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# A Regime in Need of Balance: The UN Counter-- Terrorism Regimes of Security and Human Rights

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## ARTICLE

### **A Regime in Need of Balance: The UN Counter-Terrorism Regimes of Security and Human Rights**

*Isaac Kfir*

#### ABSTRACT

*Since 9/11, the UN's counter-terrorism regime has developed two distinct approaches to 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. On the other hand, 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 the traditional state security and human security regimes.*

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The opinions, 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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## I. 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.<sup>1</sup> The reaction of the international society<sup>2</sup> was incredibly swift. It began with mass condemnation<sup>3</sup> and a call for action,<sup>4</sup> 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.<sup>5</sup>

The declaration of war against Al Qaeda, and by extension against militant, radical Islam—Islamism<sup>6</sup>—led to legislation intended to help governments

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<sup>1</sup> 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.

<sup>2</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 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”).

<sup>3</sup> See, e.g., Jean-Marie Colombani, *We Are All Americans*, LE MONDE, Sept. 12, 2001, [http://www.worldpress.org/1101we\\_are\\_all\\_americans.htm](http://www.worldpress.org/1101we_are_all_americans.htm) (declaring to its French readership, “We are all Americans”).

<sup>4</sup> See, e.g., Judy Dempsey & Andrew Parker, *NATO Call to Fight Terrorism Scourge*, FIN. TIMES, Sept. 12, 2001, at 5 (describing 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.”).

<sup>5</sup> President Bush's Address to a Joint Session of Congress and the Nation, WASH. POST, Sept. 20, available at 2001, [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) [hereinafter President Bush's Address].

<sup>6</sup> 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.”).

counter the threat that Al Qaeda and its affiliates<sup>7</sup> posed. As a result, states across the world adopted new legislative and policy agendas to address the threats posed by terrorism.<sup>8</sup> The intent was to both strengthen infrastructures in preparation for future terrorist attacks<sup>9</sup> and to adopt extraordinary measures to counter the emerging threats. The use of drones and targeted killing, not to mention the leaks involving the National Security Agency, are examples of how government policy has changed in response to terrorism.<sup>10</sup> Governments now generally take the position that it is better to err on the side of caution when it comes to Al Qaeda,<sup>11</sup> while also recognizing that some limitations exist on their ability to engage in unfettered, unregulated military campaign.<sup>12</sup> Consequently,

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<sup>7</sup> 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 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).

<sup>8</sup> *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).

<sup>9</sup> 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).

<sup>10</sup> *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>.

<sup>11</sup> 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 directed at 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*, *GUARDIAN*, June 18, 2013, <http://www.guardian.co.uk/world/2013/jun/18/nsa-surveillance-limited-focused-hearing>.

<sup>12</sup> *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.

governments have substantially increased their authorities to address the threat of terrorism.<sup>13</sup> Notably, the expansive approach to security since September 11, 2001 (9/11)<sup>14</sup> has initiated a debate as to how democratic states should combat terrorism. Increasingly it appears that the new laws, measures, and policies are at times at odds with well-established democratic principles,<sup>15</sup> such as fundamental rights.<sup>16</sup>

The reaction of some international organizations to 9/11 was more distinctive than that of some states, which radically changed in the way they respond to the threat of terrorism. The North Atlantic Council (NAC), for example, after recognizing that the United States had come under attack, allowed the U.S. to invoke Article 5 of the Washington Treaty against Al Qaeda. This enabled NATO to go to war against a non-state actor for the first time.<sup>17</sup> The most visible change however, was within the United Nations (UN). The UN is the organization entrusted with saving the international society from the scourge of war, promoting social progress, bolstering standards of living and freedoms, and advocating for international peace and security. The preamble to the UN Charter expressly declares the need "to save succeeding generations from the scourge of war," and the need to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights

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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 Droegge, *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).

<sup>13</sup> 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).

<sup>14</sup> 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.").

<sup>15</sup> *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).

<sup>16</sup> *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).

<sup>17</sup> 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* (London), Nov. 16, 2001, at 10.

of men and women and of nations large and small.”<sup>18</sup> 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.”<sup>19</sup>

The UN has approached the threat of terrorism similar to most states, targeting terrorists. One of the clearest examples was when Security Council placed international terrorism at the top of its agenda.<sup>20</sup> Concomitantly, the General Assembly also deepened its interest in international terrorism. The assembly however, adopted a different approach to combatting terrorism. It emphasized eliminating the root causes of terrorism rather than the terrorists themselves.<sup>21</sup>

Drawing influence from the New Haven School,<sup>22</sup> this paper offers a review of some of the counter-terrorism mechanisms adopted by the UN since 9/11. The paper highlights the current UN counter-terrorism regime’s<sup>23</sup> two distinctive approaches to combating international terrorism, and specifically the Al Qaeda threat. The divergence appears most clearly when contrasting the

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<sup>18</sup> The issue of maintaining peace and security only appears towards the end of the Preamble.U.N. Charter pmbl.

<sup>19</sup> *Id.*

<sup>20</sup> 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).

<sup>21</sup> 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>; THE RESPONSIBILITY TO PROTECT, INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY (2001), *available at*

<http://responsibilitytoprotect.org/ICISS%20Report.pdf>; 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, *available at* <http://www.economist.com/node/324795>.

<sup>22</sup> 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).

<sup>23</sup> 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”).

response of the Security Council to those of the General Assembly, the Human Rights Council, the Human Rights Committee, 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 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 underscores how the dichotomy weakens 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, the Security Council follows a traditional conception of security—national security. Under this paradigm, the security of the state drives the political process, aiming to adopt policies to make sure that the state is safe from internal and external threats. Drawing from this, advocates argue that a strong state serves as the best guarantor for human rights;<sup>24</sup> after all, the right to life is the most important human right.<sup>25</sup> It is under this reasoning that the Council has accepted the state defense of public emergency<sup>26</sup> as a means to justify new state policies vis-à-vis international terrorism.<sup>27</sup> In contrast, the General Assembly and other UN organs follow a human security formula arguing that the suppression of social, economic, civil and political rights encourages people to turn to terrorism. Accordingly, their focus is to call upon states to ensure that they do not violate international human rights, refugee, or humanitarian law.<sup>28</sup> This is in large part why their counter-terrorism formula is more holistic, typically non-military,<sup>29</sup> and human rights-based.<sup>30</sup>

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<sup>24</sup> M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law Oriented World Order*, 8 SANTA CLARA J. INT'L L. 1, 3 (2010).

<sup>25</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to life, liberty and security of person.").

<sup>26</sup> See *infra* Part I.A.

<sup>27</sup> 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).

<sup>28</sup> See G.A. Res. A/65/475, U.N. Doc. A/RES/65/34 (Jan. 10, 2011) (outlining measures to eliminate international terrorism); Press Release, Security Council, *As Debate Concludes, Delegates Urge Capacity-Building Partnerships, Eradication of Root Causes in Fight Against Terrorism*, U.N. Press Release GA/L/3434 (Oct. 9, 2012).

<sup>29</sup> Kalliopi K. Koufa, *Terrorism and Human Rights*, U.N. Economic and Social Council, E/CN.4/Sub.2/2001/31 (June 21, 2001) (Special Rapporteur on Terrorism and Human Rights); 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



The paper proceeds in the following manner. The first section offers a short review of the two main traditions dominating security studies discourse and how it relates to the key United Nations organs: Security Council, General Assembly, General-Secretary and human rights community. The section also discussed Al Qaeda, highlighting its metamorphosis from a traditional style terrorist organization to quintessentially an ideology.<sup>31</sup> The second section examines how the 1267 Committee has interpreted its duties. Then, this paper reviews the Counter-terrorism Committee (CTC) and its work in helping states develop domestic counter-terrorism programs. The section proceeds by exploring Security Council Resolution 1566 and the impact of updating the 1930's definition of international terrorism. In looking at these Security Council organs, it becomes apparent that states—primarily the permanent members of the Security Council—dominated the process, leading to a counter-terrorism regime that diminishes basic human rights under the guise of security. Section four looks at the General Assembly, the UN Global Counter-terrorism Strategy,<sup>32</sup> 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 to counter the threat of terrorism.

This paper concludes by calling for synergy between the two UN security

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marginalization, which in turn can help terrorism grow).

<sup>30</sup> Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 26, 2004), *See also* Martin Scheinin, Impact on the Law of Treaties, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 30 (Menno T. Kamminga et al. eds, 2009).

<sup>31</sup> 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); Nick Hopkins, US Heading for Point when 'Military Pursuit of al-Qaida Should End', *GUARDIAN*, Nov. 30, 2012, *available at* <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*, *available at* Nov. 20, 2012, <http://www.reuters.com/article/2012/11/21/us-usa-qaeda-panetta-idUSBRE8AK03R20121121>; *See, e.g.,* Morocco Arrests 'Terror' Cell, *THE DAILY STAR*, *available at* 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).

<sup>32</sup> G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

traditions. It argues that advocates of human security must recognize the concerns offered by states in defense of the measures that they have adopted to address jihadi terrorism. In doing so, there may be certain instances where abridging certain rights is warranted. This may especially be the case when dealing with threats like Al Qaeda that reject any form of compromise. This article recognizes that taking a solely socio-economic human rights approach is likely insufficient to deter terroristic campaigns from actors who reject such values and norms. States must understand however, the role of human security and respect human rights in order to understand why some individuals turn to terrorism. It will also help prevent states from creating overly aggressive counter-terrorism policies, especially ones that challenge conventional rights, that will inadvertently lead to even more acts of terrorism. Ultimately, the UN has an important role to play in countering the threat, but it can only do so if the two approaches recognize the validity and the usefulness of the other.

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

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.<sup>33</sup> 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.<sup>34</sup> In such a context, national security is understood as a concept whereby the state seeks greater physical security, assurance of economic prosperity, and preservation of its values and interests.<sup>35</sup>

After the terrorist attacks on September 11, 2001, states recognized that Al Qaeda posed a serious threat to their national security. Viewed through the

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<sup>33</sup> HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d. ed. 1954); HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

<sup>34</sup> LAURA NEACK, *ELUSIVE SECURITY: STATES FIRST, PEOPLE LAST* (2007); Ken Booth, *Security and Emancipation*, 17 *REV. INT'L STUD.* 313 (1991).

<sup>35</sup> See LAURA NEACK, *supra* note 36; Arnold Wolfers, 'National Security' as an Ambiguous Symbol, 67 *POL. SCI. Q.* 481 (1952).

rubric of a public emergency<sup>36</sup>—a threat to the “life of the nation”— it led to a “declaration of war.”<sup>37</sup> The declaration permitted states to take exceptional measures<sup>38</sup> to address threats without breaching international norms.<sup>39</sup>

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.”<sup>40</sup> Those conceptions of security are visible within the United Nations Security Council, which is heralded as the guardian of

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<sup>36</sup> 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).

<sup>37</sup> President Bush’s Address, *supra* note 6 (“On September the 11th, enemies of freedom committed an act of war against our country”).

<sup>38</sup> 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, 4<sup>th</sup> 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?](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 authorization 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).

<sup>39</sup> *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 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 F. 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).

<sup>40</sup> Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). *See also* Bush: Attacks ‘Acts of War’, CINCINNATI POST, Sept. 12, 2001, at 2A.

international peace and security.<sup>41</sup>

Defining “security” in the Security Council begins with the Permanent Members—China, France, Russia, the United Kingdom, and the United States—who possess veto powers.<sup>42</sup> Accordingly, these five states wield enormous influence<sup>43</sup> within the Council and on the conduct of international relations.<sup>44</sup> In the context of post-9/11 terrorism the permanent members disagree on some issues,<sup>45</sup> but when necessary they support a unified agenda<sup>46</sup> and a

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<sup>41</sup> 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.”).

<sup>42</sup> 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 . . .”).

<sup>43</sup> 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).

<sup>44</sup> 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.”).

<sup>45</sup> 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 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.

<sup>46</sup> Cf. Allen S. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?, 59 STAN. L. REV. 415, 419 (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, 1397 (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).

shared concern over international terrorism.<sup>47</sup> As a result, the Security Council behaves as one would expect states to behave when identifying threats to their security: search for allies, form alliances, and—if necessary—suspend or ignore international law.<sup>48</sup>

Since the adoption of Resolution 1368, adopted a day after 9/11, not only reaffirmed the right to self-defense, but expanded the right to include acts against non-state actors, recognizing them as a threat to international peace and security, the Council has continued to follow a position that grants states enormous powers against those engaged in or suspected of terrorism.<sup>49</sup> 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—<sup>50</sup> state authority prevails. Principally, the Office was established to protect individuals seeking to be removed from the Consolidated List.<sup>51</sup> Currently states have the authority to withhold information of who is on the list and the information that led to their name being added to the list.<sup>52</sup> Thus, the need for the Office arose from the lack of transparency and minimum standards

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<sup>47</sup> See, e.g., 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); Chantal de Jonge Oudraat, *Combatting Terrorism*, 26 WASH. Q. 163, 168 (2003) (arguing 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).

<sup>48</sup> Evan S. Medeiros & M. Taylor Fravel, *China's New Diplomacy*, 82 FOREIGN AFF., Nov.-Dec. 2003, at 22, 22 (“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”).

<sup>49</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 09, 2001).

<sup>50</sup> S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

<sup>51</sup> The aim of the Consolidated List was to impose sanctions, such as the freezing of assets, on individuals affiliated with Al Qaeda and associated entities. S.C. Res. 1267, U.N. Doc. S/RES/1267 Para. 6 (Oct. 15, 1999)

<sup>52</sup> Throughout Resolution 1904, the Council encourages states to work with the Office of the Ombudsman. S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); In Annex II of Resolution 1904, 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. S.C. Res. 1904, *supra* note 52, ¶ 2, Annex II; Annex II makes clear that the Committee has the power to determine whether to delist a person. *Id.* Annex II; Moreover, the Ombudsman must “respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.” *Id.* ¶ 14, Annex II.

of evidence.<sup>53</sup>

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

The General Assembly and the human rights community, although horrified and disgusted by the attack,<sup>54</sup> have approached Al Qaeda in a manner that is markedly distinct from that of the Security Council.<sup>55</sup> The assembly focuses less on traditional security when discussing the threat of transnational terrorism. It views security and, more specifically, the causes of insecurity, through a human security paradigm.<sup>56</sup> Arguably for political reasons<sup>57</sup> however, the concept rarely appears in recent UN reports.<sup>58</sup> Human security was first defined by the United Nations Development Program (UNDP) in the year 2004.<sup>59</sup> The UNDP rejected the traditional conception of security as too narrow.<sup>60</sup> Instead, it

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<sup>53</sup> Bardo Fassbender, Targeted Sanctions and Due Process, Mar. 20, 2006.

[http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)

<sup>54</sup> See, e.g., Han Seung-Soo, President, United Nations General Assembly, Acceptance Speech by H.E. Mr. Han Seung-Soo (Sept. 12, 2001) (during the fifty-sixth session of the General Assembly) (“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.”).

<sup>55</sup> See *Id.* (highlighting the General Assembly’s commitment to promote the Millennium Development Goals as a way to improve international affairs).

<sup>56</sup> See KAUL ET AL., UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 26–33 (1994) [hereinafter HUMAN DEVELOPMENT REPORT] (providing the first definition of human security).

<sup>57</sup> Mary Martin and Taylor Owen write that the shift has occurred because the key proponent of human security, Kofi Annan, 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 212–13.

<sup>58</sup> 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.”). Notably, human security was used in the 2005 World Summit and a number of General Assembly resolutions. 2005 World Summit Outcome, ¶ 143, U.N. Doc. A/60/LI (Sept. 20, 2005); See, e.g., 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).

<sup>59</sup> See HUMAN DEVELOPMENT REPORT, *supra* note 70; Astri Suhrke, A Stalled Initiative, 35 SECURITY DIALOGUE 365, 365 (2004).

<sup>60</sup> 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

identifies 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.<sup>61</sup>

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.”<sup>62</sup> Consequently, those embracing human security find the idea of derogation from international human rights treaties and conventions problematic, if not outright impossible.<sup>63</sup> For proponents of the human security model, the protection and preservation of human rights ensures national security.<sup>64</sup> When looking at the General Assembly and its resolutions, policies, and views over the last decade, it clearly adheres to the concept 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.<sup>65</sup>

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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).

<sup>61</sup> HUMAN DEVELOPMENT REPORT, *supra* note 70, at 25–33.

<sup>62</sup> Sadoka Ogata & Johan Cels, Human Security: Protecting and Empowering People, 9 GLOBAL GOVERNANCE 274 (2003).

<sup>63</sup> 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).

<sup>64</sup> 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).

<sup>65</sup> This will be seen most clearly in Part III.C(1) which deals with the United Nations Global Counter-terrorism Strategy.

### C. *Understanding the Al Qaeda Terrorist Threat*

Al Qaeda is an ideological tool whose aim is proselytization and forming more Al Qaeda subsidiaries and affiliates.<sup>66</sup> It begins with Al Qaeda's radical and uncompromising ideology that divides the world into two spheres: House of Islam (*Dar-al-Islam*) and House of War (*Dar-al-Harb*).<sup>67</sup> In doing so, Al Qaeda emphasizes the centrality of religion in the war for the salvation of Islam.<sup>68</sup> Due to the "cosmic" nature of the conflict,<sup>69</sup> Al Qaeda rejects compromise<sup>70</sup> and

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<sup>66</sup> 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). 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).

<sup>67</sup> 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*].

<sup>68</sup> THE AL QAEDA MANUAL, [http://www.fas.org/irp/world/para/manualpart1\\_1.pdf](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.").

<sup>69</sup> 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).

<sup>70</sup> See ABDEL BARI BARI ATWAN, *THE SECRET HISTORY OF AL QAEDA* (2008); See also *Terror in the name of God*, *id.* 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.").



demands total devotion and a willingness to sacrifice from its adherents.<sup>71</sup> The clearest manifestation of Al Qaeda's ideology appears in Osama bin Laden's infamous Declaration of Jihad. He interfused religion and history to emphasize the threat Muslims face from the crusading West<sup>72</sup> and from Muslim leaders, whom he believed abandoned Islam in favor of materialism.<sup>73</sup> The key threats that Al Qaeda generates stem from its religious zealotry that encourages suicide terrorism and mass casualty terrorism. These are relatively new developments in the realm of terrorism.<sup>74</sup> They are designed to exact heavy damage and to terrify others from working against them.<sup>75</sup> Ultimately, Al Qaeda's inflexible, cosmic ideology, mean that its recruits and affiliates not only show a willingness

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<sup>71</sup> 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 68, 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.").

<sup>72</sup> See Bin Laden's Fatwa, PBS NEWSHOUR (Aug. 27, 1996), [http://www.pbs.org/newshour/terrorism/international/fatwa\\_1996.html](http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html). "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 Tajakistan, Burma, Cashmere, Assam, Philippine, 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.").

<sup>73</sup> Bin Laden's Real Crusade, *BOSTON GLOBE*, Sept. 30, 2001, at D6.

<sup>74</sup> 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).

<sup>75</sup> 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 Solider'*, *TELEGRAPH* (Feb. 1, 2007), <http://www.telegraph.co.uk/news/uknews/1541272/Police-raids-foiled-plot-to-behead-soldier.html>. 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.").

to die in the process of attaining the goal, they often crave it.<sup>76</sup>

Al Qaeda's ability to use and manipulate the Internet accentuates the threat it poses.<sup>77</sup> The Internet allows Al Qaeda to transition from being a typical terrorist group to a global network. Through the Internet, it operates as a loose body of groups and individuals who share a set of ideas.<sup>78</sup> Its decentralized structure and ideological nature makes it difficult to combat and destroy.<sup>79</sup>

A study by Professors Manni Crone and Martin Harrow highlights the change and the threat that Al Qaeda's brand of terrorism and recruits possess. 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. The first group is the *internal autonomous* terrorists, "homegrown," or Western-based, individuals unaffiliated with Al Qaeda but

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<sup>76</sup> 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. . . ." 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>.

<sup>77</sup> 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.

<sup>78</sup> 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-Qaeda's Use of New Technology, 30 *FLETCHER F. WORLD AFF.* 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.

<sup>79</sup> See Coll & Glasser, *supra* note 77 (noting that "al Qaeda has become the first guerrilla movement in history to migrate from physical space to cyberspace"); See also Brachman, *supra* note 77, at 149–64.

who share its outlook.<sup>80</sup> The second group is the *internal affiliated* terrorists, homegrown individuals who have contacts with foreign Islamists, as typified for example by Burhan Hassan, a Somali-born American student who abandoned his studies to join al-Shabaab, ('The Youth'), a Somali-based terror group.<sup>81</sup> 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.<sup>82</sup> The fourth group is the *external affiliated* terrorists, best represented by the Nigerian Boko Haram, composed of individuals with little or no attachment to the West who have contact with non-Western terrorist or Islamist organizations.<sup>83</sup>

Crone and Harrow's typology fits with some of the terror attacks and recent threats that have affected the United States. In the year 2009, for example, the United States allegedly faced eleven separate Al Qaeda or Al Qaeda-inspired attacks. These included two physical attacks—the Fort Hood shooting (committed by a self-radicalized American military officer)<sup>84</sup> and a shooting incident in Little Rock Arkansas.<sup>85</sup> Besides the shootings, there were five serious plots, as well as four incidents involving Americans who wished to travel overseas to receive terrorist training.<sup>86</sup> What adds, to Al Qaeda's vicious

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<sup>80</sup> A good example of this is the 2005 ricin plot in the UK, which led to Kamel Bourgass' conviction. Bourgass was an Algerian national that came illegally to the UK. Duncan Campbell, Vikram Dodd, Richard Norton-Taylor and Rosie Cowan, Police killer gets 17 years for poison plot, *GUARDIAN*, Apr. 14, 2005, <http://www.theguardian.com/uk/2005/apr/14/politics.terrorism>. Another example is the killing of Lee Rigby by Michael Adebolajo and Michael Adebawale. The two were inspired by Al Qaeda, with Adebolajo claiming the attack on Rigby was a military strike. Vikram Dodd, Lee Rigby murder: Michael Adebolajo gets whole-life jail term, *GUARDIAN*, Apr. 14, 2005, <http://www.theguardian.com/uk-news/2014/feb/26/lee-rigby-killers-michael-adebolajo-adebawale-whole-life-ruling>

<sup>81</sup> Andrea Plott, 'A call to jihad, Answered in America,' *N.Y. TIMES*, (July 11, 2009), *available at* [http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=all&_r=0);

<sup>82</sup> A good example of this is the Nigerian group Boko Haram. Freedom C. Onuoha, *The Islamist Challenge: Nigeria's Boko Haram Crisis Explained*, *African Security Review* Vol. 19, No. 2 (2010), pp. 54-67.

<sup>83</sup> Manni Crone & Martin Harrow, *Homegrown Terrorism in the West*, 23 *TERRORISM & POL. VIOLENCE* 521 (2011).

<sup>84</sup> 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.

<sup>85</sup> James Dao, Man claims terror ties in Little Rock Shooting, *N.Y. TIMES*, (Jan. 21, 2010), *available at* <http://www.nytimes.com/2010/01/22/us/22littlerock.html?hp>

<sup>86</sup> Al Baker & William K. Rashbaum, Police Find Car Bomb in Times Square, *N.Y. TIMES*, May 2,

reputation is its alleged<sup>87</sup> use of unconventional weapons—chemical, biological, radiological, and nuclear (CBRN).<sup>88</sup> CBRN is a major concern because, “[f]rom a policymaker’s perspective, the case of nuclear terrorism is the classic case of high-consequence, low-probability problem. It would be imprudent not to take action against such a threat, but an argument can be made that resources really should be focused on more likely non-nuclear events.”<sup>89</sup> Al Qaeda and its affiliates have clearly contemplated the use of non-conventional weapons<sup>90</sup>, heightening concerns over the possible use of such weapons in general.<sup>91</sup> The

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2010; Times Square Bomb Plot May Have Cost \$7K, USA TODAY (May 9 2010), *available at* [http://www.usatoday.com/news/nation/2010-05-08-nyc-bomb-plot\\_N.htm](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).

<sup>87</sup> 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 capability was necessary and that they were intent on developing weapons that could cause large numbers of casualties.”).

<sup>88</sup> 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). In 2013, authorities in Iraq claimed to uncovered an Al Qaeda plot to use chemical weapons. Additionally, between 2006 and 2007, Al Qaeda in Iraq had detonated 16 crude chlorine bombs. Iraq uncovers al-Qaeda ‘chemical weapons plot, BBC News, Jun. 1 (2013), *available at* <http://www.bbc.com/news/world-middle-east-22742201>; Jim Garamone, Terrorists using chlorine bombs to intimidate Iraqis, U.S. Dept. of Defense, Jun. 7, 2007, *available at* <http://www.defense.gov/news/newsarticle.aspx?id=46311>

<sup>89</sup> Todd Moss, Nuclear Terrorism Redux: Conventionalists, Skeptics, and the Margin of Safety, 54 *ORBIS* 304 (2010). 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.” GEORGE TENET, *AT THE CENTER OF THE STORM: THE CIA DURING AMERICA’S TIME OF CRISIS* 277–78 (2008).

<sup>90</sup> Over the last few years, the United Kingdom has faced a number of terror plots involving non-conventional weaponry. *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>.

<sup>91</sup> 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), *available at*

matter is augmented by the inherent weakness of the non-proliferation regime,<sup>92</sup> which may explain the adoption of a number of Security Council resolutions calling for the tightening of controls over these unconventional attack materials.<sup>93</sup>

### III. THE UN COUNTER-TERRORISM REGIME

In the post-9/11 era, the UN system<sup>94</sup> places more attention on the causes and consequences of terrorism than before.<sup>95</sup> In developing its counter-terrorism regime, the Security Council has relied on its expansive powers to impose positive obligations on member states with respect to international terrorism.<sup>96</sup> The downing of Pan Am flight 103 in 1988,<sup>97</sup> UTA flight 772 in

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

<sup>92</sup> BOB GRAHAM ET AL., *WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM* (2008).

<sup>93</sup> *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”).

<sup>94</sup> 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>.

<sup>95</sup> 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, *available at* <http://www.un.org/en/terrorism/ctitf/office.shtml> (last visited Oct. 16, 2012).

<sup>96</sup> *See, e.g.*, 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).

<sup>97</sup> 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 A17; *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 “producers of plastic or sheet explosives, to intensify research into means of making such explosives more easily detectable, and to co-operate in this endeavor”).

1989,<sup>98</sup> the attempted assassination of President Hosni Mubarak in 1995,<sup>99</sup> and the bombing of the U.S. embassies in Kenya and Tanzania in 1998<sup>100</sup> led the Security Council to view terrorism, when occurring at specific times and locations, as a threat to international peace and security.<sup>101</sup> These events illustrate that pre-9/11 resolutions were generally limited in scope.<sup>102</sup>

Since 9/11, terrorism has been securitized by the Security Council, with the resolutions placing more duties on states to counter terrorism<sup>103</sup> while recognizing that multilateral commitment is vital to counter the threat. The aim is to produce an internationally agreed response to the threat of terrorism by focusing on the security of states. Accordingly, the Council's counter-terrorism regime is composed of the following: the Al Qaeda/Taliban sanctioning committee (1267 Committee), the CTC, and the 1540 Committee.<sup>104</sup>

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<sup>98</sup> 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 its forms, including those in which States are directly or indirectly involved, which endanger 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).

<sup>99</sup> 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 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).

<sup>100</sup> S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998).

<sup>101</sup> 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").

<sup>102</sup> S.C. Res. 635, *supra* note 94, at ¶ 1 (condemning "all acts of unlawful interference against the security of civil aviation," though its focus is on the type of explosive—plastic or sheet—used to bring down the airplane).

<sup>103</sup> 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).

<sup>104</sup> The 1540 Committee recognized that the proliferation of nuclear, chemical and biological weapons including the means of their delivery amounts to a threat to the maintenance of international peace and security, and therefore it seeks to promote domestic legislation to prevent the proliferation of such weapons. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). 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), available at <http://search.proquest.com.libeproxy2.syr.edu/docview/275950446?accountid=14214>.

These entities clearly have a state-centric philosophy, as after all they were created by states.<sup>105</sup> Thus, 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.<sup>106</sup> In the following sections, a review of the key committees is offered to underline the dominance of the state-centric approach taken by the specialist terrorist-entities of the Security Council.

A. *The 1267 Committee: Addressing Threats from Individuals from a Statist Perspective*

By the late 1990s, large parts of Afghanistan were under the control of the Taliban. At that time, the Taliban was providing sanctuary to bin Laden, which explains why the United States urged the formation of the 1267 Al Qaeda/Taliban Committee.<sup>107</sup> Security Council Resolution 1267, which followed Resolution 1214,<sup>108</sup> amounted to a watershed in the history of the Security Council's treatment of terrorism. It emphasized that the Council saw terrorism as a threat to international peace and security and that it wanted to combat the phenomenon through sanctions and listing.<sup>109</sup> 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 in addition to preventing their travelling.<sup>110</sup> The impact of the 1267 Committee has been

<sup>105</sup> 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).

<sup>106</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 29, 2001).

<sup>107</sup> 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).

<sup>108</sup> S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (declaring that 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”).

<sup>109</sup> 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 A22.

<sup>110</sup> 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

significant, specifically in terms of the listing process. As a result, some individuals have engaged in litigation to challenge their designation as terrorists,<sup>111</sup> while others have sought to question the mechanism and the idea of listing.<sup>112</sup>

There are serious questions about the scope of the Committee's powers, particularly in relation to domestic and international law.<sup>113</sup> In July 2006 for example, the Canadian government argued that being listed by the 1267 sanctions improperly prevented Abousfian Abdelrazik, a Sudanese-born naturalized Canadian, from reentering Canada.<sup>114</sup> The Canadian government argued that allowing Abdelrazik to enter Canada would breach its UN Charter obligation.<sup>115</sup> Moreover, numerous courts have questioned the very nature of 1267. Some courts interpret 1267 as subservient to the member states which

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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).

<sup>111</sup> *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](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_Judgment.pdf).

<sup>112</sup> Martin Scheinin for example noted "[t]he Special Rapporteur has maintained the position that the procedures for terrorist listing and delisting by the 1267 Committee of the Security Council do not meet international human rights standards concerning due process or fair trial." *Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism*, Martin Scheinin, Geneva, June 29, 2011, *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E>

<sup>113</sup> 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.").

<sup>114</sup> It was the United States that had Abousfian Abdelrazik designated a member of Al Qaeda. From the Canadian court reports, this designation was based on his acquaintance with Ahmed Ressay (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.R. at ¶ 11; *See also* *A, K, M, Q & G v. HM Treasury* [2010] UKSC 2 (raising similar issues in the British context).

<sup>115</sup> Tzanakopoulos, *supra* note 34, at 252–53.



meant that the mechanism to provide for protection from abuse to be insufficient.<sup>116</sup>

Despite criticism from the courts, the state-centric approach to security prevails within the 1267 Committee. This was recently exhibited in the case of Afghanistan where the key foreign and domestic stakeholders shifted their stance in relation to the Taliban. As the primary states engaged in Afghanistan—the United States, the UK, Germany, France and others—began to disengage and withdraw from Afghanistan, they recognized that there was a need to compromise with the Taliban.<sup>117</sup> Accordingly, they have instituted a distinction between members of Al Qaeda and the Taliban, with the former remaining heavily sanctioned, whereas sanctioning the latter is achieved more on political reasoning and whether they would work with the Afghan government.<sup>118</sup> This policy development highlights state dominance in the listing aspect of the UN counter-terrorism regime, which depends on whether states decide that a Taliban member has moderated his extreme attitudes, often by looking at their words<sup>119</sup> and not actions.<sup>120</sup> This decision, in turn, permits possible incorporation into the Afghan political system.<sup>121</sup> The shift in

<sup>116</sup> A, K, M, Q & G, [2010] UKSC at ¶ 78 (welcoming the formation of the Office of the Ombudsman, but maintaining that it is not an effective judicial remedy).

<sup>117</sup> Karen DeYoung & Peter Finn, Karzai Supports U.S.-Taliban Talks, WASH. POST, Jan. 5, 2012, at A10; 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>.

<sup>118</sup> See, e.g., Helene Cooper & Thom Shanker, U.S. Seeking Opportunities in Easing Taliban Talks, N.Y. TIMES, Oct. 15, 2010, at A8; Alissa J. Rubin, Karzai Says Afghanistan Has Begun Taliban Talks, N.Y. TIMES, Feb. 16, 2012, at A4; Michael Semple, The Taliban's Qatar Office is a Positive Step, but Not a Prologue to Peace, GUARDIAN (June 19, 2013), available at <http://www.guardian.co.uk/commentisfree/2013/jun/19/taliban-qatar-office-positive>. Human rights / Counter terrorism: the new UN listing regimes for the Taliban and Al-Qaida - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin, Geneva, June 29, 2011, available at

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E>

<sup>119</sup> See ABDUL SALAM ZAEFF ET AL., MY LIFE WITH THE TALIBAN (2010).

<sup>120</sup> Reportedly, from 2011 to 2012 there was a 12 percent reduction in civilian casualties overall, but a 20 percent increase in injuries to women and girls. The most striking statistic was the 700 percent increase in the number of government employees targeted by the Taliban. Golnar Motevalli, Taliban Targeting Afghan Women and Government Workers, UN Report Finds, GUARDIAN (Feb. 19, 2013), <http://www.guardian.co.uk/world/2013/feb/19/taliban-targeting-women-un-report>. See also Anup Kaphle, List of Prominent Afghan Officials Assassinated (and Targeted) in 2012, WASH. POST (Dec. 10, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/10/list-of-prominent-afghan-officials-assassinated-and-targeted-in-2012/>.

<sup>121</sup> Kamran Yousaf, Afghan Peace Process: 12 Taliban Peace Brokers May be Taken off UN List,

policy further empowers the Afghan government at the cost of international human rights and international criminal law.<sup>122</sup> The power to list or delist<sup>123</sup> is the power to grant a person immunity, even if they are accused of having committed international crimes.<sup>124</sup> In sum, because it was states that designed the UN Security Council counter-terrorism mechanism and their conception of security and threats is about protecting the state.

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

i. Security Council Resolution 1373 (2001)

The CTC is rooted in Security Council Resolution 1373. It was adopted almost three weeks after 9/11. At the time, the adoption was revolutionary because it placed positive obligations on states to adopt a domestic counter-terrorism regime.<sup>125</sup> This had never been done before, particularly with respect to terrorism.<sup>126</sup> Notably, the resolution clarifies what the Security Council

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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), available at [http://www.rferl.org/content/un\\_considers\\_splitting\\_al-qaeda-taliban\\_blacklist/24237173.html](http://www.rferl.org/content/un_considers_splitting_al-qaeda-taliban_blacklist/24237173.html).

<sup>122</sup> Razeshta Sethna, Afghan Women's Rights under Threat, GUARDIAN (June 20, 2013), available at <http://www.guardian.com/global-development/2013/jun/20/afghan-womens-rights-under-threat>; Hamida Ghafour, What Afghan Women Fear (it's not the Taliban), TORONTO STAR, Feb. 3, 2013, at p. A3.

<sup>123</sup> 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), available at <http://www.guardian.co.uk/world/2011/jun/02/afghanistan-peace-move-lifting-taliban-sanctions>.

<sup>124</sup> Adrian Croft, Afghan Peace Negotiator Sees Progress in Talks with Taliban, REUTERS (Oct. 14, 2012), available at <http://www.reuters.com/article/2012/10/14/us-afghanistan-stanekzai-idUSBRE89DOI620121014>.

<sup>125</sup> Resolution 1373 serves as an indication that states lead the Security Council counter-terrorism regime by demanding 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." S.C. Res. 1373, ¶ 2(b)-(c), U.N. Doc. S/RES/1373 (Sept. 29, 2001). 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." *Id.* at ¶ 1(b).

<sup>126</sup> Sanjay Sethi, Security Council Strengthens Fight Against Terrorism, 39 UN CHRON. 22 (2002).

demands and expects from the member states—denial of safe haven for those who support terrorism and those that practice it.<sup>127</sup> Thus, 1373 lays out a mechanism compelling all member states to adopt a three-tiered program to combat terrorism. The first demands that states have a domestic counter-terrorism legislation program. The second requires an executive commitment to counter the threat of terrorism. The third requires each state to help the CTC by providing a report of its counter-terrorism regime.<sup>128</sup> The aim of the program is to help foster counter-terrorism dialogue between the CTC and the member states. Accordingly, based on the information provided by states, the CTC created a database of counter-terrorism mechanisms, which states can use to see which mechanisms other states have used.<sup>129</sup> Some claim that “[t]hrough its capacity-building and global coordination initiatives, the CTC has become a significant element in the worldwide campaign against terrorism.”<sup>130</sup>

To further aid and develop groundbreaking initiatives developed by the CTC, the Security Council established the Counter-Terrorism Executive Directorate (CTED) in the year 2004.<sup>131</sup> This new body was mandated to visit countries in order to examine their compliance with 1373. CTED is a technical body, with 40 staff members, half of whom are legal experts whose expertise ranges from terrorist financing to border and customs control. They analyze the reports that are submitted by the states.<sup>132</sup> The purpose of CTED is to help the CTC and the members of the UN develop their counter-terrorism programs.<sup>133</sup> The hope was probably that through such interaction, states would harmonize their counter-terrorism mechanisms and provide protection against attacks.

In sum, Resolution 1373 and the subsequent resolutions adopted to sustain and expand the regime are limited in the scope of their enforcement. 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.<sup>134</sup> The resolution accepts

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<sup>127</sup> S.C. Res. 1373, ¶ 2(b)-(c), U.N. Doc. S/RES/1373 (Sept. 29, 2001).

<sup>128</sup> 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).

<sup>129</sup> Emilio J. Cardenas, The United Nations Security Council’s Quest For Effectiveness, 25 MICH. J. INT’L L. 1341, 1342–44 (2004).

<sup>130</sup> 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].

<sup>131</sup> S.C. Res. 1535, U.N. Doc. S/RES/1535 (March. 26, 2004).

<sup>132</sup> See *Id.*; UN SC Enhances Coordination, *supra* note 124. E.J. Flynn, The Security Council’s Counter-Terrorism Committee and Human Rights, 7 HUM. RTS L. REV. 371 (2007).

<sup>133</sup> S.C. Res. 1535, U.N. Doc. S/RES/1535 (March. 26, 2004).

<sup>134</sup> 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).

the possibility that the Security Council may decide that, in failing to abide by the Resolution, a state is in breach of its obligations, raising the prospect of sanctions to attain compliance.<sup>135</sup> Additionally, 1373 only calls on states to apply the international standards of human rights for asylum seekers and those seeking refugee status.<sup>136</sup>

## ii. Security Council Resolution 1566

In 2004, the Security Council adopted Resolution 1566 condemning all forms of terrorism and calling on member states to cooperate in combating terrorism.<sup>137</sup> Resolution 1566 is a response to the fact that an internationally accepted definition of terrorism has been missing from the counter-terrorism campaign for decades.<sup>138</sup> 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

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<sup>135</sup> 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).

<sup>136</sup> 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*].

<sup>137</sup> 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.”).

<sup>138</sup> *Id.*; 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). 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. Robert A. Friedlander, *Terrorism and International Law: What is Being Done*, 8 *RUTGERS-CAM L.J.* 383, 386 (1976-1977). Friedlander notes that in 1833 the Belgian government adopted legislation prohibiting extradition of political offenders. The French and the Swiss parliaments adopted similar provision a year later. *Id.* at 384.

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.<sup>139</sup>

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.<sup>140</sup>

There are two key implications with the Terrorism Convention. First, it highlighted a historical shift in the way European countries addressed the issue of terrorism. European governments would only extradite individuals wanted in connection to crimes, as long as the political offence exception did not apply.<sup>141</sup> This essentially meant that those engaged in political opposition to a regime could escape extradition demands. 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. However, as Claudia Hillebrand persuasively shows, European courts have been timid in ensuring that the UN and EU ‘terrorist lists’ meet human rights standards. Instead they have argued that they lack the authority to examine the lists.<sup>142</sup> When it comes to terrorism cases—specifically listing—the European Court of Human Rights (ECHR) arguably has not taken a liberal interpretation of the Convention. Instead, they have opted to refer applicants to the judicial mechanism within the member states.<sup>143</sup> In other words, the

<sup>139</sup> S.C. Res. 1566, *supra* note 130, at ¶ 3 (emphasis added); *See also* Saul, *supra* note 131.

<sup>140</sup> Council of Europe Convention on the Prevention of Terrorism, pmbl., May 16, 2005, C.E.T.S. no. 196.

<sup>141</sup> In 1891, the British High Court in *Castioni* imposed two basic requirements for the application of the political offense 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. *In 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 offense 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 offense exception in light of the threat posed by terrorism).

<sup>142</sup> *See, e.g.*, Claudia Hillebrand, *supra* note 9 at 164-165.

<sup>143</sup> 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

ECHR has to balance the demands of states with what it can impose on the member states.<sup>144</sup>

Ultimately, the importance of Resolution 1566 is that it highlighted the idea that state-sponsored terrorism in the post-9/11 period is not associated with wars of national liberation.<sup>145</sup> By taking such a position, the Security Council not moved away from the historical wrangling that prevented the formulation of a definition of terrorism. It also became more active in promoting an expansive definition of terrorism by states. Under the Security Council counter-terrorism regime, states are encouraged to adopt a definition of terrorism that encapsulates domestic and international terrorism.<sup>146</sup> Such an approach ultimately allows states to consider what is appropriate for them, even if it comes at the expense of individual rights and personal liberties, something that human security proponents reject, as they argue that when personal freedoms are undermined the conditions that facilitate terrorism prosper, which may explain the approach taken by the General Assembly, which is discussed below.

### C. *The General Assembly, Human Security and Counter-Terrorism*

Immediately following 9/11 the General Assembly and other UN bodies took a secondary role in the counter-terrorism regime, as terrorism became a primary threat to the maintenance of international peace and security. The Council was able to take such a position because the Charter grants it primary responsibility to deal with threats to international peace and security.<sup>147</sup> Yet, as

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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.”).

<sup>144</sup> Soon after 9/11, the British government informed the Council of Europe that it derogates from elements of the European Convention on Human Rights from Article 5 should it determine that an individual residing in the UK is deemed to be a threat, allowing their indefinite detention and possible deportation, as long as Article 3 (freedom from torture) of the Convention is not breached. Vijay M. Padmanabhan, Introductory Note to Human Rights Committee and the European Court of Human Rights—Treatment of Terrorism Suspects, 48 INT'L LEGAL MATERIALS 567, 568 (2009).

<sup>145</sup> 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).

<sup>146</sup> Ben Saul, Definition of “Terrorism” in the UN Security Council: 1985–2004, 4 CHINESE J. INT'L L. 141, 157 (2005)

<sup>147</sup> Article 24 declares “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.” Initially, during the Korean crisis, the General Assembly took the lead in dealing with the North Korean military attack because the

9/11 grew more distant, states increasingly felt that the campaign against Al Qaeda was too invasive from a human rights perspective<sup>148</sup> and that the state-centric counter-terrorism regime was actually facilitating terrorist recruitment.<sup>149</sup> The member states at the assembly also noted that that the focus had shifted away from human security toward traditional security. Those sentiments lead the General Assembly and UN human rights organs to demand more transparency, accountability, and openness.<sup>150</sup> Focus immediately landed on the listing procedure, managed by the CTC, where substantive human rights violations seemed to occur.<sup>151</sup> Arguably because the Council's reforms were not as expansive and extensive in terms of their protection for individuals, the Assembly supported the formulation of its own version of a counter-terrorism strategy.

#### i. The United Nations Global Counter-Terrorism Strategy and the Counter-Terrorism Implementation Task Force

In 2005, the General Assembly declared its position on countering international terrorism by adopting the United Nations Global Counter-

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Security Council was in limbo due to the Soviet boycott. The Assembly was able to address an international threat to peace and security by highlighting that the charter underlines that the Council has primary as opposed to sole responsibility for the maintenance of international peace and security.

<sup>148</sup> Report on the Promotion and Protection of Rights, *supra* note 129, at ¶ 33–50 (arguing that state's record-keeping facilities and surveillance challenge the fundamental human right to privacy).

<sup>149</sup> See Tahir Abbas, Muslim Minorities in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period, 28 J. INTERCULTURAL STUD. 287 (2007).

<sup>150</sup> 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 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), *available at* [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf).

<sup>151</sup> 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”).

terrorism Strategy.<sup>152</sup> This was a natural continuation of the 2005 World Summit, which discussed the value and the need to adopt the responsibility to protect doctrine while also recognizing that security has changed.<sup>153</sup> The strategy amounted to a clear demarcation between the General Assembly and the Security Council on the issue of counter-terrorism, using a development-based approach to address insecurity.<sup>154</sup> According to some, 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.”<sup>155</sup>

The Strategy that the Assembly formulated has four 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.<sup>156</sup> Principally, what the assembly seems to be suggesting is that conditions in states—no distinction is made between democratic and non-democratic—such as alienation and poverty help foster terrorism. Under this Pillar, the Department of Political Affairs (DPA) has become involved in counter-terrorism efforts through its conflict prevention mandate.<sup>157</sup>

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<sup>152</sup> *Supra* note 29.

<sup>153</sup> Nevertheless, the World Summit instead of building momentum for internationalism, continued to highlight the centrality of state sovereignty in international relations. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at ¶ 138, (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).

<sup>154</sup> ARVINDER SAMBEI ET AL., *COUNTER-TERRORISM LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 25 (2009); S.C. Res. 1963, ¶ 3, 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 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”); S.C. Res. 1963, ¶ 11, U.N. Doc. SC/RES/1963 (Dec. 20, 2010) (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.”).

<sup>155</sup> SAMBEI, *supra* note 145, at 24–25.

<sup>156</sup> G.A. Res. 60/288, *supra* note 32, at Annex, Plan of Action.

<sup>157</sup> In a 2012 Report, the Secretary-General argued that the DPA “through its conflict



Pillar II calls upon the member states to undertake measures to prevent and combat terrorism, with specific focus on resources and means.<sup>158</sup> The strategy takes the view that what fuels terrorism is lack of resources, inequality and economic disparity. Therefore, for the Assembly, the way to address the conditions that foster terrorism is to remove what proponents of human security would call ‘want.’

Pillar III calls for building state capacity to challenge, prevent, and combat terrorism and strengthen the UN system’s counter-terrorism mechanisms.<sup>159</sup> This pillar strives to demand state compliance with the Security Council’s counter-terrorism regime, specifically its resolutions such as 1373. At the same time, it underscores the importance of developing a state-based counter-terrorism mechanism in states that do not currently have one. This dovetails with the reporting mechanism instituted under 1373, which calls on states to advise the CTC what mechanism they lack in the hope that others would provide equipment and assistance.<sup>160</sup>

Finally, Pillar IV is composed of eight sections that demand states to respect and abide by international human rights law, international refugee law and international humanitarian law when combating terrorism.<sup>161</sup> The aim of this pillar is to call attention to the fact that the Security Council’s approach to counter-terrorism insufficiently respected basic international human rights law. As states pursued security in the wake of 9/11, they increasingly derogated from key human rights mechanism.<sup>162</sup> Additionally, Pillar IV emphasizes the role of the United Nations system in this process.<sup>163</sup> The key emphasis being

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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).

<sup>158</sup> G.A. Res. 60/288, *supra* note 32, at Annex, Plan of Action.

<sup>159</sup> *Id.* at Annex: Plan of Action. § III.

<sup>160</sup> The Counter-terrorism Executive Directorate (CETD) keeps a list of donor countries, though it remains unclear and unknown what aid and assistance is provided, as states opt not publicise what they provide and to whom.

<sup>161</sup> See G.A. Res. 60/158, ¶ 2, 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”).

<sup>162</sup> The British government for example following the ricin plot indicate that it was willing to pull out of the European Convention of Human Rights, should the European Court of Human Rights prevent the British government from altering British asylum law. Rosemary Bennett, Asylum fears force human rights rethink, *TIMES*, Jan 27, 2003, at p. 1.

<sup>163</sup> G.A. Res. 60/288, *supra* note 32, 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,

two-fold, first recognizing a need to harmonizing the state response to terrorism, while at the same time wanting to make sure that the UN is involved because of the organization's commitment to individual rights and international human rights law.

## ii. The Secretary-General, Human Security and Terrorism

The issue of terrorism has sparked a fierce debate over its root causes, as seen with the 2004 High-level Panel on Threats, Challenges and Changes captured.<sup>164</sup> The Panel 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<sup>165</sup> that by addressing poverty, international society not only saves millions of lives but also strengthens states. This, they argue, would lead to better defenses against international terrorism and transnational organized crime. The report called for a multilayered approach. It underlined that terrorism is a result of failures in the state system to provide individuals with basic needs and argued that individuals turn to terrorism because they have no other cause of action.<sup>166</sup>

Notably, the panel recommended five elements to address terrorism. The first element calls for embracing human security and ideas that address social, political, and economic problems that prevent opportunities for growth and advancement. It surmised that weak social, political, and economic opportunities create conditions that terrorist use to recruit or that lead individuals to reach the conclusion that they can only affect change through violence.<sup>167</sup>

The panel emphasized the importance of education and public debate as

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which constitute the fundamental basis of our common fight against terrorism").

<sup>164</sup> 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://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

<sup>165</sup> 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://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf) [hereinafter High-Level Panel]; *supra* note 21.

<sup>166</sup> 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." High-Level Panel, *supra* note 153.

<sup>167</sup> Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 148 (2004), available at [http://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

the second element. The view being that education provides more opportunities not only for individuals to escape poverty, intolerance and extremism as well as the means to participate in public discourse. The panel assumed that ignorance enables terrorists to recruit individuals.<sup>168</sup> The third element called for a stronger system of cooperation in law enforcement and intelligence-sharing in counter-terrorism. The Panel recognized that terrorists operate across borders and therefore there is a need for law enforcement to work together to counter the threat. Nevertheless, the Panel emphasized that for counter-terrorism to be effective it must operate within established legal—domestic and international—parameters.<sup>169</sup> The fourth element of the strategy refers to building state capacity to prevent terrorist recruitment and operation, which includes controlling dangerous materials, providing public health defense and developing a mechanism to prevent the financing of terrorism<sup>170</sup> The fifth sought to promote the ratification of all 12 international convention against terrorism, in addition to the eight recommendations on Terrorist Financing.<sup>171</sup>

Soon after the publication of the Panel's report, the Secretary-General followed suit with his own report. Entitled *Uniting Against Terrorism*, the report focused on "dissuasion, denial, deterrence, development of State capacity and defence [sic.] of human rights."<sup>172</sup> The Secretary-General argued "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."<sup>173</sup>

Another important example in highlighting the dominance of the human security approach to combating terrorism was the adoption the decision by the assembly to establish its own counter-terrorism regime: the Global Counter-Terrorism Strategy, which emphasizes the centrality of human rights in an effective counter-terrorism regime. The plan of action attached to the

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<sup>168</sup> Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 148 (2004), available at [http://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

<sup>169</sup> Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 148-149 (2004), available at [http://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

<sup>170</sup> Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 148-149 (2004), available at [http://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

<sup>171</sup> Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 149-150 (2004), available at [http://iis-db.stanford.edu/pubs/20806/A\\_More\\_Secure\\_World.pdf](http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World.pdf)

<sup>172</sup> *Uniting Against Terrorism*, *supra* note 29, at ¶ 4.

<sup>173</sup> *Id.*

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.<sup>174</sup>

In sum, when looking at the General Assembly and its counter-terrorism regime, it is clear that initially the assembly was content to let the Security Council take the lead. This was mainly because the Charter entrusts the Security Council with primary responsibility for the maintenance of international peace and security. However, when it became clear that the Council's regime was quintessentially undermining personal liberties and basic rights and arguably challenging international human rights law, the General Assembly adopted a new approach. The following section examines the role played by the Special Rapporteurs, as these have been the most critical of the Security Council, arguing that the counter-terrorism agenda be turned on its head, as they are concerned that states are implement an agenda that fundamentally challenges human rights.

### iii. The Special Rapporteurs, Human Rights and Counter-Terrorism

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.<sup>175</sup> The Special Rapporteur<sup>176</sup> was concerned that existing human

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<sup>174</sup> G.A. Res. 60/288, *supra* note 32, at Annex 3.

<sup>175</sup> The 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. 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).

<sup>176</sup> The Special Rapporteur is part of the Human Rights Council's Special Procedure regime. "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 itself, through corporations to armed opposition groups—to account for alleged or perceived violations of

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. It quickly became apparent that the states and the Special Rapporteur were approaching the issue of international terrorism very differently. The divergence may explain why, in one 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.”<sup>177</sup> 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.”<sup>178</sup>

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 adopted a *thematic approach* in his study of how countries draft, adopt, and implement counter terrorism.<sup>179</sup>

This latter approach has led to tremendous tension among states that increasingly criticize the work of Special Rapporteurs and feel that Rapporteurs push the human rights agenda beyond their mandate.<sup>180</sup> 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

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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. 561, 565 (2011).

<sup>177</sup> 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).

<sup>178</sup> Report on the Promotion and Protection of Rights, *supra* note 129, at ¶ 2.

<sup>179</sup> *Id.* ¶ 7–10.

<sup>180</sup> See, e.g., Alston, *supra* note 161, at 26; Philip Alston, *The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston*, 2 J. HUM. RTS. PRAC. 355, 359 (2010).

gender.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup> This conception of human rights transcends civil and political rights, as it is argued that pursuing social justice helps prevent injustice,<sup>185</sup> which is assumed to be the cause of terrorism.<sup>186</sup> 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

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<sup>181</sup> Report on the Promotion and Protection of Rights, *supra* note 129. 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).

<sup>182</sup> Report on the Promotion and Protection of Rights, *supra* note 129, at ¶¶ 51–58.

<sup>183</sup> *Id.* ¶ 39.

<sup>184</sup> UN Human Rights Office of the High Commissioner for Human Rights, 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), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11517&LangID=E>.

<sup>185</sup> UN Human Rights Office of the High Commissioner for Human Rights, A Call on States to Ratify New Instrument to Enhance Protection of Economic, Social and Cultural Rights, U.N. HUM. RTS. (May 8, 2013), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx>.

<sup>186</sup> High-Level Panel, *supra* note 153.

of individuals.<sup>187</sup>

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

The UN's multiple counter-terrorism regimes that stem from an ideological gap between the Security Council and the General Assembly. Mending the gap calls for recognition that Al Qaeda poses a serious threat to states and to the international community. This is evident by the fact that security services repeatedly foil terror attempts.<sup>188</sup> Nevertheless, 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"<sup>189</sup> is necessary to embed<sup>190</sup> both national security thinking and human rights values within the system. Contemporization within this context calls for a balance where national security and human rights complement one another.

The UN must recognize 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.<sup>191</sup> Human rights organizations are suspicious of the

<sup>187</sup> See, e.g., Paul Cruickshank & Mohannad Hage Ali, *Abu Musab Al Suri: Architect of the New Al Qaeda*, 30 *STUD. CONFLICT & TERRORISM* 1, 2 (2007) (discussing Abu Musab al-Suri and Al Qaeda's promotion of individual terrorism).

<sup>188</sup> 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), available at <http://www.telegraph.co.uk/news/worldnews/europe/spain/9447206/Spanish-police-foil-al-Qaeda-terror-attack.html>.

<sup>189</sup> See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 869 (1990).

<sup>190</sup> 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).

<sup>191</sup> *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 & 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

ability of states to develop a balanced counter-terrorism regime. Obviously, the decision to adopt a new counter-terrorism mechanism through Chapter VII and the Security Council has led to the adoption of excessive measures,<sup>192</sup> mainly because of a lack of judicial oversight.<sup>193</sup> 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, the human rights community has to recognize that 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.<sup>194</sup>

A national security-human rights nexus would greatly reduce the likelihood of such as *Kadi*<sup>195</sup> or *Yusuf*<sup>196</sup> do not occur. One way to attain accountability is by allowing the International Court of Justice (ICJ) to appraise Security Council resolutions on counter-terrorism.<sup>197</sup> This can be done through ICJ advisory opinions or something similar to the preliminary reference system that exists within the European Union.<sup>198</sup> For too long the Security Council has operated

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has much to offer in respect to the development of a domestic counter-terrorism regime, which is why they must improve their working relations).

<sup>192</sup> 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.").

<sup>193</sup> See Monika Heupel, Multilateral Sanctions Against Terror Suspects and the Violation of Due Process Standards, 85 INT'L AFF. 307 (2009).

<sup>194</sup> 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).

<sup>195</sup> 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

<sup>196</sup> 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.

<sup>197</sup> 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).

<sup>198</sup> 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



without review or analysis, especially as discussions pertaining to resolution take place behind closed doors, making it difficult for any entity to oversee Council action, which may explain why, increasingly, domestic and regional courts have felt the need to challenge the Security Council.<sup>199</sup> If the Council is to continue to maintain international peace and security and not to change the world order, which it seems to be doing under the guise of combating terrorism,<sup>200</sup> it must accept that its structure, modus operandi, and composition have become anachronistic.<sup>201</sup> 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. As 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 emergency . . . .”<sup>202</sup>

#### V. CONCLUSION

The attacks on September 11, 2001 were devastating because of their scope, scale and complete disregard for human life. The notion that a terrorist group would use passenger planes to undertake a large-scale attack, particularly against the United States was simply inconceivable. As a result, states sought ways and means to protect themselves and their inhabitants from

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Contribution of the European Court of Justice to the Area Of Freedom, Security and Justice, 59 INT'L & COMP. L.Q. 255 (2010).

<sup>199</sup> 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).

<sup>200</sup> See *Namibia, 1971 I.C.J.* at 115 (dissenting opinion of Sir Gerald Fitzmaurice).

<sup>201</sup> Professor Martti Koskeniemi 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 naos, 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. Quod non fecerunt barbari, fecerunt Barberini. The peace of the police is not the calm of the temple but the silence of the tomb.” Martti Koskeniemi, *The Police in the Temple Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 348 (1995).

<sup>202</sup> *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008).

this new breed of terrorism whose principal agenda was to destroy and to kill. Based on what was known at the time of Al Qaeda and its ideology, states took the view that protection was paramount, leading them to adopt measures that at times challenged or suspended basic rights. What was not recognized however, was how those measures would impact or impeded other as humanitarian actions.<sup>203</sup>

The decline in successful large-scale terrorist attacks has led the international community to reflection on whether a pervasive counter-terrorism regime is needed. Interfused within that introspection were questions as to whether the measures implemented were having an undermining effect on security. Taking a human security approach, the General Assembly increasingly argued that in order to prevent terrorism there is a need to address the conditions that foster terrorism, which they understood as 'want' and 'freedom'—without freedom and with want, terrorism prosper. The program includes regular review as to whether existing measures are effective.<sup>204</sup> Thus, the system that the assembly and the UN human rights community was predicated on addressing the political and civil rights abuses in addition to seeking to improve economic, social and cultural rights.

Ultimately, a two-tier approach to counter-terrorism has emerged within the UN which undermines the regime as it appears that each operate independently because the Council and Assembly have their own views as to what are the root causes of terrorism and how to address it. It is incumbent on both—Security Council and the General Assembly—to find a way to develop a more integrated policy that provides states with the security they desire but not at the expense of basic human rights, as only through such an approach is it possible for the United Nations to contribute to countering the threat of transnational terrorism, otherwise the UN would simply be another organization promoting a disjointed, contradictory policy of limited relevance.



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<sup>203</sup> Kate Mackintosh and Patrick Duplat, Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action, July 2013.

[https://docs.unocha.org/sites/dms/Documents/CT\\_Study\\_Full\\_Report.pdf](https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf)

<sup>204</sup> Countering Terrorism, Protecting Human Rights: A Manual, OSCE Office for Democratic Institutions and Human Rights, (2007), p. 259, available at <http://www.osce.org>.