathies go to the American people, the victims and their families. These barbaric acts constitute intolerable aggression against democracy and underline the need for the international community and the members of the alliance to unite their forces in fighting the scourge of terrorism.”).

⁶ *President Bush's Address to a Joint Session of Congress and the Nation*, WASH. POST. (Sept. 20, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [*President Bush's Address*].

⁷ When understood as a political movement, Islamism appears in different shades and types. Graham E. Fuller, *The Future of Political Islam*, 81 FOREIGN AFF. 48, 49 (2002) (“Today one encounters Islamists who may be either radical or moderate, political or apolitical, violent or quietist, traditional or modernist, democratic or authoritarian. The oppressive Taliban of Afghanistan and the murderous Algerian Armed Islamic Group (known by its French acronym, GIA) lie at one fanatic point of a compass that also includes Pakistan's peaceful and apolitical preaching-to-the-people movement, the Tablighi Jamaat; Egypt's mainstream conservative parliamentary party, the Muslim Brotherhood; and Turkey's democratic and modernist Fazilet/Ak Party.”).

⁸ Eliza Manningham-Buller, *The Safety of the Realm in Retrospect and Prospect*, 148 THE RUSI JOURNAL 8 (2003) (noting that “the events of 11 September were a watershed in the history

the world, states adopted legislative and policy changes to address the new threat that terrorism was seen to pose.¹⁰ The changes were aimed at both strengthening infrastructures in preparation for a devastating terrorist attack¹¹ and permitting the adoption of extraordinary measures to counter the threat.¹² In other words, states have generally taken the position that it is better to err on the side of caution when it comes to the threat that Al Qaeda poses.¹³ Consequently there has been a substantial increase in terms of responsibility and procedural expansion of government authority to address the threat.¹⁴ Nevertheless, as horrific as the attacks were, the expansive

of terrorism. . . . [t]hese were dramatic and devastating attacks, resulting in major loss of life, destruction of property and economic damage across the globe”); see also Anthony Field, *The New Terrorism: Revolution or Evolution?*, 7 POLITICAL STUD. REV. 195 (2009) (identifying six reasons why Al Qaeda represents ‘new’ terrorism).

⁹ See Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?* 65 MOD. L. REV. 724 (2002) (explaining how the changes affected domestic legislation).

¹⁰ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORISTS ATTACKS UPON THE UNITED STATES (2004) [hereinafter 9/11 COMMISSION REPORT] (calling for the establishment of the Department of Homeland Security to ensure better cooperation and information sharing); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; see also CLAUDIA HILLEBRAND, COUNTER-TERRORISM NETWORKS IN THE EUROPEAN UNION (2012) (highlighting the change in the European Union’s counter-terrorism network and emphasizing the role of the US in facilitating the change).

¹¹ Shaun Hill, *Maze, Grosvenor Square, London W1*, GUARDIAN, Aug. 12, 2005, at 63 (“The US embassy looks like Checkpoint Charlie and there are armed police at every corner.”); Hugh Muir, *Lack of Funds Hampers ‘Dirty Bomb’ Response Say Met Chiefs*, GUARDIAN, Feb. 26, 2006, at 10; see also Jon Coaffee, *Protecting Vulnerable Cities: The UK’s Resilience Response to Defending Everyday Urban Infrastructure*, 86 J. INT’L AFF. 939 (2010).

¹² The most visible recent example of the change in government policy as a response to terrorism has been the use of drones and targeted killing, not to mention the leaks as to the National Security Agency. See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (arguing that the U.S. system of using drones and targeted killing needs more transparency and that due process principles should apply with respect to drone attacks); see also Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2353 (2006) (critiquing the way the Bush administration has approached the threat of terrorism by declaring, “We now downplay torture and violations of the Geneva Conventions committed by ourselves or our allies as necessary elements of the war on terror, claiming that freedom from fear is now the overriding human rights value.”). Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN, (June. 5, 2013) <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

¹³ NSA Director Keith Alexander has defended the NSA surveillance program claiming that it has foiled more than 50 terrorist attacks in over 20 countries, of which 10 were in relation to the US. FBI Deputy Director Sean Joyce has also supported the program. Spencer Ackerman, *NSA chief Claims ‘focused’ Surveillance Disrupted more Than 50 Terror Plots*, (June 18, 2013) <http://www.guardian.co.uk/world/2013/jun/18/nsa-surveillance-limited-focused-hearing>.

¹⁴ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (arguing that the substantive expansion in terms of responsibility and procedural changes have come to compromise basic principles of equal treatment, individual justice, rule of law and political freedoms).

approach to security in the post-9/11 period¹⁵ has initiated a debate as to how the post-9/11 liberal state should combat terrorism, which has been equated with a war, although in the twenty-first century the notion of an unfettered, unregulated military campaign is no longer possible.¹⁶ Put simply, increasingly it appears that the new laws, measures, and policies comprising post 9/11 security challenge established liberal democratic principles,¹⁷ which includes basic fundamental rights.¹⁸

The reaction of some international organizations to 9/11 was more distinctive than that of states, leading to a radical change in the way these organizations respond to the threat of terrorism.¹⁹ The most visible change was within the United Nations (UN). The UN is the organization entrusted with saving international society from the scourge of war, promoting social progress, bolstering standards of living and freedoms, and advocating for international peace and security.²⁰ These are all basic rights. The clearest sign

¹⁵ Matt McDonald, *Human Security and the Construction of Security*, 16 J. GLOBAL SOC'Y, 290 (2002) ("In responding to the terrorist attacks by declaring war on a foreign government, Bush sought to create a context in which traditional mechanisms of security could be perceived as operating to achieve security for individuals.").

¹⁶ See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) (finding that the protection offered by international human rights law does not cease in time of armed conflict); see also G.A. Res. 65/208, U.N. Doc. A/RES/65/208 (Mar. 30, 2010) ("[I]nternational human rights law and international humanitarian law are complementary and mutually reinforcing."); see also Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007) (arguing that, in the twenty-first century, international humanitarian law and international human rights law overlap and complement each other).

¹⁷ See, e.g., PAUL WILKINSON, *TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE* (2001); Norman Abrams, *Development in US Anti-Terrorism Law*, 4 J. INT'L CRIM. JUST. 1117 (2006); Martha Crenshaw, *Counter-Terrorism Policy and the Political Process*, 24 STUD. CONFLICT & TERRORISM 329 (2001).

¹⁸ See, e.g., Mark Sidel, *Counter-terrorism and the Regulation of Civil Society in the USA*, 41 DEVELOPMENT & CHANGE, 293 (2010) (contrasting the American and British approach to counter-terrorism and charity regulation and finding that the US approach is more draconian, which affects the working of civil society groups).

¹⁹ The North Atlantic Council, for example, after recognizing that the United States had come under attack, allowed it to invoke Article 5 of the Washington Treaty against Al Qaeda. In other words, the first time NATO went to war, it was against a non-state actor. *North American Treaty Organization (NATO): Statement By NATO Secretary General, Lord Robertson*, 40 INT'L LEGAL MATERIALS 1268 (2001); see also Edward Alden & Alan Beattie, *Help Urged over Terror Funding IMF/World Bank*, FIN. TIMES, Nov. 16, 2001, at 10.

²⁰ It is noteworthy that *after* discussing the need "to save succeeding generations from the scourge of war," the Preamble moves to the need to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The third section calls on the organization to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom." The issue of maintaining peace and security only appears towards the end of the Preamble. *U.N. Charter*, pmbl.

of the organization's increased involvement in countering the Al Qaeda threat but in a manner more in tune with states, appeared at the Security Council, which—after decades of snubbing international terrorism—placed it at the top of its agenda.²¹ Concomitantly, the General Assembly also deepened its interest in international terrorism but with greater respect to the root causes of terrorism, leading it to adopt measures to counter the threat.²²

Drawing influence from the New Haven School,²³ this paper offers a review of some of the counter-terrorism mechanisms adopted by the UN since 9/11. In doing so, this paper highlights that the current UN counter-terrorism regime,²⁴ has two distinctive approaches to combating international terrorism and specifically the Al Qaeda threat. The divergence appears most clearly when contrasting the response of the Security Council to those of the General Assembly, the Human Rights Council, the Human Rights Committee,²⁵ and the Secretary-General's Office. In identifying this dichotomy, this paper does not seek to diminish the contribution of the UN's counter-terrorism regime or the efforts of the human rights community to ensure that a human rights perspective is present within the regime. Rather, this paper seeks to emphasize the duality of the regime, which ultimately

²¹ Hilde H. Kramer & Steve A. Yetiv, *The UN Security Council's Response to Terrorism: Before and After September 11, 2001*, 122 POL. SCI. Q. 415 (2007) (noting that prior to 9/11 the Security Council adopted thirteen resolutions classified as dealing with terrorism, but between 2011 and 2005, the Council adopted twenty resolutions dealing with terrorism).

²² G.A. Res. 59/195, ¶ Annex 3, U.N. Doc. A/RES/59/195 (Mar. 22, 2005) (“[T]errorism creates an environment that destroys the right of people to live in freedom from fear.”); *see also* UNITED NATIONS, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE: A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 48 (2004), *available at* <http://www.un.org/secureworld/report2.pdf>; INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, (2001); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 25, 2005) [hereinafter *In Larger Freedom*]; Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 51–52.

²³ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (noting the importance of innovation within the legal system and rejecting an anachronistic interpretation of such fundamental principles as sovereignty, rights (states' and human), and intervention); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007); Laura A. Dickinson, *Toward a New New Haven School of International Law*, 32 YALE J. INT'L L. 547 (2007).

²⁴ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 J. INT'L ORGANIZATIONS 185 (1982) (defining an international regime as “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area”).

²⁵ The Human Rights Council is an intergovernmental body established by the General Assembly pursuant to resolution 60/251 (Mar. 15, 2006) to help promote an international human rights regime. This regime includes addressing human rights violations committed by states against people. G.A. Res. 60/251 U.N. Doc. A/RES/60/251 (Apr. 3, 2006). The Human Rights Committee is a treaty-based organ entrusted with interpreting the 1966 International Covenant on Civil and Political Rights (ICCPR), which deals with legal obligations vis-à-vis civil and political rights. International Covenant on Civil and Political Rights art. 28(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

weakens the UN's contribution to the counter-terrorism campaign. Principally, this paper explains the development of the two approaches as it explores the different philosophical outlooks that the Security Council and the General Assembly incorporate. It also highlights how the dichotomy undermines the development of an effective program to counter and address the threat posed by terrorism in the post-9/11 period, which is what the UN needs to do. Ultimately, as will be shown below, the Security Council follows a traditional conception of security—national security. Under this paradigm, the security of the state is at the heart of politics. Drawing from this, advocates argue that if the state is strong, it serves as the best guarantor for human rights;²⁶ after all, the right to life is the most important human right.²⁷ It is under this reasoning that the Council has accepted the state defense of public emergency²⁸ as a mean to justify new state policies vis-à-vis international terrorism.²⁹ In contrast, the General Assembly and other UN organs follow a human security formula. They argue that the suppressing social and economic rights, and civil and political rights, encourages people to use terrorism. Thus, their focus is to call on states to ensure that they do not violate international human rights, refugee, and humanitarian law,³⁰ which is why their counter-terrorism formula is more holistic, typically non-military,³¹ and human rights-based.³²

²⁶ M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law Oriented World Order*, 8 SANTA CLARA J. INT'L L. 1, 3 (2010) (“[T]he Kantian view has influenced modern international law as evidenced by the contemporary emphasis on human rights, which is based on universal values. But, this paradigm has yet to be translated into binding and enforceable norms of international law that would compel the pursuit of peace, justice and human rights irrespective of the power and enrichment imperatives pursued by those states that have one or the other, over other states that have neither the one nor the other.”).

²⁷ Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to life, liberty and security of person.”).

²⁸ See *infra* Part I.A

²⁹ The clearest manifestation of this development is the right to invoke the defense of self-defense against non-state actors. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

³⁰ See G.A. Res. A/65/475, U.N. Doc. A/RES/65/34 (Jan. 10, 2011) (outlining measures to eliminate international terrorism); U.N. GAOR, 67th Sess., 3d mtg., U.N. Doc. GA/L/3434 (Oct. 9, 2012), <http://www.un.org/News/Press/docs/2012/gal3434.doc.htm>.

³¹ Special Rapporteur on Terrorism and Human Rights, *Terrorism and Human Rights*, U.N. Economic and Social Council, E/CN.4/Sub.2/2001/31 (June 21, 2001) (by Kalliopi K. Koufa), http://www1.umn.edu/humanrts/demo/Koufa_TerrorismHumanRights.pdf; see also U.N. Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, ¶ 35–37, U.N. Doc. A/60/825 (April 27, 2006) [hereinafter *Uniting Against Terrorism*] (noting that exclusion—social, economic, and political—fosters marginalization, which in turn can help terrorism grow).

³² Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., 2187th mtg., U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 26, 2004) (reinforcing the obligation of individual states to fulfill their obligations towards the inhabitants of that state and the obligation of third-party states to ensure that these obligations to citizens are fulfilled. It states, “[E]very State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are

The paper proceeds in the following manner. The first section reviews the two main traditions that dominate security studies discourse. This allows for an understanding as to the philosophical outlooks of the two key actors within the United Nations and their approaches to the threat of international terrorism. Principally, the Security Council is categorized as a state-led institution, whose ideas and policies are very much based on the interests of states. Therefore, its conception of security is more akin to traditional security studies. This is arguably due to the dominance of the five permanent members.³³ Conversely, the General Assembly takes a less state-centric approach, due to both the absence of veto powers among voting members and the fact that each state has a single vote. These factors lead the General Assembly toward a policy of human security.³⁴

The second section looks at Al Qaeda's goals and how its metamorphosis affects international peace and security. The aim is two-fold: first, to emphasize that there has been substantial misunderstanding of the organization and its aims,³⁵ and second, to highlight that even though Al Qaeda as an organization no longer offers a real threat,³⁶ its ideology does,³⁷ which is why one should not dismiss the concerns of states and the security apparatus.

erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.”); *see also* MARTIN SCHEININ, *IMPACT ON THE LAW OF TREATIES* 30 (Menno T. Kamminga & Martin Scheinin eds., 2009) (arguing that human rights should exist as an international norm, which would embed them in all international treaties and asserting that, “[r]ather than speaking of a formal hierarchy of sources that would claim supremacy to human rights *treaties* in respect to other treaties, the constitutional dimension of human rights norms is based in their substantive content and, hence, represents constitution in the substantive rather than formal sense”).

³³ *See infra* Part I.A

³⁴ *See infra* Part I.B

³⁵ Michael Scheuer, *Not Reading Means Losing: The National Security Cost of Ignoring Osama Bin Laden's Words*, 37 WM. MITCHELL L. REV. 5320 (2011) (arguing that we have made faulty assessments as to the risks and threats posed by Al Qaeda and bin Laden due to a consistent failure to use primary sources).

³⁶ Nick Hopkins, *US Heading for Point when 'Military Pursuit of al-Qaida Should End'*, GUARDIAN (Nov. 30, 2012), <http://www.guardian.co.uk/world/2012/nov/30/us-war-against-al-qaida> (U.S. Defense Department General Council Jen Johnson suggesting that a time will come when law enforcement measures will be more appropriate when dealing with Al Qaeda); David Alexander, *U.S. Has Decimated Al Qaeda Chiefs But Must Persist In Fight: Panetta*, REUTERS (Nov. 20, 2012), <http://www.reuters.com/article/2012/11/21/us-usa-qaeda-panetta-idUSBRE8AK03R20121121>.

³⁷ *See, e.g., Morocco Arrests 'Terror' Cell*, THE DAILY STAR (Nov. 5, 2012), <http://www.dailystar.com.lb/News/Middle-East/2012/Nov-05/193970-morocco-arrests-terror-cell.ashx#axzz2BRlzHxQ1> (highlighting attempts to commit acts of terror by Al Qaeda or groups associated with Al Qaeda).

The third section opens with an assessment of how the 1267 Committee has interpreted its duties. Then, this paper reviews the Counter-terrorism Committee and its work in helping states develop domestic counter-terrorism programs. The third part of the section explores Security Council Resolution 1566, which arguably offers a definition of international terrorism, something that the international community has sought to formulate since the 1930s when it toyed with an international convention on terrorism. Principally, in looking at these Security Council organs, it becomes apparent that states—primarily the permanent members—dominated the process, leading to a counter-terrorism regime that challenges basic rights under the guise of security.

Section four, which is divided into a number of sub-sections, looks at the General Assembly, the UN Global Counter-terrorism Strategy, and the work of the Special Rapporteur on Human Rights and Counter-terrorism. The section underlines how these different actors have adopted a human security formula in response to the Al Qaeda threat, which is very different from the way the Security Council has approached the threat. In doing so, these bodies epistemologically and ontologically pursue a human rights paradigm as to how one should counter the threat of terrorism.

This paper concludes by calling for a synergy between the two security traditions when it comes to the United Nations. It argues that advocates of human security must recognize the concerns and arguments offered by states in defense of the measures that they have adopted to address jihadi terrorism. In doing so, there may be some needs for measures that challenge basic rights, especially as Al Qaeda and those adhering to its ideology reject any form of compromise. Therefore, taking a socio-economic human rights approach is insufficient and unlikely to end terroristic campaigns from actors who reject such values and norms. Concomitantly, states must understand the role of human security and respect for human rights in explaining why some individuals turn to terrorism and, further, that aggressive counter-terrorism policies, especially ones that challenge conventional rights, can lead to even more terrorism. Ultimately, the UN has an important role to play in countering the threat, but it can only do so, if the two approaches recognise the validity and the usefulness of the other.

I. STATES, NATIONAL SECURITY, HUMAN SECURITY, UN ORGANS, 9/11 AND SECURITY STUDIES

This section highlights how the Security Council and General Assembly, both key organs of the United Nations, grapple with security issues, specifically terrorism. However, before examining the UN, it is pertinent to begin with the state conception of national security. This section highlights not only that the Security Council is a state-centric organ, but also that the interests of the five permanent members shape much of the Security Council's agenda. Moreover, it is also clear that the permanent members have

faced greater security threats from Al Qaeda and Islamic terrorists,³⁸ which may explain their determination to address the threat posed by the organization. Conversely, the General Assembly is less state-oriented: no single state dominates its agenda, which allows the Assembly to take a cosmopolitan view of international relations. This section then offers a broad review of the UN counter-terrorism regime to show that the regime operates through two distinctive and incompatible doctrines, causing overall weakness in the regime.

A.States, National Security, International Law and the United Nations

The core assumption dominating the security studies field is that to attain national security, states must break, suspend, or establish new rules to address new threats.³⁹ This doctrine, developed during the Cold War, led scholars to focus on three core elements: military threats and the need for a strong response to such threats; maintenance of the status quo through a balancing act predominately of mutual destruction; and the centrality of states in the international system.⁴⁰ In such a context, national security requires providing the state greater physical security; assurance of economic prosperity; preservation of its values; and conduct consistent with its interests.⁴¹ Further, a natural suspicion is inherent to national security studies, especially when the survival of the state is on the line. Caroline Kennedy writes,

In the interests of ‘national security’ large defense budgets, nuclear weapons, the military conscription of the male population (sometimes but not usually the female population), foreign invasion and intervention, and the curtailment of domestic civil liberties have all been justified, at various times. The security of the state is perceived as a fundamental duty of

³⁸ See, e.g., James, Blitz, *Al-Qaeda Threat is Smaller but Jihadism Remains*, FIN. TIMES, Jan. 25, 2012, at p. 3; Walter Russel Mead, *The Evolving Terror Threat*, WALL STREET JOURNAL, March 5, 2013 at p. A13; Brian Fishman, *Al-Qaeda and the Rise of China: Jihadi Geopolitics in a Post-Hegemonic World*, 34 WASH Q. 47 (2011) (suggesting that Al Qaeda is expanding its operations into China, and one could therefore understand Chinese support for more aggressive international measures against Al Qaeda); Peter Bergen et al., *Assessing the Jihadist Terrorist Threat to America and American Interests*, 34 STUD. CONFLICT & TERRORISM 65, (2011) (claiming that Al Qaeda and groups that are allies to it continue to pose a threat to the United States).

³⁹ HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* S (1977); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

⁴⁰ LAURA NEACK, *ELUSIVE SECURITY: STATES FIRST, PEOPLE LAST* (2007); Ken Booth, *Security and Emancipation*, 17 REV. INT’L STUD. 313 (1991).

⁴¹ See LAURA NEACK, *ELUSIVE SECURITY: STATES FIRST, PEOPLE LAST* (2007); Arnold Wolfers, ‘National Security’ as an Ambiguous Symbol, 67 POL. SCI. Q. 481 (1952).

the government and as a task that must be supported by most if not all citizens.⁴²

The use of national security language with respect to terrorism is relatively new; historically, states did not perceive terrorism as an existential threat.⁴³ 9/11 changed this assumption, and when it comes to Al Qaeda, states take the threat that it poses seriously,⁴⁴ labeling it or equating it as a public emergency⁴⁵—a threat to the “life of the nation”—and the basis for a declaration of war.⁴⁶ Such a designation arguably allows states to take exceptional measures⁴⁷ to address the threat and simultaneously claim that these measures do not breach international norms.⁴⁸ Thus, capacious

⁴² Caroline Kennedy, Gender and Security, in, CONTEMPORARY SECURITY STUDIES, 117, 118 (Alan Collins ed., 2013).

⁴³ In 1937, the Attorney General, D.B. Somervell, and the Solicitor General, T.J. O’Connor, opposed Britain’s ratification of the Convention for the Prevention and Punishment of Terrorism. They held that the convention could undermine more important fundamental rights. Geoffrey Marston, *Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Convention of 1937*, 73 BRIT. Y.B. INT’L L. 293 (2002).

⁴⁴ President George W. Bush defended the invasion of Afghanistan with claims that Al Qaeda posed a threat to the existence of the United States, to its inhabitants, and to people across the world. He asserted that the only way to deal with such a threat was through military power. On September 16, 2001, President Bush went so far as to declare that a national emergency existed “by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). *See also* Bush: *Attacks ‘Acts of War’*, CINCINNATI POST, Sept. 12, 2001, at 2A.

⁴⁵ The ICCPR identifies the existence of a “public emergency,” though neither the convention nor the Human Rights Committee (the monitoring body of the treaty) define the term “public emergency.” International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; *see also* Dominic McGoldrick, *The Interface between Public Emergency Powers and International Law*, 2 INT’L J. CONST. L. 380 (2004).

⁴⁶ *President Bush’s Address*, *supra* note 6 (“On September the 11th, enemies of freedom committed an act of war against our country.”).

⁴⁷ International law does not define “exceptional measures,” though the term is used with regard to humanitarian intervention. *See, e.g.*, FOREIGN AFFAIRS COMMITTEE, RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 4th Report from the House of Commons Foreign Affairs Committee, 2000 H.C., at 7, *available at* http://www.fco.gov.uk/resources/en/pdf/7179755/2000_aug_fourth_report? (taking the position that military action against Serbia was, “justified as an exceptional measure when it is the only means to avert an immediate and overwhelming catastrophe and is in support of objectives set by the UN Security Council, even if the express authorisation of the Council has not been possible. Such cases would in the nature of things be exceptional and depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.”); *see also* Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT’L & COMPARATIVE L. Q. 926 (2000) (arguing that NATO’s use of force in Kosovo was legal under international law).

⁴⁸ *See, e.g.*, Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA L. REV. 675 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011 (2003); Oren Gross, *Once More unto the Breach: The Systemic Failure of Applying the European Convention on*

acquisition of power, under the auspices of a public emergency, develops through a two-step process. First, the executive branch identifies the threat to the public and therefore to the state. In the case of 9/11, states argued that Al Qaeda and Islamic terrorism posed a real and immediate threat to the United States and its people, necessitating an aggressive response.⁴⁹ Second, the executive uses national security language to adopt and defend measures that challenge individual rights or procedural fairness.⁵⁰ The executive then claims that, at times of public emergency, such actions are not only legal but necessary.⁵¹ Rosa Brooks correctly notes, “Just as the international law of armed conflict permits certain activities in time of war that would be unlawful in time of peace, U.S. domestic law recognizes that national security imperatives may render permissible some otherwise impermissible government acts.”⁵² This paper will argue that such conceptions of security are visible within the United Nations Security Council, especially in the post-9/11 period. In particular, the Security Council serves as the guardian of

Human Rights to Entrenched Emergencies, 23 YALE J. INT’L L. 437 (1998); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27 FLETCHER FORUM WORLD AFF. 55 (2003); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 20 EUR. J. INT’L L. 15 (2010); David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 U. PA. INT’L L.J. 1185 (2010).

⁴⁹ See, e.g., *President Bush’s Address*, *supra* note 6 (“Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen.”); see also Fareed Zakaria, *Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22 (arguing that the response to the threat that Bin Laden and his followers pose requires a comprehensive response of fighting terrorism and reform in the Arab World).

⁵⁰ See, e.g., Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1 (2006) (arguing that since 9/11, there has been a tremendous loss of liberty in the United States); Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399 (2002) (arguing that in prosecuting the war on terror, the Justice Department discharges its responsibilities and duties within the confine of the Constitution and the rule of law); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 25 (2004) (emphasizing the need to be vigilant that the pursuit of security does not come at the expense of liberty).

⁵¹ An important element in this expansion of executive power is the how law enforcement changes: the police adopt a more militaristic style because the threat is much bigger and more potent than previous threats. We see this in Britain, where there is greater interaction between the police, the military, and security services. Ronald Dworkin, *Terror and the Attack on Civil Liberties*, N.Y. REV. BOOKS (Nov. 6, 2003), <http://www.nybooks.com/articles/archives/2003/nov/06/terror-the-attack-on-civil-liberties/?pagination=false>; Peter Kennison & Amanda Loumansky, *Shoot to Kill—Understanding Police Use of Force in Combatting Suicide Terrorism*, 47 CRIME, L. & SOCIAL CHANGE 151 (2007); Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501 (2007); Beth Elise Whitaker, *Exporting the Patriot Act? Democracy and the ‘War on Terror’ in the Third World*, 28 THIRD WORLD 1017 (2007).

⁵² Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA L. REV. 675, 695 (2004).

international peace and security.⁵³ The process of defining “security” in the context of the Security Council begins with China, France, Russia, the United Kingdom, and the United States. Due to their permanent positions and their veto powers,⁵⁴ these states have enormous influence⁵⁵ within the Council and therefore on the conduct of international relations.⁵⁶ These countries structure the Council’s policies and its agenda; in doing so, they ensure that the Council promotes policies that benefit their national interests.⁵⁷ The Cold War made this abundantly clear, as the permanent members often used vetoes to prevent UN action.⁵⁸

In the context of post-9/11 terrorism, there are strong indicators that, though the permanent members have major disagreements about many issues relating to the War on Terror⁵⁹ when necessary they support a unified

⁵³ U.N. Charter art. 24(1) (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

⁵⁴ The UN Charter does not use the term “veto.” Rather, the Security Council veto power is implied. U.N. Charter art. 27 (“1. Each member of the Security Council shall have one vote; 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members; 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .”).

⁵⁵ See M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law Oriented World Order*, 8 SANTA CLARA J. INT’L L. 1 (2010) (noting that the ad hoc manner in which the Security Council fulfills its mandate and emphasizing that it reflects the interest of the powerful and wealthy as opposed to Kantian values); Axel Dreher et al., *Development Aid and International Politics: Does Membership on the UN Security Council Influence World Bank Decisions?*, 88 J. DEV. ECON. 1, 4–6 (2009) (showing that membership in the Security Council has a positive impact on whether countries receive World Bank loans and arguing that the permanent members (primary contributors to the World Bank) use the loans to encourage temporary members to support their policy agendas in the Council); see also Ilyana Kuziemko & Eric Werker, *How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations*, 114 J. POL. ECON. 905 (2006).

⁵⁶ This may explain why the permanent members will not support any reform of the Security Council that would weaken the veto. Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL J. INT’L & COMPL. L. 187, 187 (2010) (“One rather doubts that the Administration has in mind reforming the veto power of the permanent five members or making the veto power available to a more representative body of the Council.”).

⁵⁷ See, e.g., Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT’L L. 516 (1991) (arguing that the Council was far too subservient to the United States and, by implication, U.S. interests when it came to the war against Saddam Hussein).

⁵⁸ Joseph S. Nye, Jr., *U.S. Power and Strategy after Iraq*, 82 FOREIGN AFF. 60, 68 (2003). (arguing that the inactivity of the Council during the Cold War was not due to a design flaw in the Charter, but rather stemmed from the fact that “[t]he council was specifically designed to be a concert of large powers that would not work when they disagreed. The veto is like a fuse box in the electrical system of a house. Better that a fuse blows and the lights go out than that the house burns down.”).

⁵⁹ The French, for example, after initially supporting the U.S. position, came to see the Bush doctrine as amounting to a “simplistic approach that reduces all the world’s problems to the

agenda.⁶⁰ This unified approach indicates the concern for international terrorism.⁶¹ In other words, the permanent members, as the engine of the Security Council, behave as one would expect all states to behave when they identify a threat to their security: search for allies, form alliances, and—if necessary—suspend or ignore international law.⁶² Chantal de Jonge Oudraat argues that, with the adoption of Security Council Resolution 1368, the Council redefined the use of force; the resolution grants *cart blanche* powers to states to counter international terrorism. Oudraat adds that China and Russia supported such an interpretation.⁶³ Since the adoption of Resolution 1368, the Council has continued to follow a position that grants states enormous powers against those engaged in or suspected of terrorism. Thus, even with the establishment of the Office of the Ombudsman—whose purpose is to enhance the protection of human rights within the UN 1267 sanctioning regime—⁶⁴ state authority prevails; even though the Office was established with the aim of protecting individuals seeking to be removed from the Consolidated List,⁶⁵ states have the authority to withhold that information.⁶⁶

struggle against terrorism.” The French Foreign Secretary at the time, Hubert Vedrine, called on Europe to oppose U.S. hyper-power and argued that, to combat terrorism, one needs to “tackle the root causes, the situations, poverty, injustice.” Tracy Sutherland, *France Condemns Bush’s War on Terror Tactics*, THE AUSTRALIAN, Feb. 8, 2002, at 9.

⁶⁰ Compare Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006) (arguing that the Security Council will revert to collective security to address new security threats—terrorism and the proliferation of weapons of mass destruction (WMD)), with Alexander Benard & Paul J. Leaf, *Modern Threats And The United Nations Security Council: No Time For Complacency (A Response To Professor Allen Weiner)*, 62 STAN. L. REV. 1395 (2010) (arguing that Russia and China have strong economic relations with countries that sponsor terrorism and engage in WMD proliferation; therefore, Weiner’s analysis is too idealistic).

⁶¹ See, e.g., Brian Fishman, *supra* note 38.

⁶² Evan S. Medeiros & M. Taylor Fravel, *China’s New Diplomacy*, 82 FOREIGN AFF. 22, 22 (2003) (“In recent years, China has begun to take a less confrontational, more sophisticated, more confident, and, at times, more constructive approach toward regional and global affairs. In contrast to a decade ago, the world’s most populous country now largely works within the international system. It has embraced much of the current constellation of international institutions, rules, and norms as a means to promote its national interests. And it has even sought to shape the evolution of that system in limited ways.”).

⁶³ Chantal de Jonge Oudraat, *Combating Terrorism*, 26 WASH. Q. 163, 168 (2003).

⁶⁴ S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

⁶⁵ *Id.* at para. 21.

⁶⁶ Throughout Resolution 1368, the Council encourages states to work with the Office of the Ombudsman. In Annex II, for example, the delisting process exemplifies state dominance; the Ombudsman must engage in dialogue with the state and adopt the state’s opinion regarding delisting. Annex II makes clear that the Committee has the power to determine whether to delist a person. Moreover, the Ombudsman must “respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.” S.C. Res. 1904, *supra* note 64, ¶ Annex II, 14.

B. Human Security, the United Nations, and 9/11

Soon after the 9/11 attacks, UN Secretary-General Kofi Annan stated, “In less than 48 hours, the security council [sic.] and the general assembly [sic.] joined me in condemning the attacks and voted to support actions taken against those responsible and states that aid them.”⁶⁷ The General Assembly and the human rights community, although horrified and disgusted at the attack,⁶⁸ have approached Al Qaeda in a manner that is markedly distinct from that of the Security Council.⁶⁹ The Assembly’s decision to focus less on traditional security in countering the threat of transnational terrorism stems from the fact that the Assembly views security and, more specifically, the causes of insecurity, through a human security paradigm.⁷⁰ It is noteworthy that human security rarely appears in recent UN reports,⁷¹ though it was used in the 2005 World Summit⁷² and a number of General Assembly resolutions⁷³ and although the term is no longer in wide use, it is worthwhile to expand upon its definition in order to better identify it in UN General Assembly discourse.⁷⁴

The roots of human security lie with two key liberal traditions of positive and negative freedoms. These traditions manifest in the idea that the state has a duty to its people beyond that of basic security. Human security also recognizes that security is not only relational; it calls for engagement between

⁶⁷ Kofi Annan, *United We Stand Against Terror, Divided We Fail*, GUARDIAN (Sept. 22, 2001), <http://www.guardian.co.uk/world/2001/sep/22/september11.usa1>; S.C. Res. 1386, U.N. Doc. S/RES/1386 (Sept. 12, 2001); S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

⁶⁸ See, e.g., Press Release, General Assembly, Transcript of Press Conference by President of General Assembly, Han Seung-Soo, 12 September, UN Press Release GA/SM/273 (Sept. 12, 2001) (“Mere words cannot express the outrage and disgust we doubt less all feel for the vile actions perpetrated in our host country, the United States . . . I condemn in the strongest possible terms these heinous acts of terrorism.”).

⁶⁹ *Id.* (highlighting the General Assembly’s commitment to promote the Millennium Development Goals as a way to improve international affairs).

⁷⁰ See UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 26–33 (1994) [hereinafter HUMAN DEVELOPMENT REPORT] (providing the first definition of human security).

⁷¹ Mary Martin & Taylor Owen, *The Second Generation of Human Security: Lessons from the UN and EU Experience*, 86 INT’L AFF. 211, 211 (2010) (“Canada, one of the principal initial proponents of the human security agenda, is also going through a period of withdrawal from both advocacy and use of the concept. A recently leaked internal email from the Department of Foreign Affairs and International Trade outlined a series of shifts in the language of Canadian foreign policy. ‘Human security’ was among a group of terms blacklisted in government parlance.”).

⁷² 2005 World Summit Outcome, ¶ 143, U.N. Doc. A/60/LI (Sept. 20, 2005).

⁷³ G.A. Res. 64/291, U.N. Doc. A/RES/64/291 (July 27, 2010); G.A. Res. 66/290, U.N. Doc. A/RES/66/290 (Oct. 25, 2010).

⁷⁴ Mary Martin and Taylor Owen write that the shift has occurred because the key proponent of human security, Kofi Annan not only stopped using the term while he was secretary-general. In 2006, he left the United Nations, which may also explain why the institution ceased using the term. Finally, the member states that promoted the idea had shifted their attention to R2P. Martin & Owen, *supra* note 71, at 212–213

the state and the individual on social and economic levels in addition to civil and political levels.⁷⁵ The United Nations Development Program (UNDP), the purpose for which is to help promote development across the globe, was the first to define the concept of human security.⁷⁶ Canadian and Norwegian governments helped to promote human security “as an appropriate umbrella for their membership of the UN Security Council.”⁷⁷

The 1994 UNDP Human Development Report, drafted by the Pakistani economist Professor Mahbub ul Haq, provided the initial definition of human security. First, the UNDP rejected the traditional conception of security as too narrow.⁷⁸ Second, the UNDP identified security through seven categories: economic security, understood as having an assured basic income; food security, referring to ensuring that all people have access to basic food at all times; health security; environmental security; personal security; community security; and political security, referring to human rights.⁷⁹ Based on the UNDP Report, human security has come to mean, “protecting people from severe and pervasive threats, both natural and societal, and empowering individuals and communities to develop the capabilities for making informed choices and acting on their own behalf.”⁸⁰ Consequently, those embracing human security find the idea of derogation from international human rights treaties and conventions problematic, if not outright impossible.⁸¹ For proponents of the human security model, the

⁷⁵ Sadako Ogata, *Development Co-operation and Human Security*, 10 CONFLICT, SECURITY & DEV. 181, 188 (2010).

⁷⁶ See HUMAN DEVELOPMENT REPORT, *supra* note 70.

⁷⁷ Astri Suhrke, *A Stalled Initiative*, 35 SECURITY DIALOGUE 365, 365 (2004).

⁷⁸ HUMAN DEVELOPMENT REPORT, *supra* note 70, at 22 (asserting that a fixation on states as opposed to people meant forgetting “. . . the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards.”); see, Martin & Owen, *supra* note 71, at 211 (reviewing the development of human security—second generation human security—identified with the European Union and the United States in terms of new military doctrines).

⁷⁹ HUMAN DEVELOPMENT REPORT, *supra* note 70, at 25–33.

⁸⁰ Sadoka Ogata & Johan Cels, *Human Security: Protecting and Empowering People*, 9 GLOBAL GOVERNANCE 274 (2003).

⁸¹ Human Rights Committee, General Comment No. 29, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 INT’L CRIM. JUST. 683 (2009). A good example of the tension between the two approaches is apparent in the discussion over the right to life (Article 6, ICCPR) and military necessity with respect to targeted killing. Under international humanitarian law—which deals with state conduct in times of conflict—in order to deprive a person of the right to life, the state must show that the individual was a member of an armed force engaged in combat. However, the person need not be in combat at the time of death. Therefore, the target’s membership in an armed force determines his status. Conversely, under international human rights law, the decision to kill a person requires the state to examine the whole context in which the killing occurs. Tomuschat, *supra* note 48, at 15–23; United Nations Millennium Declaration, adopted Sept. 8, 2000, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (2000).

protection and preservation of human rights ensures national security.⁸² Thus, when looking at the General Assembly and its resolutions, policies, and views over the last decade, it is clear that it adheres to the idea of human security; it continuously argues that the way to make the world more secure is by addressing issues that create divisions, resentments, and inequalities.⁸³

II. UNDERSTANDING THE AL QAEDA TERRORIST THREAT

In the 1990s, many established terrorist organizations opted to end the use of terrorism and turn to negotiations as a means of resolving their disputes with states.⁸⁴ This pattern created the perception that terrorism was waning.⁸⁵ Oddly, the 1990s was the period when Al Qaeda gathered momentum, as evidenced by the 1996 Khobar Towers attack in Saudi Arabia, during which, nineteenth American died.⁸⁶ Similarly, the 1998 East Africa embassy bombings⁸⁷ and the attack on the *U.S.S. Cole*⁸⁸ led the United States and the Security Council to adopt a host of measures against Al Qaeda.⁸⁹ The 9/11 attacks arguably ushered in the notion of “new terrorism;”⁹⁰ people realized that not only could commercial airplanes become flying bombs,⁹¹ but

⁸² See, e.g., SHANNON D. BEBBE & MARY KALDOR, *THE ULTIMATE WEAPON IS NO WEAPON: HUMAN SECURITY AND THE NEW RULES OF WAR AND PEACE* (2010); See also Charles R. Beitz, *Human Rights as a Common Factor*, 95 AM. POL. SCI. REV. 269 (2001).

⁸³ This will be seen most clearly in Part III.C(1) which deals with the United Nations Global Counter-terrorism Strategy.

⁸⁴ In 1993, the Palestinian Liberation Organization signed up to the Oslo Peace Process. In 1997, the Irish Republican Army signed the Good Friday Agreement. See also Bruce Hoffman, *Rethinking Terrorism and Counterterrorism Since 9/11*, 25 STUD. CONFLICT & TERRORISM 303 (2002).

⁸⁵ See, e.g., Eliza Manningham-Buller, *The Safety of the Realm in Retrospect and Prospect*, 148 RUSI J. 8 (2003) (highlighting the emergence of new terrorism that Al Qaeda embodies, but also noting that in the 1980s, security services focused on state-sponsored terrorism).

⁸⁶ Dan Eggen, *9/11 Panel Links Al Qaeda, Iran Bin Laden May Have Part in Khobar Towers, Report Says*, WASH. POST., June 26, 2004, at A12; 9/11 COMMISSION REPORT, *supra* note 10, at 60.

⁸⁷ David Johnston, *Charges Against 2d Suspect Detail Trail of Terrorists*, N.Y. TIMES, Aug. 29, 1998, at 4; 9/11 COMMISSION REPORT, *supra* note 10, at 68–69.

⁸⁸ Peter Bergen, *He Is Back . . . Osama Bin Laden Makes His Return*, WASH. TIMES., Oct. 26, 2000, at A19; 9/11 COMMISSION REPORT, *supra* note 10, at 74.

⁸⁹ In August 1998, President Clinton ordered a missile attack against targets in Sudan and Afghanistan. President Clinton stated that the 75 missiles that were fired were in response to the Al Qaeda sponsored attacks against the US embassies in Kenya and Tanzania. Clinton used self-defense to defend the order. Art Pine, *Missiles Strike Bases Linked to African Blasts*, L.A. TIMES, (Aug. 21, 1998) <http://articles.latimes.com/1998/aug/21/news/mn-15247>. For the UN's response, see e.g., S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

⁹⁰ WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* (2002).

⁹¹ This may explain why at least one survey conducted after 9/11 to determine the reaction of Americans to the attacks found high rates of stress among Americans, with many of the respondents anticipating further attacks, which they thought could be local. Mark A.

also that the nature of terrorism had changed. Bruce Hoffman captured this shift by highlighting that historically spectacular, coordinated attacks were a rarity before 9/11, which “not only showed a level of patience and detailed planning rarely seen among terrorist movements today, but the hijackers stunned the world with their determination to kill themselves as well as their victims.”⁹²

Al Qaeda, and the threat that it poses, is multifaceted. It begins with Al Qaeda’s propagated ideology and those who embrace it. This ideology is radical and uncompromising, dividing the world into two spheres: House of Islam (*Dar-al-Islam*) and House of War (*Dar-al-Harb*).⁹³ In doing so, Al Qaeda emphasizes the centrality of religion in the war for the salvation of Islam.⁹⁴ Due to the “cosmic” nature of the conflict,⁹⁵ Al Qaeda has to reject compromise,⁹⁶ demanding from the members complete devotion and willingness to sacrifice.⁹⁷ Al Qaeda’s ideology is rooted in the writing and

Schuster et al., *A National Survey of Stress Reactions after the September 11, 2001 Terrorist Attacks*, 345 NEW ENG. J. MED. 1512 (2001) (“The events of September 11 made Americans realize that the United States is vulnerable to attack on a scale that few had thought possible.”).

⁹² Hoffman, *supra* note 84, at 304.

⁹³ Assaf Moghadam argues that Al Qaeda adheres to a Salafi-Jihad ideology, which he sees as a product of nineteenth-century industrialization and its link to modernity. The Salafi-Jihadi ideology seeks to reverse the effects of modernity and globalization, which it sees as the cause of social, economic, and political changes. Salafi-Jihadism therefore seeks to raise awareness among Muslims that their religion is on the decline. Finally, Salafi-Jihadism identifies the enemy as crusaders, Zionists, and apostates. Assaf Moghadam, *The Salafi Jihad as a Religious Ideology*, 1 CTC SENTINEL 14, 14–15 (2008) [hereinafter *Salafi Jihad*].

⁹⁴ THE *AL QAEDA* MANUAL, http://www.fas.org/irp/world/para/manualpart1_1.pdf, at 8 (last visited Feb. 2, 2013) [hereinafter THE *AL QAEDA* MANUAL] (“These young men realized that an Islamic government would never be established except by the bomb and rifle. Islam does not coincide or make a truce with unbelief, but rather confronts it. The confrontation that Islam calls for with these godless and apostate regimes, does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.”).

⁹⁵ Mark Juergensmeyer, *Terror in the Name of God*, 100 CURRENT HIST. 357 (2001) [hereinafter *Terror in the Name of God*] (arguing that Cosmic Wars refer to spiritual battles taking place in the here-and-now that require adherents to participate in the ultimate battle of Good versus Evil in defense of the faith); see also Mark Juergensmeyer, *Terror Mandated by God*, 9 TERRORISM & POL. VIOLENCE 16 (1997); Mark Juergensmeyer, *The New Religious State*, 27 COMP. POL. 27 (1995).

⁹⁶ See ABDEL BARI BARI ATWAN, THE SECRET HISTORY OF AL QAEDA (2008); see also *Terror in the name of God*, *supra* note 95, at 358 (“In such battles, waged in divine time and with heaven’s rewards, there is no need to compromise one’s goals. No need, also, to contend with society’s laws and limitations when one is obeying a higher authority. In spiritualizing violence, religion gives terrorism a remarkable power.”).

⁹⁷ In 2002 in Manchester, England, British police found an Al Qaeda Manual, which expresses how the organization viewed the world and how it believed that the war against the infidels should be conducted. THE *AL QAEDA* MANUAL, *supra* note 94, at 15 (“He [the member] has to be willing to do the work and undergo martyrdom for the purpose of achieving the goal and establishing the religion of majestic Allah on earth.”).

philosophy of conservative Islamic scholars. This philosophy is most identified with the Salafi and Wahhabi schools.⁹⁸ The clearest manifestation of Al Qaeda's ideology is Osama bin Laden's infamous Declaration of Jihad, in which bin Laden used language that interfused religion and history to emphasize the threat that the Muslim world faces from the crusading West.⁹⁹ In his statement, bin Laden attacked the sanctions on Iraq,¹⁰⁰ the unwavering support that Israel receives from the United States and the international community,¹⁰¹ and Muslim leaders whom he believes abandoned Islam in favor of materialism.¹⁰² Professor Joan Fitzpatrick follows the notion of a cosmic war in which adherents to Al Qaeda's ideology cannot accept peace unless they decide that they have won the war.¹⁰³ Their religious zealotry not only allows but encourages the use of suicide terrorism and mass casualty terrorism, a relatively new development in the realm of terrorism that was previously used by only a very small number of terrorists.¹⁰⁴ This is also linked to the intention to terrify others from working against Al Qaeda.¹⁰⁵

⁹⁸ Wahhabism is associated with the Muhammad bin Abd al Wahhab, a Muslim scholar who lived in the Arabian Peninsula in the eighteenth century. He advocated a purified form of Islam that rejects all innovations or deviation from the practices of those of the Prophet Muhammad and his companions, hence the term *salaf*, which means to "follow" or "precede." CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RS21695, THE ISLAMIC TRADITIONS OF WAHHABISM AND SALAFIYYA (2008), available at <http://www.fas.org/sgp/crs/misc/RS21695.pdf>; see also *Salafi Jihad*, *supra* note 93, at 14.

⁹⁹ See *Bin Laden's Fatwa*, PBS NEWSHOUR (Aug. 27, 1996), http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html.

¹⁰⁰ *Id.* ("It should not be hidden from you that the people of Islam had suffered from aggression, iniquity and injustice imposed on them by the Zionist-Crusaders alliance and their collaborators; to the extent that the Muslims blood became the cheapest and their wealth as loot in the hands of the enemies. Their blood was spilled in Palestine and Iraq. The horrifying pictures of the massacre of Qana, in Lebanon are still fresh in our memory. Massacres in Tajakestan, Burma, Cashmere, Assam, Phillipine, Fatani, Ogadin, Somalia, Erithria, Chechnia and in Bosnia-Herzegovina took place, massacres that send shivers in the body and shake the conscience. All of this and the world watch and hear, and not only didn't respond to these atrocities, but also with a clear conspiracy between the USA and its' allies and under the cover of the iniquitous United Nations, the dispossessed people were even prevented from obtaining arms to defend themselves.")

¹⁰¹ *Id.* ("The people of Islam awakened and realised that they are the main target for the aggression of the Zionist-Crusaders alliance. All false claims and propaganda about "Human Rights" were hammered down and exposed by the massacres that took place against the Muslims in every part of the world.")

¹⁰² *Bin Laden's Real Crusade*, BOSTON GLOBE, Sept. 30, 2001, at D6.

¹⁰³ Joan Fitzpatrick, *Speaking Law to Power: The War against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 251–52 (2003).

¹⁰⁴ It used to be that only a very small and select number of terrorist organizations such as Hezbollah or Hamas would engage in suicide terrorism and even then under very strict guidelines. See, e.g., Scott Atran, *Genesis of Suicide Terrorism*, 5612 SCIENCE 1534 (2003); Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343 (2003).

¹⁰⁵ In 2007, reports appeared in the British press of an Islamist plot to kidnap, torture, and behead a British Muslim soldier in order to dissuade Muslims from joining the military. Philip Johnston & Nick Britten, *Police Raids Foiled Plot to Behead Soldier*, TELEGRAPH (Feb. 1,

Ultimately, this inflexible cosmic ideology means that Al Qaeda recruits and affiliates not only show willingness to die in the process of attaining the goal, they crave it.¹⁰⁶ Mohammed Siddique Khan, the leader of the July 7, 2005 bombing in London, typified this view with his “death statement”:

We are at war and I am a soldier. Now you too will taste the reality of this situation. . . . Our words have no impact upon you, therefore I’m going to talk to you in a language that you understand. Our words are dead until we give them life with our blood. . . . Your democratically elected governments continuously perpetuate atrocities against my people and your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters. . . . Until we feel security, you will be our target. Until you stop the bombing, gassing, imprisonment and torture of my people, we will not stop this fight. . . .¹⁰⁷

Al Qaeda’s use of the internet poses an important threat.¹⁰⁸ The internet allows Al Qaeda to transition from a typical terrorist group to a network: it no longer operates as a top-down terrorist organization, but rather as a loose body of groups and individuals who share a set of ideas.¹⁰⁹ Consequently, Al

2007), <http://www.telegraph.co.uk/news/uknews/1541272/Police-raids-foiled-plot-to-behead-soldier.html>.

¹⁰⁶ Assaf Moghadam, *Motives for Martyrdom: Al-Qaida, Salafi Jihad, and the Spread of Suicide Attacks*, 33 INT’L SECURITY 46, 59 (2009) (“In al-Qaida’s tactical arsenal, suicide attacks play a pivotal role. No other tactic symbolizes al-Qaida’s tenaciousness and ability to inspire a large number of Muslims worldwide as much as ‘martyrdom operations,’ to use the group’s euphemistic labeling. Al-Qaida has all but perfected this tactic and institutionalized it to an extent not seen in other terrorist groups. It instilled the spirit of self-sacrifice in the collective psyche of virtually all of its fighters, thus creating a cult of martyrdom that far exceeds the Palestinian and Lebanese cult of death in both scope and depth.”).

¹⁰⁷ Vikram Dodd & Richard Norton-Taylor, *Video of 7/7 Ringleader Blames Foreign Policy*, GUARDIAN (Sept. 2, 2005), <http://www.guardian.co.uk/uk/2005/sep/02/alqaida.politics>.

¹⁰⁸ 9/11 COMMISSION REPORT, supra note 10, at 88 (“The emergence of the World Wide Web has given terrorists a much easier means of acquiring information and exercising command and control over their operations.”). The Internet does not only focus on jihadi websites, it also allows for email communications, chat rooms, e-groups, message boards, and social networks such as Facebook. These mediums provide a useful tool for the dissemination of radical ideas because those providing the information can disguise or hide their identities.

¹⁰⁹ Leah Farrall, *How al Qaeda Works—What the Organization’s Subsidiaries Say about Its Strength*, 90 FOREIGN AFF. 128, 133 (2011) (“Al Qaeda today is not a traditional hierarchical terrorist organization, with a pyramid-style organizational structure, and it does not exercise full command and control over its branch and franchises Due to its dispersed structure, al Qaeda operates as a devolved network hierarchy, in which levels of command authority are not always clear; personal ties between militants carry weight and, at times, transcend the command structure between core, branch, and franchises.”); see also MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008); Jarret M. Brachman, *High-Tech Terror: Al-Qaada’s Use of New Technology*, 30 FLETCHER F. WORLD AFF.

Qaeda has become more difficult to destroy.¹¹⁰ Al Qaeda is now an ideological tool and more interested in proselytization, resulting in the formation of more Al Qaeda subsidiaries and affiliates.¹¹¹ That is, in its new form, Al Qaeda encourages individuals and like-minded Islamic groups to take action and to fulfill Al Qaeda's goals independently, as opposed to mere instructions flowing from Al Qaeda Central (Bin Laden and al-Zawahiri) to its cadre.¹¹²

A study by Professors Manni Crone and Martin Harrow highlights the change and the threat that Al Qaeda's brand of terrorism and recruits poses. Crone and Harrow's typology recognizes four groups while examining the relationship between Al Qaeda and individuals. The relationship is dependent on a given individual's level of autonomy and attachment, or sense of belonging to the group. Thus, the first group is the *internal autonomous* terrorists, "homegrown," or Western-based, individuals unaffiliated with Al Qaeda, but who share its outlook. The second group is the *internal affiliated* terrorists, homegrown individuals who have contacts with foreign Islamists. The third group is the *external autonomous* terrorists, who have little if any attachment to the West but are independent of terrorist organizations. This group also includes non-Western Islamists existing outside of the West. The fourth group is the *external affiliated* terrorists, individuals with little or no attachment to the West who have contact with non-Western terrorist or Islamist organizations.¹¹³ Crone and Harrow's typology fits with some of the terror attacks and threats that have affected the United States over the last few years in addition to emphasizing the threat that new terrorism poses. For example, in 2009, the United States allegedly faced eleven separate Al Qaeda or Al Qaeda-inspired attacks. These included two physical attacks—the Fort

149 (2006); Jason Burke, *Al Qaeda*, 142 FOREIGN POL'Y 18, 20–26 (2004); Steve Coll & Susan B. Glasser, *Terrorists Turn to the Web as Base of Operations*, WASH. POST, Aug. 7, 2005, at A01.

¹¹⁰ See Coll & Glasser, *supra* note 107 (noting that "al Qaeda has become the first guerrilla movement in history to migrate from physical space to cyberspace"); Brachman, *supra* note 109, at 149–64.

¹¹¹ John Turner, *From Cottage Industry to International Organisation: The Evolution of Salafi-Jihadism and the Emergence of the Al Qaeda Ideology*, 22 TERRORISM & POL. VIOLENCE 541 (2010) (arguing that that, following the invasion of Afghanistan, Al Qaeda morphed into an ideology that draws on a host of Islamic thinking and doctrines).

¹¹² See Paul Cruickshank & Mohannad Hage Ali, *Abu Musab Al Suri: Architect of the New Al Qaeda*, 30 STUD. CONFLICT & TERRORISM 1 (2007) (analyzing Abu Musab Al Suri to show how Al Qaeda has become a decentralized movement, in addition to emphasizing the importance of the internet in this new phase of Al Qaeda); see also BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL QAIDA STRATEGIST ABU MUS'AB AL-SURI (2008); Farrall, *supra* note 109; Barak Mendelsohn, *Al-Qaeda's Franchising Strategy*, 53 SURVIVAL 29 (2011) (noting that Al Qaeda's survival is dependent on how its subsidiaries and affiliates adapt to the post-Bin Laden era).

¹¹³ Manni Crone & Martin Harrow, *Homegrown Terrorism in the West*, 23 TERRORISM & POL. VIOLENCE 521 (2011).

Hood shooting (committed by a self-radicalized American military officer)¹¹⁴ and a shooting incident in Little Rock Arkansas. Besides the shootings, there were five serious plots, as well as four incidents involving Americans who wished to travel overseas to receive terrorist training.¹¹⁵

Looking overseas, other countries have also had to deal with terror plots as Al Qaeda sought new markets.¹¹⁶ Brian Fishman notes:

To date, China has responded to a potential threat from al-Qaeda by minimizing rhetorical confrontation and hoping that al-Qaeda's operators remain focused elsewhere. But 10 years after 9/11, global jihadists such as al-Qaeda view China's economic and political support for "apostate" regimes a terrible offense. That, coupled with the increasing prominence of the Uyghurs in jihadi propaganda, suggests China will not be able to avoid al-Qaeda forever.¹¹⁷

A third element adding to Al Qaeda's vicious reputation is its alleged¹¹⁸ use of unconventional weapons—chemical, biological, radiological, and nuclear

¹¹⁴ Anwar al-Awlaki provides a good example of the threat that the new Al Qaeda cadre poses. Through the internet, al-Awlaki, a Yemeni-American, was able to influence Major Malik Hasan, a U.S. officer, to kill thirteen people in Fort Hood, Texas in November 2009. Reportedly, Anwar al-Awlaki also influenced Faisal Shahzad, the Times Square bomber. Jason Burke, *Anwar al-Awlaki Obituary*, GUARDIAN, Oct. 2, 2011, at 35.

¹¹⁵ Al Baker & William K. Rashbaum, *Police Find Car Bomb in Times Square*, N.Y. TIMES, May 2, 2010; *Times Square Bomb Plot May Have Cost \$7K*, USA TODAY (May 9 2010), http://www.usatoday.com/news/nation/2010-05-08-nyc-bomb-plot_N.htm (expressing the threat that even a failed attack, such as the 2010 New York Times Square terror attack, can pose; even though the device failed, it required evacuation and a major security operation); Peter Bergen et. al., *supra* note 38, at 67–69 (2011).

¹¹⁶ Maman Sidikou, Niger's Ambassador to the US has claimed for example that Al Qaeda terrorists buoyed by criminal activity that includes drug-trafficking, kidnapping, and an influx of extremists are consolidating their position in northern Mali. *Moroccan American Center for Policy; Experts Warn al-Qaeda Consolidating Position in Northern Mali*, BIOTERRORISM WEEKLY, June 18, 2012, at p.13.

¹¹⁷ Brian Fishman, *supra* note 38, at 48; see also Carl J. Ciovacco, *The Contours of Al Qaeda's Media Strategy*, 32 STUD. CONFLICT & TERRORISM 853 (2009). In February 2012, for example, nine men, allegedly inspired by Al Qaeda, were convicted in the UK for plotting to bomb the London Stock Exchange in 2010. Information gathered suggests that other targets included the Mayor of London, Boris Johnson, the London Eye, and the U.S. Embassy. Sandra Laville, *Al-Qaida Inspired Plotters Planned Attacks on High-Profile London Targets*, GUARDIAN, Feb. 2, 2012, at 4; *Confronting al-Qaeda: Understanding the Threat in Afghanistan and Beyond: Hearing Before the Committee on Foreign Relations*, 111th Cong (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55931/html/CHRG-111shrg55931.htm>.

¹¹⁸ James R. Van De Velde, *The Impossible Challenge of Deterring "Nuclear Terrorism" by Al Qaeda*, 33 STUD. CONFLICT & TERRORISM 682, 684 (2010) ("Al Qaeda leadership in particular has shown a consistent interest in the development of a nuclear capability and other WMD. Former senior Al Qaeda operations planner Khalid Shaykh Muhammad (KSM) confirmed in March 2003 that senior Al Qaeda leadership—including bin Laden, Ayman al-Zawahiri, and Muhammad 'Atif (a.k.a. Abu Hamza al-Masri)—all believed that obtaining a CBRN

(CBRN).¹¹⁹ The issue of WMD and terrorism is a major concern for policymakers because, “[f]rom a policymaker’s perspective, the case of nuclear terrorism is the classic case of high-consequence, low-probability problem. It is imprudent not to take any action against such a threat, but an argument can be made that resources really should be focused on more likely non-nuclear events.”¹²⁰ The former director of the Central Intelligence Agency, George Tenet, writes that from December 2002, “a loose association of groups planned a string of poison plots across Europe,” a continuation of efforts that began in the late 1990s. Tenet further claims that Al Qaeda’s anthrax program “had been developed in parallel to 9/11 planning.”¹²¹ Al Qaeda and its affiliates have clearly contemplated the use of non-conventional weapons in respect to the United Kingdom; over the last few years, the United Kingdom has faced a number of terror plots involving non-conventional weaponry,¹²² heightening concerns over the possible use of such weapons in general.¹²³ The matter is augmented by the inherent weakness of the non-proliferation regime. This weakness exacerbates the threat of an unconventional attack,¹²⁴ and leads to the adoption of a number of Security Council resolutions emphasizing the need for tightening controls over these unconventional attack materials.¹²⁵

capability was necessary and that they were intent on developing weapons that could cause large numbers of casualties.”).

¹¹⁹ 9/11 COMMISSION REPORT, supra note 10, at 245 (disclosing that Mohamed Atta, the leader of the nineteen bombers who committed the 9/11 attacks, mentioned targeting a nuclear facility during a meeting in Spain); see also Graham Allison, *Nuclear Disorder: Surveying Atomic Threats*, 89 FOREIGN AFF. 79 (2010); Mohamed El-Baradei & Jonas Cahr Store, *How the World Can Combat Nuclear Terrorism*, 48 INT’L ATOMIC ENERGY AGENCY BULL. 15 (2006).

¹²⁰ Todd Moss, *Nuclear Terrorism Redux: Conventionalists, Skeptics, and the Margin of Safety*, 54 ORBIS 304 (2010).

¹²¹ GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA’S TIME OF CRISIS 277–78 (2008).

¹²² See, e.g., Joanna Walters et al., *Three Held Over Poison Gas Bomb Plot*, OBSERVER, Nov. 16, 2002, at 1; Nick Hopkins & Tania Branigan, *Poison Find Sparks Terror Alert*, GUARDIAN (Jan. 8, 2003), <http://www.guardian.co.uk/uk/2003/jan/08/terrorism.alqaida>.

¹²³ David Pallister, *Seven Linked to al-Qaida are Jailed for Terror Plots*, GUARDIAN, June 15, 2007, at 9; James Sturcke, *Public Warned of Growing Threat of Terror Attacks*, GUARDIAN (Nov. 30, 2007),

<http://www.guardian.co.uk/uk/2007/nov/30/terrorism.politicalnews?INTCMP=SRCH>.

¹²⁴ BOB GRAHAM ET AL., WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM (2008).

¹²⁵ See, e.g., S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (stating that the Security Council was gravely concerned of the threat of a terrorist organization, especially those identified by the United Nations “under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery”).

III. THE UN COUNTER-TERRORISM REGIME

In the post 9/11 period, the UN system¹²⁶ seems to place more attention on terrorism, both in terms of causes and consequences.¹²⁷ This section analyzes three key organs that direct the United Nations terrorism and counter-terrorism regimes. This analysis begins with the 1267 Committee, established prior to the 9/11 attacks. Then, this section examines the Counter-terrorism Committee (CTC), which is the principal counter-terrorism organ within the UN and, specifically, the Security Council. The section concludes with a discussion of the General Assembly, the Secretary-General, and the Human Rights Council.

In developing its counter-terrorism regime, the Security Council has relied on its expansive powers, granted by the UN Charter, to impose positive obligations on member states with respect to international terrorism.¹²⁸ The downing of Pan Am flight 103 (1988),¹²⁹ UTA flight 772 (1989),¹³⁰ the attempted assassination of President Hosni Mubarak (1995),¹³¹ and the

¹²⁶ The phrase “UN System” refers to the United Nations; voluntary and special funds and programs; a number of specialized, affiliated agencies; and UN peacekeeping operations. MARJORIE ANN BROWNE, CONG. RESEARCH SERV., RL33611, UNITED NATIONS SYSTEM FUNDING: CONGRESSIONAL ISSUES (2013), available at <http://www.fas.org/sgp/crs/row/RL33611.pdf>.

¹²⁷ In 2005, the General Assembly formed the Counter-terrorism Implementation Task Force to help the organization coordinate the various counter-terrorism measures within the UN. See generally COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, <http://www.un.org/en/terrorism/ctif/office.shtml> (last visited Oct. 16, 2012).

¹²⁸ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America) 1992 I.C.J. 115 (Feb. 27) (discussing the power of the Security Council when it applies Chapter VII); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993).

¹²⁹ Interestingly, it appears that the UN Security Council did not adopt specific a resolution condemning the Pan Am 103 flight terrorism. This is possibly because it was not known at the time who had committed this atrocity. However, the UK and the USA proposed tightening aviation security at the International Civil Aviation Organization, a UN specialized body. The proposal included a call for the banning of radios, computers, and other such electronic devices that cannot be easily inspected easily from being carried onto airplanes. John H. Cushman, Jr., *U.S. and Britain Call for Stricter Aviation Security*, N.Y. TIMES, Feb. 16, 1989 at A.17. See also S.C. Res. 635, ¶ 5, U.N. Doc. S/RES/635 (Jun. 13, 1989) (adopting Security Council Resolution 635, which focused on explosives and called on “procedures of plastic or sheet explosives, to intensify research into means of making such explosives more easily detectable, and co-operate in this endeavor”).

¹³⁰ When investigations indicated Libya as potentially responsible for the Pan Am 103 and UTA 772 bombings, the Security Council adopted a resolution declaring that it was “*Deeply disturbed* by the world-wide persistence of acts of international terrorism in all of its forms, including those in which States are directly or indirectly involved, which endanger lives or take innocent lives, have deleterious effect on international relations and jeopardize the security of States.” S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) (emphasis added).

¹³¹ See, e.g., S.C. Res. 1044, U.N. Doc. S/RES/1044 (Jan. 31, 1996) (condemning “the terrorist assassination attempt on the life of the President of the Arab Republic of Egypt in

bombing of the U.S. embassies in Kenya and Tanzania (1998)¹³² all led the Security Council to view terrorism, when occurring at specific times and locations,¹³³ as a threat to international peace and security.¹³⁴

Since 9/11, the Security Council has effectively securitized terrorism by adopting resolutions that place more duties on states to counter terrorism.¹³⁵ The Council accepted that multilateral commitment was necessary to counter international terrorism. Such commitment occurred in the post-9/11 period, when the Council developed a counter-terrorism regime composed of the following: the Al Qaeda/Taliban sanctioning committee (1267 Committee), the CTC, and the 1540 Committee.¹³⁶ These entities embrace a state-centric philosophy¹³⁷ and the measures they mandate emphasize sovereign duties, such as preventing the movement of suspected terrorists, curtailing the terrorism financing and the proliferation of non-conventional weapons, and calling for inter-state cooperation.¹³⁸ Messmer and Yardin assert that, in the post-9/11 period, the UN's counter-terrorism system is

based on a division of labor in which the Security Council occupies a strategic role of developing the overarching guidelines for how the international community should respond against terrorists and their activities, while UN member states provide

Addis Ababa, Ethiopia, on 26 June 1995” and calling on the Sudanese government to comply with various requests to extradite to Ethiopia three individuals deemed to be connected with the assassination attempt).

¹³² S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998).

¹³³ S.C. Res. 635, U.N. Doc. S/RES/635 (Jun. 13, 1989) (condemning “all acts of unlawful interference against the security of civil aviation,” though its focus is with the type of explosive—plastic or sheet—used to bring down the airplane).

¹³⁴ S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (expressing concern at the increase of acts of international terrorism and it condemning “all acts of terrorism irrespective of motive, wherever and by whomever committed”).

¹³⁵ See, e.g., S.C. Res. 1624, ¶ 1(C), U.N. Doc. S/RES/1624 (Sep. 14, 2005) (assessing incitement of terrorist acts and calling on states to introduce legislation that prohibits the incitement of terrorist acts, prevents the conduct of incitement, and denies safe haven “to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct”); see also S.C. Res. 1735, ¶ 1(A)-(C), U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1988, ¶ 1(A)-(C), U.N. Doc. S/RES/1988 (June 17, 2011).

¹³⁶ The three committees have issued joint communiqués indicating were the Security Council counter-terrorism regime is at. See, e.g., *Speakers In Security Council Call For Unified, Global Counter-Terrorism Effort, Following Briefings By Chairs Of Committees Set Up To Spearhead Fight*, U.S. FEDERAL NEWS SERVICES (May 12, 2010), <http://search.proquest.com.libezproxy2.syr.edu/docview/275950446?accountid=14214>.

¹³⁷ See Anthony Aust, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Practitioner's View*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 31–38 (Erika de Wet & Andre Nollkaemper eds., 2003).

¹³⁸ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001).

operational efforts informed by the Security Council's strategies.¹³⁹

A. The 1267 Committee: Addressing Threats from Individuals

This section reviews how the Security Council became involved in the campaign against international terrorism prior 9/11. By the late 1990s, the Taliban had controlled Afghanistan and had provided bin Laden with sanctuary, which may explain why the United States urged the formation of the 1267 Al Qaeda/Taliban Committee.¹⁴⁰ Security Council Resolution 1267, which followed Resolution 1214,¹⁴¹ amounted to a watershed in the history of the Security Council's treatment of terrorism. The Resolution emphasized not only that the Council saw terrorism as a threat to international peace and security, but also that it wanted to combat the phenomenon through sanctions and listing.¹⁴² The Committee, composed of representatives of the Council, was empowered to freeze the assets of individuals and entities that had ties to Al Qaeda and the Taliban; it was also able to prevent these individuals from travelling.¹⁴³ The impact of the 1267 Committee has been

¹³⁹ William B. Messmer & Carlos L. Yordán, *Partnership to Counter International Terrorism: The UN Security Council and the UN Member States*, 34 *STUD. CONFLICT & TERRORISM* 843, 845–46 (2011).

¹⁴⁰ Permanent Rep. of the U.S., Letter Dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), *available at* <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf> (informing the Council that the U.S. had applied the right to self-defense in its attack on Afghanistan and asserting that the Taliban had allowed Al Qaeda to operate in the territories under its control).

¹⁴¹ S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (declaring that it the Council is deeply disturbed that terrorists use Taliban-controlled areas in Afghanistan for the “sheltering and training of terrorists and the planning of terrorist acts” and reiterating that “the suppression of international terrorism is essential for the maintenance of international peace and security”).

¹⁴² S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (imposing sanctions on the Taliban following its refusal to turn over bin Laden, even in the face of an arrest warrant). The Taliban's to try bin Laden through a panel of Islamic judges suggests that the Taliban felt the pressure of the Council's sanctions and growing unhappiness with their intransigency. John Lancaster, *Afghanistan Offers to Try Bin Laden in Possible Prelude to Expulsion*, *WASH. POST*, Oct. 30, 1999, at A.22

¹⁴³ Rene Uruena points out that, in its early years, the Committee had little restriction or oversight in the application of its mandate. However, after the listing of three Swedish nationals—Abdirisak Aden, Abdi Abdulaziz Ali, and Youssef Ali—member states permitted the introduction of some oversight: the 2002 Guidelines. Rene Uruena, *International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror*, 4 *INT'L. ORG. L. REV.* 321 (2008); *see also* Monika Heupel, *Multilateral Sanctions against Terror Suspects and the Violation of Due Process Standards*, 85 *INT'L AFF.* 307 (2009); Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 *AM. J. INT'L L.* 745 (2004). S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002) (allowing the Committee to expand its remit with Resolution 1390, making its reach universal no longer restricted to Afghanistan).

significant, leading to a host of cases¹⁴⁴ that challenge the very essence of the 1267 sanction regimes. However, these cases have also raised serious questions about the scope of the Committee's powers and how they relate to domestic and international law.¹⁴⁵ This tension was particularly evident in the *Abdelrazik* case, where the Canadian government argued that being listed by the 1267 sanctions in July 2006 prevented Sudanese-born, naturalized Canadian Abousfian Abdelrazik from reentering Canada.¹⁴⁶ Simply, the Canadian government argued that to allow Abdelrazik to enter Canada would breach its UN Charter obligation.¹⁴⁷ Numerous courts have continued to question the very nature of 1267, interpreting it as subservient to the member states and insufficient as legal protection to potential Al Qaeda members or affiliates.¹⁴⁸

The willingness of the key foreign and domestic stakeholders in the Afghan conflict to engage with some members of the Taliban has affected the 1267 Committee. These relationships emphasize that the Committee exists to serve the states and their conception of national security. That is, as the primary states engaged in Afghanistan—the United States, the UK, Germany, France and others—begin to disengage, they recognize that the new Afghanistan will still need to function with the Taliban. Consequently, Al Qaeda is now viewed as distinct from the Taliban as there is a need to engage with the Taliban in the reconstruction of Afghanistan.¹⁴⁹ The development is in part the work of Afghan leaders, who have come to realize that they will

¹⁴⁴ See, e.g., *Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada*, 2009 F.C. 580 (Can. Ont.), available at <http://decisions.fct-cf.gc.ca/en/2009/2009fc580/2009fc580.pdf>; *A, K, M, Q & G v. HM Treasury* [2010] UKSC 2, available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_Judgment.pdf.

¹⁴⁵ Antonios Tzanakopoulos, *United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada*, 8 J. INT'L CRIM. JUST. 249, 250 (2010) (“[D]omestic courts are increasingly engaged by persons seeking to challenge restrictions imposed on them under the 1267 regime. Faced with the lack of any judicial remedies against Security Council decisions at both the international and the national level, affected persons are resorting to domestic courts, attacking the domestic acts adopted in implementation of the relevant resolutions.”).

¹⁴⁶ It was the United States that had Abousfian Abdelrazik designated a member of Al Qaeda. From the Canadian court reports, the designation was based on his acquaintance with Ahmed Ressam (convicted of plotting to blow up the Los Angeles Airport) and Adil Charkaoui (arrested because he was a threat to Canada's national security). *Abousfian Abdelrazik*, 2009 F.C. at para. 11; see also *A, K, M, Q & G v. HM Treasury* [2010] UKSC 2 (raising similar issues in the British context).

¹⁴⁷ Tzanakopoulos, *supra* note 145, at 252–53.

¹⁴⁸ *A, K, M, Q & G*, [2010] UKSC at para. 78 (welcoming the formation of the Office of the Ombudsman, but maintaining that it is not an effective judicial remedy).

¹⁴⁹ See, e.g., Helene Cooper & Thom Shanker, *U.S. Seeking Opportunities in Easing Taliban Talks*, N.Y. TIMES, Oct. 15, 2010, at A.8; Alissa J. Rubin, *Karzai Says Afghanistan Has Begun Taliban Talks*, N.Y. TIMES, Feb. 16, 2012, at A.4; Michael Semple, *The Taliban's Qatar Office is a Positive Step, but Not a Prologue to Peace*, GUARDIAN (June 19, 2013) <http://www.guardian.co.uk/commentisfree/2013/jun/19/taliban-qatar-office-positive>

need to work with Taliban members once foreign forces withdraw and of the international community recognizing that no peace can be established in Afghanistan without the Taliban.¹⁵⁰ This policy change highlights state dominance in the listing aspect of the UN counter-terrorism regime: the listing process is dependent on whether states decide that a Taliban member has moderated his extreme attitudes.¹⁵¹ This decision, in turn, permits his possible incorporation into the Afghan political system.¹⁵² Moreover, the shift in policy further empowers the Afghan government at the cost of international human rights and international criminal law;¹⁵³ the power to list or delist¹⁵⁴ is the power to grant a person impunity, even after having committed international crimes.¹⁵⁵

B. The Counter-Terrorism Committee, States, and Domestic Counter-terrorism

1. Security Council Resolution 1373 (2001)

The section examines the principal United Nations organ dealing with terrorism—the Counter-Terrorism Committee (CTC). The CTC is rooted in Security Council Resolution 1373, adopted almost three weeks after 9/11. At the time, Resolution 1373 appeared revolutionary, as it placed positive obligations on states to adopt a domestic counter-terrorism regime, which had never been done before, especially with respect to terrorism. The nature,

¹⁵⁰ Karen DeYoung & Peter Finn, *Karzai Supports U.S.-Taliban Talks*, WASH. POST, Jan. 5, 2012, at A.10; Jon Boone, *Karzai Seeks Talks with Taliban*, FIN. TIMES (Sept. 30, 2008), <http://search.proquest.com/docview/229199215?accountid=14214>; Dan Roberts and Emma Graham-Harrison, *Taliban peace talks: 'Peace and reconciliation' negotiations to take place in Qatar*, GUARDIAN (June 18, 2013) <http://www.guardian.co.uk/world/2013/jun/18/us-peace-talks-taliban-afghanistan>

¹⁵¹ See ABDUL SALAM ZAEFF ET AL., MY LIFE WITH THE TALIBAN (2010).

¹⁵² Kamran Yousaf, *Afghan Peace Process: 12 Taliban Peace Brokers May be Taken off UN List*, EXPRESS TRIB. (Nov. 19, 2012), <http://tribune.com.pk/story/467889/afghan-peace-process-12-taliban-peace-brokers-may-be-taken-off-un-list/>; see also Nikola Krastev, *UN Considers Splitting Al-Qaeda-Taliban Blacklist*, RADIO FREE EUR. (Oct. 18, 2012), http://www.rferl.org/content/un_considers_splitting_al-qaeda-taliban_blacklist/24237173.html.

¹⁵³ Razeshta Sethna, *Afghan Women's Rights under Threat*, GUARDIAN (June 20, 2013) <http://www.guardian.co.uk/world/2013/jun/18/us-peace-talks-taliban-afghanistan>; Hamida Ghafour, *What Afghan Women Fear (it's not the Taliban)*, TORONTO STAR, Feb. 3, 2013, at p. A.3.

¹⁵⁴ When the Taliban was in power, Mohammed Qalamuddin, one of the individuals that the Karzai government wanted take off the list, ran patrols that beat men and women whom the patrol felt were breaching Islamic law. Jason Burke, *Making Peace with the Taliban? UN Pressed to Lift Afghan Sanctions*, GUARDIAN (June 2, 2011), <http://www.guardian.co.uk/world/2011/jun/02/afghanistan-peace-move-lifting-taliban-sanctions>.

¹⁵⁵ Adrian Croft, *Afghan Peace Negotiator Sees Progress in Talks with Taliban*, REUTERS (Oct. 14, 2012), <http://www.reuters.com/article/2012/10/14/us-afghanistan-stanekzai-idUSBRE89D0I620121014>. See generally Isaac Kfir, *An Imperfect Solution to Afghan Reconciliation—An Afghan Truth Commission* (Feb. 4, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2211473> (discussing the issue of reconciliation).

manner, and style of the resolution, and its adoption under Chapter VII, raises the prospect of national and international action to remove a terroristic threat if a state fails to comply with the resolution requirement under the guise of self-defense.¹⁵⁶

Resolution 1373 serves as another clear indication that states lead the Security Council counter-terrorism regime. 1373 demands that all states shall “[t]ake the necessary steps to prevent the commission of terrorist acts . . . [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”¹⁵⁷ In other words, the Resolution makes clear what it wants and expects from the member states—denial of safe haven for those who support terrorism and those that practice it. Additionally, the Council demands that states shall,

[c]riminalize the wilful [sic.] provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.¹⁵⁸

Thus, 1373 lays out a mechanism compelling all member states to adopt a three-tiered program to combat terrorism. The first stage demands that states have a domestic counter-terrorism legislation program. The second stage requires an executive commitment to counter the threat of terrorism. The third stage requires each state to help the CTC by providing a report of its counter-terrorism regime.¹⁵⁹ The aim of the three-stage process is to help foster dialogue between the CTC and the member states regarding counter-terrorism regimes and, thus, create a database of counter-terrorism mechanisms, which states use them, and which mechanisms work.¹⁶⁰ Some claim that “[t]hrough its capacity-building and global coordination initiatives, the Counter-Terrorism Committee has become a significant element in the worldwide campaign against terrorism. The Committees mandate under Resolution 1373 is not changed by the new resolution.”¹⁶¹

Resolution 1373, and the subsequent resolutions adopted to sustain and expand the regime, are limited in the scope of their enforcement. For

¹⁵⁶ Sanjay Sethi, *Security Council Strengthens Fight Against Terrorism*, 39 UN CHRON. 22 (2002).

¹⁵⁷ S.C. Res. 1373, ¶ 2(c), U.N. Doc. S/RES/1373 (Sept. 29, 2001).

¹⁵⁸ *Id.* ¶ 1(b).

¹⁵⁹ See Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT’L L. 333, 333–34 (2003).

¹⁶⁰ Emilio J. Cardenas, *The United Nations Security Council’s Quest For Effectiveness*, 25 MICH. J. INT’L L. 1341, 1342–44 (2004).

¹⁶¹ Press Release, Spokesperson Richard Boucher, UN Security Council Enhances Coordination on Counter-Terrorism (Mar. 30, 2004), available at <http://2001-2009.state.gov/r/pa/prs/ps/2004/30899.htm> [hereinafter UN SC Enhances Coordination].

example, it remains unclear what the Council would do if a state rejected a CTC visit or if a country decided not to submit a report to the CTC.¹⁶² Resolution 1373 accepts the possibility that the Security Council may decide that, in failing to abide by the Resolution, a state is in breach of its obligations. This situation may require sanctions to attain compliance.¹⁶³ With respect to human rights, 1373 only calls on states to apply international standards of human rights for asylum and seekers and those seeking refugee status.¹⁶⁴ Professor Andrea Bianchi argues,

[i]f states are to properly and effectively implement SC anti-terror resolutions, there must be the sense that such a process occurs in conformity with those other values which form part and parcel of a common identity of the international community. To disregard this simple fact would seriously hamper the efficacy of anti-terror measures, as perceptions of legitimacy and fairness are likely to greatly enhance the level of compliance by states.¹⁶⁵

In March 2004, the Council felt that the CTC needed more assistance and established the Counter-Terrorism Executive Directorate (CTED).¹⁶⁶ This new body was mandated to visit countries in order to examine their compliance with 1373. CTED is a technical body and its purpose is to help countries interact with and learn from one another through best practices. This function is the reason for CTED's emphasis on special meetings.¹⁶⁷

The new mechanisms did not address the human rights deficit within the Council's counter-terrorism regime. E.J. Flynn, a human rights officer within the CTC argued that the CTC and the other Security Council counter-terrorism organs do incorporate a human rights formula in their operations. Flynn maintains that the organs have incorporated this human rights formula spontaneously, without a specific order from the Council. According to

¹⁶² See Leslie Palti, *Combating Terrorism While Protecting Human Rights*, 41 UN CHRON. 27 (2004) (recognizing the limitation of the enforcement mechanism and appreciating that sovereign states cannot be compelled to submit reports).

¹⁶³ Jimmy Gurule, *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*, 41 CASE W. RES. J. INT'L L. 19, 62–63 (2009) (arguing that by failing to enforce legal duties and obligations imposed by Resolutions 1267 and 1333 against non-compliant states, the Security Council runs the risk of rendering the UN sanctions regime (freezing terrorist assets) irrelevant in the fight against global terrorism).

¹⁶⁴ Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 33–50, U.N. Doc. A/65/258 (Aug. 6, 2010) (by Martin Scheinin) [hereinafter *Report on the Promotion and Protection of Rights*].

¹⁶⁵ Andrea Bianchi, *Security Council's Anti-terror Resolutions and Their Implementation by Member States*, 5 J. INT'L CRIM. JUST. 1073 (2006).

¹⁶⁶ S.C. Res. 1535, U.N. Doc. S/RES/1535 (March. 26, 2004).

¹⁶⁷ See *id.*; UN SC Enhances Coordination, *supra* note 161.

Flynn, the CTC and CTED independently recognize the importance of human rights and meet their human rights obligations through extensive interaction between the Council's counter-terrorism community and the human rights community. This interaction is exemplified by the fact that High Commissioners have addressed the CTC on several occasions.¹⁶⁸

2. Security Council Resolution 1566

In 2004, the Security Council adopted Resolution 1566. The Resolution condemned all forms of terrorism and called on member states to cooperate in combating terrorism.¹⁶⁹ The significance of Resolution 1566 stems from the fact that an internationally accepted definition of terrorism has been missing from the counter-terrorism campaign for decades¹⁷⁰ and the Resolution offers a definition of terrorism as:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are *under no circumstances justifiable* by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁷¹

The desire to deal with terrorism, as well as define it, is not new. Since the 1930s, when terrorism became an international problem, many have attempted to define terrorism in order to better prevent it.¹⁷² Thus, the

¹⁶⁸ E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, 7 HUM. RTS L. REV. 371 (2007).

¹⁶⁹ S.C. Res. 1566, ¶ 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (alteration in original) (“Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.”).

¹⁷⁰ S.C. Res. 1566, ¶ 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004); see also Ben Saul, *Definition of “Terrorism” in the UN Security Council: 1985–2004*, 4 CHINESE J. INT’L L. 141 (2005) (reviewing the history of the “definition” of terrorism within the UN and noting that, until 9/11, resolutions neither imposed penalties vis-à-vis acts of terrorism nor defined terrorism).

¹⁷¹ *Id.* ¶ 3 (emphasis added); see also Saul, *supra* note 170.

¹⁷² It was the assassination of King Alexander I of Yugoslavia and the French Foreign Minister, Louis Barthou in Marseille by the extremist Croat organization – Ustase – led by Ante Pavelic on October 9, 1934 that saw increase demand for some form of action, as by this point several high-profile killings had taken place. Friedlander notes that in 1833 the

Council of the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism. Although the Convention never came into force,¹⁷³ it does highlight a long-standing desire to address the issue of terrorism on an international level, beyond the domestic realm.

A year after Resolution 1566 was adopted, the Council of Europe, which has 47 member states, and which drafted the European Convention on Human Rights, adopted the Convention on the Prevention of Terrorism, condemning terrorism, regardless of its motives.¹⁷⁴ There are two key implications, first it highlighted an historical shift in the way European countries addressed the issue of terrorism. That is, when political violence began to affect Europe in the late nineteenth-century with the anarchists, European governments took the position that there is an important need to cooperate as a way to prevent anarchists from continuing with their policies. The clearest manifestation of the new level of cooperation was in relation to extradition, whereby European governments agreed to extradite individuals wanted in connection to crimes in another jurisdiction, as long as the political offence exception does not apply.¹⁷⁵ Second, it affected the Council of Europe and the European Union in terms of their approach to the threat of terrorism and the need to combat it through an effective, transparent, legal regime. In respect to the Council of Europe, within which the European Court of Human Rights exists, and which has sought to defend human rights within its *espace juridique*, a change has taken place. Claudia Hillebrand persuasively shows, the Court's has been timid in ensuring that the UN and EU 'terrorist lists' meet human rights standards, opting to argue that it lacks the authority to examine the lists.¹⁷⁶ In other words, when it comes to terrorism cases—specifically listing—the European Court of Human Rights arguably has not taken a liberal interpretation of the Convention, opting instead to refer applicants to the judicial mechanism within the member

Belgian government adopted legislation prohibiting extradition of political offenders. The French and the Swiss parliaments adopted similar provision a year later. Robert A. Friedlander, *Terrorism and International Law: What is Being Done*, 8 RUTGERS-CAM. L.J. 383, 384 (1976-1977).

¹⁷³ See John Dugard, *International Terrorism: Problems of Definition*, 50 INT'L AFF. 67, 67–70 (1974).

¹⁷⁴ Council of Europe Convention on the Prevention of Terrorism, pmb., May 16, 2005, C.E.T.S. no. 196.

¹⁷⁵ In 1891, the British High Court in *Castioni* imposed two basic requirements for the application of the political offence exception: first, the act had to take place during a political revolt or a disturbance. Second, the act in question had to have been ancillary to, or a part of, that same revolt or disturbance. *Re Castioni*, [1891] 1 Q.B. 149. See also, Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, 15 DENV. J. INT'L L. & POL'Y 125 (1986-1987) (tracing the history of the political offence exception in relation to terrorism); Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767 (1991-1992) (analyzing various proposals dealing with how to retain the political offence exception in light of the threat posed by terrorism).

¹⁷⁶ See e.g., CLAUDIA HILLEBRAND, *supra* note 10 at 164-165.

states.¹⁷⁷ Ultimately though, the importance of Resolution 1566's stems not only from the fact that it is an attempt by the Security Council to define terrorism, but that it fails to address state-sponsored terrorism. Because many states—attempting to vindicate those engaged in wars of national liberation—refused to have a definition that did not include state-sponsored terrorism, this issue has always been central to the debate over a definition.¹⁷⁸ However, it is clear that state-sponsored terrorism in the post-9/11 period is not associated with wars of national liberation, which helped the Council Security formulate a definition of terrorism, and which the Council of Europe for example largely accepted by incorporating it into the Convention on the Prevention of Terrorism.

C. The General Assembly, Human Security, and Counter-terrorism

During the immediate post-9/11 period, the General Assembly and other UN bodies took a subsidiary role when in the counter-terrorism regime, possibly because the Council had primary responsibility to deal with threats to international peace and security.¹⁷⁹ Yet, as 9/11 grew more distant, members of the United Nations and various UN entities felt that the campaign against Al Qaeda became too invasive, specifically from a human rights perspective.¹⁸⁰ Further, UN members feared that the counter-terrorism regime facilitated terrorist recruitment.¹⁸¹ Moreover, there was a sense that the balance had shifted away from human security and toward traditional security, which encouraged the General Assembly and the UN human rights organs to demand that the Security Council counter-terrorism regime become more transparent, accountable, and open.¹⁸² Focus immediately

¹⁷⁷ Julia Hoffmann, *Terrorism Blacklisting: Putting European Human Rights Guarantees to the Test*, CONSTELLATIONS 543, 555 (2008) (arguing that the European courts have focused on the issue of “information” or lack of, in relation to the UN and EU listing procedures. Hoffmann asserts “in a climate of fear, human rights guarantees are most easily undermined The European constitutional order must not be abused to circumvent those guarantees and Community judges must not defer to the pressures of an international political climate which would lead to a permanent state of emergency and a sell-out of human rights protection within the EU.”).

¹⁷⁸ Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986) (arguing that the rule of law has not been effective in addressing the threat of terrorism because states refuse to accept that terrorism is wrong, as some equate it with wars of national liberation).

¹⁷⁹ The significance of the Council leadership is highlighted by the fact that Council decisions are not reviewable, providing the Council with enormous power.

¹⁸⁰ *Report on the Promotion and Protection of Rights*, supra note 164, at ¶ 33–50 (arguing that state's record-keeping facilities and surveillance challenge the fundamental human right to privacy).

¹⁸¹ See Tahir Abbas, *Muslim Minorities in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period*, 28 J. INTERCULTURAL STUD. 287 (2007).

¹⁸² Growing criticism led to a number of changes within the 1267 Committee. First, the Analytical Support and Sanctions Monitoring Team, established in 2003, replaced the Monitoring Group (2001-2003). Second, the Committee adopted new guidelines explaining the listing and delisting processes and laying down some parameters that embrace fundamental human rights values. For example, the Office of the Ombudsperson, is meant to receive and process requests for delisting, acquire additional information from states and

landed on the listing procedure, managed by the CTC, where substantive human rights violations seemed to occur.¹⁸³

This section will analyze the role of the General Assembly and the Human Rights community in addressing counter-terrorism. First, this section will offer a broad overview of the Assembly's approach through its establishment of both the United Nations Global Counter-Terrorism Strategy, adopted in September 2006,¹⁸⁴ and the Counter-terrorism Implementation Task Force (CTITF). The two succeeding sections will address the role played by Secretary-General and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in the UN counter-terrorism regime.

1. The United Nations Global Counter-Terrorism Strategy and the Counter-terrorism Implementation Task Force

In 2005, the General Assembly, which in the previous four years followed the Security Council's lead on countering international terrorism, declared its position on the matter. However, the adoption of the United Nations Global Counter-terrorism Strategy amounted to a clear demarcation between the Assembly and the Council on the issue of counter-terrorism. The Strategy was arguably a natural continuation of the 2005 World Summit. The Summit discussed the value and the need to adopt the responsibility to protect doctrine¹⁸⁵ but also recognized that security has changed. The result was a development-based approach in addressing insecurity.¹⁸⁶ According to some,

UN entities, and communicate with those wishing to be delisted. The latest set of Guidelines were adopted in January 2011. S. C. Comm. Pursuant to Resolution 1267 (1999) and 1989 (2011) Concerning Al Qaeda and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of Its Work* (Jan. 26, 2011), http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

¹⁸³ S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (asking states to ensure that the measures they adopt in respect to their counter-terrorism programs comply "with all their obligations under international law" and declaring that states "should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law").

¹⁸⁴ G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

¹⁸⁵ Instead of building momentum for internationalism, the World Summit Outcome Document highlighted the centrality of state sovereignty in international relations. 2005 World Summit Outcome, ¶ 138, U.N. Doc. A/60/1 (Oct. 24, 2005); (referring to the responsibility to protect civilians from international crimes and highlighting the centrality of states, holding that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means"); see also Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine—But What of Implementation*, 19 HARV. HUM. RTS. J. 289 (2006).

¹⁸⁶ ARVINDER SAMBEI ET AL., COUNTER-TERRORISM LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 25 (2009); S.C. Res. 1963, U.N. Doc. SC/RES/1963 (Dec. 20, 2010) (recognizing that, to defeat terrorism, we must use policy that goes beyond the use of force and includes law enforcement measures, "protection of human rights and fundamental

the “fact that the Strategy was negotiated under the auspices of the General Assembly is also of positive significance, as the General Assembly generally carries more legitimacy than the Security Council due to its border representational base.”¹⁸⁷

The Strategy has four key pillars. Pillar I focuses on ensuring that counter-terrorism measures adopted by states do not breach human rights and the rule of law. Pillar I asserts that it is essential to “address the conditions conducive to the spread of terrorism,” which the Assembly identified as conflict, foreign occupation, oppression, poverty, lack of economic growth, under-development, lack of global prosperity, poor governance, human rights violations, political exclusion, and socio-economic marginalization.¹⁸⁸ Under this Pillar, the Department of Political Affairs (DPA) has become involved in counter-terrorism efforts through its conflict prevention mandate.¹⁸⁹ Pillar II calls upon the member states to undertake measures to prevent and combat terrorism, with specific focus on resources and means.¹⁹⁰ Pillar III calls for building state capacity to challenge, prevent, and combat terrorism and strengthen the UN system’s counter-terrorism mechanisms.¹⁹¹ The final pillar, Pillar IV, is composed of eight sections, tailored to demand that states must respect and abide by international human rights law, international refugee law and international humanitarian law when combating terrorism.¹⁹² Additionally, Pillar IV emphasizes the role of the United Nations system in this process.¹⁹³

freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence.” Also recognizing “that development, peace and security, and human rights are interlinked and mutually reinforcing, and underlining the international effort to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all.”).

¹⁸⁷ SAMBEI, *supra* note 186, at 24–25.

¹⁸⁸ G.A. Res. 60/288, *supra* note 184, at Annex, Plan of Action.

¹⁸⁹ In a 2012 Report, the Secretary-General argued that the DPA “through its conflict prevention mandate, makes valuable contributions to the global struggle against terrorism.” This is because UN mediators and envoys strive to reduce political tensions, which, unless addressed, could lead to terrorism. U.N. Secretary-General, *United Nations Global Counter-Terrorism Strategy: Activities of the United Nations System in Implementing the Strategy*, ¶ 28, U.N. Doc. A/66/762 (Apr. 4, 2012).

¹⁹⁰ G.A. Res. 60/288, *supra* note 184, at Annex, Plan of Action.

¹⁹¹ *Id.*

¹⁹² See also G.A. Res. 60/158, U.N. Doc. A/RES/60/158 (Feb. 28, 2006) (reaffirming “the fundamental importance, including in response to terrorism and the fear of terrorism, of respecting all human rights and fundamental freedoms and the rule of law”).

¹⁹³ G.A. Res. 60/288, *supra* note 184, at Annex, Plan of Action § 5 (reaffirming “the United Nations system’s important role in strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism”).

The counter-terrorism human security agenda received a boost with the formation of the CTITF, a UN body mandated to coordinate thirty other UN entities including Interpol, which, in December 2009, was institutionalized in the Department of Political Affairs. The CTITF is composed of eight working groups: Preventing and Resolving Conflict; Supporting and Highlighting Victims of Terrorism; Preventing and Responding to WMD Terrorism; Tackling the Financing of Terrorism; Countering the Use of the Internet for Terrorist Purposes; Strengthening the Protection of Vulnerable Targets; Protecting Human Rights while Countering Terrorism; and Border Management Related to Counter-terrorism.¹⁹⁴

2. The Secretary-General, Human Security, and Terrorism

The issue of terrorism has sparked a fierce debate over its root causes, which the 2004 High-level Panel on Threats, Challenges and Changes captured. The Report identified six clusters of threats: inter-state war; intra-state conflict that includes genocide and large-scale human rights violations; poverty, infectious disease and environmental damage; weapons of mass destruction; terrorism and transnational crime. The Panel claimed that, by addressing poverty, international society not only saves millions of lives but also strengthens states, which leads to a better defense against international terrorism and transnational organized crime. Finally, the report called for a multilayered program led by the Secretary-General and driven by human security philosophies, considered the most effective way to combat terrorism and general insecurity.¹⁹⁵ The report underlined that terrorism is a result of failures in the state system to provide individuals with basic needs. It argued that individuals turn to terrorism because they have no other cause of action. The Panel declared:

Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and order.¹⁹⁶

The Panel's recommendations embraced human security ideas by calling for a five-level strategy. The first element was dissuasion: addressing social

¹⁹⁴ See DEPARTMENT OF POLITICAL AFFAIRS, <http://www.un.org/wcm/content/site/undpa/main/issues/counter-terrorism> (last visited Oct. 12, 2012).

¹⁹⁵ Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 48 (2004), available at <http://www.un.org/secureworld/report2.pdf> [hereinafter High-Level Panel]; *In Larger Freedom*, *supra* note 18.

¹⁹⁶ High-Level Panel, *supra* note 195.

and political problems, specifically, lack of opportunities and the state collapse that prevents opportunities. The second element emphasized education and public debate. The third called for a stronger system of cooperation in law enforcement and intelligence-sharing in counter-terrorism. The fourth element of the strategy refers to building state capacity to prevent terrorist recruitment and operation. The fifth sought a regime to control dangerous materials and public health.¹⁹⁷

Soon after the publication of the Panel’s report, a Secretary-General Report, entitled *Uniting Against Terrorism*, was issued. It focused on three key elements that identified with human security. The Report called for “dissuasion, denial, deterrence, development of State capacity and defence [sic.] of human rights.”¹⁹⁸ The Secretary-General in effect argued that “the defence of human rights is essential to the fulfillment of all aspects of a counter-terrorism strategy. The central role of human rights is therefore highlighted in every substantive section of this report, in addition to a section on human rights per se.”¹⁹⁹

Following the 2005 World Summit and possibly because of rising discontentment with the Security Council counter-terrorism regime, the Assembly established its own counter-terrorism regime: the Global Counter-Terrorism Strategy. It aimed to emphasize the centrality of human rights in an effective counter-terrorism regime. The Plan of Action attached to the Resolution declares:

We, the States Members of the United Nations, resolve . . . [t]o recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.²⁰⁰

3. The Special Rapporteurs, Human Rights, and Counter-terrorism

This section focuses on the work of the Special Rapporteurs. These bodies wield tremendous influence within the UN system. The Special Rapporteur is part of the Human Rights Council’s Special Procedure regime.²⁰¹ The

¹⁹⁷ *Id.*

¹⁹⁸ *Uniting Against Terrorism*, *supra* note 31, at ¶ 4.

¹⁹⁹ *Id.*

²⁰⁰ G.A. Res. 60/288, *supra* note 184, at Annex 3.

²⁰¹ “Special Procedures” refers to the human rights regime that encapsulates a variety of designations and processes, including Independent Expert, Working Group member, Special Representative, and Special Rapporteurs. Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2004-2010) claims that the Special Procedures “hold governments, as well as other actors—ranging from the United Nations

mandate of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism is to ensure that states pursuing terrorists do not breach international human rights, refugee, or international humanitarian law obligations.²⁰²

In 2005, the UN Commission on Human Rights (which became the Human Rights Council in 2006) appointed a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. The Special Rapporteur was concerned that existing human rights mechanisms were not providing sufficient human rights coverage. This concern led to studies regarding the effect of counter-terrorism on freedom of association; the effect of counter-terrorism on social, economic, and cultural rights; and the threat of suicide terrorism as a specific challenge to human rights and fundamental freedoms. However, it very quickly became apparent that the states and the Special Rapporteur were approaching the issue of international terrorism very differently. This divergence may explain why, in his final report, the Rapporteur conceded that “almost 70 per cent of the 52 countries requested have either not responded at all to requests, or have failed to approve a visit.”²⁰³ This state non-responsiveness was highly disheartening, as “[t]he Special Rapporteur sees the establishment of his mandate as a device to support and advise States in protecting and promoting human rights and fundamental rights while countering terrorism.”²⁰⁴

To craft an international counter-terrorism campaign within the confines of international human rights law, the Special Rapporteur developed a four-fold policy: First, *complementarity*, under which the Rapporteur tailors projects to compliment the work already operating through existing mandate holders. Second, *comprehensiveness*, which recognizes that counter-terrorism measures have wide-ranging consequences. Therefore, assessing these measures vis-à-vis human rights requires a broad-brush approach. Third, *proactivity*, whereby letters, appeals, and country visits catalyze assessment of counter-terrorism measures through a human rights lens. Finally, the Special Rapporteur

itself, through corporations to armed opposition groups—to account for alleged or perceived violations of international human rights norms. While they conspicuously lack any formal powers of enforcement, the practical impact of their work can be significant, and there are many instances in which governments and even the United Nations itself have been successfully pressured to adopt major changes in terms of policy and practice.” Philip Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, 52 HARV. INT’L L.J. 565 (2011).

²⁰² Commission on Human Rights 2005/80, Rep. of the Commission on Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 61st Sess., 60th mtg., Mar. 14–Apr. 22, 2005 (April 21, 2005).

²⁰³ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killing*, Human Rights Council, U.N. Doc. A/HRC/14/24 (May 20, 2010) (by Philip Alston).

²⁰⁴ *Report on the Promotion and Protection of Rights*, *supra* note 164, at ¶ 2.

adopted a *thematic approach* in his study of how countries draft, adopt, and implement counter terrorism.²⁰⁵

This latter approach has led to tremendous tension among states who increasingly criticize the work of Special Rapporteurs and feel that Rapporteurs push the human rights agenda beyond their mandate.²⁰⁶ In the field of terrorism, this tension came to the fore when Special Rapporteur Martin Scheinin decided to include sexual minorities in the protected category of gender.²⁰⁷ Specifically, the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has challenged a number of CTC practices as well as the Committee's agenda. The Special Rapporteur has taken issue with the non-public nature of CTED country-visits and with Security Council Resolution 1624, which deals with incitement, for failing to address the human rights aspect of free speech.²⁰⁸ During his tenure as Special Rapporteur, Martin Scheinin stated:

[T]he Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the Council and continues to pose risks to the protection of a number of international human rights standards.²⁰⁹

In October 2011, Ben Emmerson, the newly appointed Special Rapporteur on Human Rights and Counter-terrorism, informed the CTC that he plans to focus on the rights of terrorists as well as the prevention of terrorism. Emmerson made clear that states prevent terrorism by promoting and protecting *all* human rights. He argued further that successful counter-terrorism policies are based on strict observance of human rights standards.²¹⁰ This conception of human rights transcends civil and political

²⁰⁵ *Id.* ¶¶ 7–10.

²⁰⁶ Alston, *supra* note 201; Philip Alston, *The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston*, 2 J. HUM. RTS. PRAC. 355 (2010).

²⁰⁷ *Report on the Promotion and Protection of Rights*, *supra* note 160. The General Assembly responded by refusing to accept the report and asking Scheinin “to make recommendations in the context of his mandate, with regard to preventing, combating and redressing violations of human rights and fundamental freedoms in the context of countering terrorism.” G.A. Res. 64/168, ¶19, U.N. Doc. A/RES/64/168 (Jan. 22, 2009); *see also* Nigel S. Rodley, *On the Responsibility of Special Rapporteurs*, 15 INT’L J. HUM. RTS. 319 (2011).

²⁰⁸ *Report on the Promotion and Protection of Rights*, *supra* note 164, at ¶ 51–58.

²⁰⁹ *Id.* ¶ 39.

²¹⁰ *New UN Expert on Counter-terrorism and Human Rights to Focus on Rights of Victims and Prevention of Terrorism*, U.N. HUM. RTS. (Oct. 21, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11517&LangID=E>.

rights, as it is argued that by pursuing social justice helps prevent injustice,²¹¹ which is assumed to be the cause of terrorism.²¹² While this view fails to consider that post-9/11 Islamic terrorism is motivated by a dogmatic ideology that seeks a world revolution, it does acknowledge that terrorism still occurs through the actions of individuals.²¹³

IV.A NATIONAL SECURITY-HUMAN RIGHTS SYNERGY FOR THE UN COUNTER-TERRORISM REGIME

This section serves as a conclusion, bringing together the various arguments raised throughout the paper. Principally, this section strives to show that the UN counter-terrorism system would benefit from a breach in the ideological gap that currently exists between the Security Council regime and the General Assembly. This section argues that only through a confluence of international humanitarian human rights law can society address the challenges that international terrorism poses to the contemporary world. To view the threat Al Qaeda poses as anything other than existential is naïve; it ignores that security services repeatedly foil terror attempts.²¹⁴ At the same time, imposing an indefinite state of public emergency in order to allow de facto or de jure derogation from human rights mechanisms risks the values that states have fought so hard to develop and preserve. Thus, a process of “updating” or “contemporization”²¹⁵ is necessary to embed²¹⁶ both national security thinking and human rights values within the system.

Sovereignty, the complex nature of the UN system, and the diverse powers of the UN organs all encouraged the UN’s multiple counter-terrorism regimes. This is why contemporization within this context must attain a balance between traditional security considerations; national security and human rights must complement one another. Thus, the UN must recognize

²¹¹ *A call on States to Ratify New Instrument to Enhance Protection of Economic, Social and Cultural Rights*, U.N. HUM. RTS. (May.8, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13310&LangID=E>

²¹² High-Level Panel, *supra* note 195.

²¹³ Paul Cruickshank & Mohannad Ali, *Abu Musab Al Suri: Architect of the New Al Qaeda*, 30 *STUD. CONFLICT & TERRORISM* 1 (2007) (discussing Abu Musab al-Suri and Al Qaeda’s promotion of individual terrorism).

²¹⁴ See Ken Dilanian & Brian Bennett, *Al Qaeda Bomb Plot Was Foiled By Double Agent*, L.A. TIMES (May 9, 2012), <http://articles.latimes.com/2012/may/09/world/la-fg-bomb-plot-20120509>; *Spanish Police Foil Al-Qaeda Terror Attack*, TELEGRAPH (Aug. 2, 2012), <http://www.telegraph.co.uk/news/worldnews/europe/spain/9447206/Spanish-police-foil-al-Qaeda-terror-attack.html>.

²¹⁵ See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT’L L.* 866 (1990).

²¹⁶ See, e.g., Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *EUR. J. INT’L L.* 130 (2008) (discussing embeddedness and the law); Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

that a vibrant domestic counter-terrorism program controlled and supervised by a domestic judicial program is the most effective way to establish an international counter-terrorism regime. States—as opposed to international organizations—are better equipped to introduce and review counter-terrorism legislation, as evidenced by the continuous revisions of domestic counter-terrorism legislation to ensure consistency with fundamental human rights.²¹⁷

Importantly, states can be trusted to develop a balanced counter-terrorism regime. Many human rights organizations reject this kind of state power and have developed deep suspicion of states and state counter-terrorism programs. By using Chapter VII to adopt a new counter-terrorism mechanism, the Security Council has, at times, not only acted disproportionately²¹⁸ but has then gone without judicial oversight.²¹⁹ However, the Council remains steadfast in its approach to combating terrorism, focusing on traditional security and challenging established doctrines about rights and the rule of law in the process. Allowing the General Assembly and specialist human rights entities to educate Council members on the value of human security (which address many of the issues that fuel terrorism—poverty, political oppression, disenchantment, and misery) would help to resolve some key tensions. Conversely, though, Special Rapporteurs and Special Procedures must also adjust and recognize that states have every right to national security through counter-terrorism. Additionally, a human security approach does not explain why individuals turn to transnational terrorism, as many of Al Qaeda's adherents do not have poor socio-economic backgrounds. Rather, they follow Al Qaeda because they believe in its ideology.²²⁰

²¹⁷ A and Others v. Secretary of State for the Home Department, [2004] UKHL 56 (finding the UK's Anti-Terror Law incompatible with international human rights). Fiona de Londras and Fergal F. Davis debate executive expansionism. De Londras emphasizes court willingness to challenge counter-terrorism legislation; Davis highlights extra-constitutionalism. Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD J. LEGAL STUD. 19 (2010) (showing that each branch has much to offer in respect to the development of a domestic counter-terrorism regime, which is why they must improve their working relations).

²¹⁸ See Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights* 25 BERKELEY J. INT'L L. 203, 227 (2007) ("There is no doubt that the 1267 regime has shifted some responsibility for dealing with individuals who pose a security threat from member states to the Security Council. While there has been a transfer of authority, there has been no commensurate transfer of legal safeguards. This is problematic for a regime which has unprecedented and serious powers, no definition of terrorism, and an exceptionally broad category of individuals it can target.").

²¹⁹ See Monika Heupel, *Multilateral Sanctions Against Terror Suspects and the Violation of Due Process Standards*, 85 INT'L AFF. 307 (2009).

²²⁰ PETER L. BERGEN, *HOLY WAR INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (2002); LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006).

A national security human rights formula calls for accountability, transparency, and efficiency in adopting measures to combat terrorism. Without these measures cases such as *Kadi* or *Yusuf* challenge the UN counter-terrorism regime by pitting states against the Council.²²¹ One way to attain accountability is to allow the International Court of Justice (ICJ) to appraise Security Council resolutions on counter-terrorism.²²² For too long the Security Council has operated without review or analysis. This is especially marked because discussions pertaining to resolution take place behind closed doors, making it difficult for any entity to oversee Council action. This may explain why, increasingly, domestic and regional courts have felt the need to challenge the Security Council.²²³ This can be done through ICJ advisory opinions or something similar to the preliminary reference system that exists within the European Union.²²⁴ If the Council is to continue to maintain international peace and security, it must accept that its structure, modus operandi, and composition have become anachronistic. Martti Koskenniemi captured this challenge:

The police are ransacking the temple, searching for criminals and those it calls terrorists. The mind of the police—the security police in this case—is a machine, programmed to believe that history ended and we won it; that what remains is a clash of civilizations and we intend to come up first. As it proceeds—helmets, boots, blackjacks and all—towards the altar, the people draw silently away into the small chapels, surrounding the *navis*, each to attend communion before a different god. After the police have gone, the altar hall is empty but for the few that were left to guard it, and their admirers. The frescoes, the bronze statuettes, the stained glass, the marble speak from different ages, through different symbols, and towards a now empty centre.

²²¹ Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Comm'n of the European Communities*, 2005 E.C.R. II-3649; Case T-306/01, *Ahmed Ali Yusuf & Al Barakaat Int'l Found. V. Council of the European Union and Comm'n of the European Communities*, 2005 E.C.R. II-3533.

²²² *Certain Expenses of the United Nations, Advisory Opinion*, 1962 I.C.J. Reports (July 20); *Legal Consequences for States of the Continued Present of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Reports (June 21).

²²³ *See, e.g., A, K, M, Q & G v. HM Treasury* [2010] UKSC 2 (noting that the freezing order is disproportionate and oppressive and the mechanism for the protection of the individuals and their rights weak, but generally criticizing the 1267 mechanism).

²²⁴ Treaty on the Functioning of the European Union art. 267, May 9, 2008, O.J. C 115/1 (“Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon.”); *see also* Koen Lenaerts, *The Contribution of the European Court of Justice to the Area Of Freedom, Security and Justice*, 59 INT’L & COMP. L.Q. 255 (2010).

Quod non fecerunt barbari, fecerunt Barberini. The peace of the police is not the calm of the temple but the silence of the tomb.²²⁵

The Security Council appears to have forgotten that its primary purpose is to keep the peace, not to change the world order, which it seems to be doing under the guise of combating terrorism.²²⁶ The advancement of the rule of law has become a central feature in international relations, as well as within national security strategies. It is the duty and responsibility of the Council to promote a strong counter-terrorism regime within domestic jurisdictions; it is equally the duty and responsibility of the Council to respect international human rights law. Judge Myjer noted,

States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those “absolute” rights from which no derogation may be made even in times of emergency²²⁷

²²⁵ Martti Koskenniemi, *The Police in the Temple Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT’L L. 325, 348 (1995).

²²⁶ See *Namibia*, 1971 I.C.J. at 115 (dissenting opinion of Sir Gerald Fitzmaurice); see also Koskenniemi, *supra* note 225.

²²⁷ *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008).