

Legislative and Policy Responses to Terrorism, A Global Perspective

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I. INTRODUCTION

While Tuesday morning, September 11, 2001, would strike most Americans as the starting date for terrorism—at least as understood by a recently attacked America—the truth is very different both from the American and international perspective. The scope and intensity of the attack that Tuesday morning dramatically changed the American response to terrorism in the short-term and long-term. The change in America's response has impacted the American political debate, its way of life, and its legal and policy perspectives regarding terrorism and counter-terrorism alike.

September 11 also had a global impact from an operational, intelligence-gathering, policy and legal perspective. The world has known terrorism for years, or at least parts of it have, and different nations have responded in varying ways to attack. How nations respond is often a reflection of their existing infrastructure, operational abilities, political system, and culture.

However, as this article discusses, the different responses clearly exhibit a common theme, that of responding while attempting to strike a balance between legitimate national security interests and the rights of the individual. That balance, from the perspective of both law and policy, will be analyzed in the context of terrorist threats and actual attacks alike. The analysis of the legal and policy responses is the core of this article.

An examination of the American response must begin with a historical perspective. In examining how the United States has responded, it is important to assess actions—operational, intelligence-gathering, legislative, and policy—taken in response to acts of terrorism.

II. HISTORICAL SURVEY

A. The Nixon Administration

The point of reference for determining when an American administration was first confronted with terrorism is the Black September terrorist attack at the 1972 Munich Olympics, which killed eleven Israeli athletes.¹ That day, Americans were confronted with issues that had previously never caught the public's eye: the Middle East, terrorists, and the Palestinian Liberation Organization (PLO). The impact of that day, primarily as a direct result of ABC's television coverage, was significant. Accordingly, our survey of America's response and the actions undertaken by subsequent administrations begins with the Nixon administration.

According to documents recently made public, the Nixon administration established a terrorism taskforce.² The documents reflect the administration's concern regarding potential biological terrorism, but for various

1. See International Olympic Committee, Munich 1972: Games of the XX Olympiad, http://www.olympic.org/uk/games/past/index_uk.asp?OLGT=1&OLGY=1972 (last visited Sept. 22, 2005).

2. See Frank Bass & Randy Herschaft, Nixon-Era Terrorism Task Force Envisioned Today's Threats, GAFFNEY LEDGER, Jan. 24, 2005, available at http://www.gaffneyledger.com/news/2005/0124/AP_News/040.html.

reasons—the war in Vietnam, Watergate, and the president’s subsequent resignation from office—the taskforce died a natural death.

B. The Ford Administration

In response to the Church Committee,³ which investigated alleged CIA abuses generally and in Latin America in particular, the Ford administration issued Executive Order 11905,⁴ which outlawed the assassination of leaders of sovereign states and declared: “No employee of the United States government shall engage in, or conspire to engage in, political assassination. . . .”⁵

This Order, reissued by subsequent administrations,⁶ was the Ford administration’s principal contribution to counter-terrorism efforts. While there was deep concern in the United States about the activities of the CIA, Executive Order 11905 curtailed counter-terrorism options available to decision makers.

C. The Carter Administration

Jimmy Carter was elected in large part as a response to the Nixon legacy, Watergate in particular. The Carter administration’s primary foreign policy focus was the protection of human rights. While this was a laudable aim, the question that must be addressed in the context of this article is the impact of such a policy on America’s national security. In November 1979, sixty-six Americans were taken hostage in Iran.⁷ The administration’s operational response ended when a failed rescue mission was aborted⁸ and eight servicemen were killed.⁹ From a counter-terrorism perspective, this mission should have sent red lights flashing. An elite special forces unit was unable to move beyond the staging area in the Iranian desert because of a sand storm, poor planning, and incompetent command. Certainly, terrorists took note of America’s inability to respond to an act of international terrorism while Americans were held hostage.

3. See Paul Wolf, *CIA Powers and 1975 Church Committee*, Sept. 22, 2001, <http://www.labournet.net/world/0109/us15.html>.

4. See Exec. Order No. 12333, 3 C.F.R. 200, 46 Fed. Reg. 59941 (Dec. 4, 1981), available at www.cia.gov/cia/information/eo123333.html (last visited April 5, 2005).

5. *Id.*

6. *Id.* at pt. II, § 2.11.

7. DOYLE MCMANUS, *FREE AT LAST* 241–45 (1981).

8. *Id.*

9. *Id.* at 245.

D. The Reagan Administration

Ronald Reagan's counter-terrorism policy sounded firm and decisive: "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution."¹⁰ But the reality was very different from the articulated policy. In what are considered the first terrorist suicide bombings conducted, hundreds of Americans were killed in Beirut in two separate attacks.¹¹ What was the American response? President Reagan ordered the withdrawal of the Marines from Beirut.¹² According to terrorists and their disciples, Reagan's decision may be the seminal event in the history of modern terrorism.¹³ Terrorist leaders understood and no doubt internalized the wide gulf between America's stated policy and its actual implementation. The deterrence threat may have died before it was born.

Similarly, following the brutal murder of Navy SEAL Robert Stethem by Hezbollah terrorists in Beirut during a plane hijacking, the Reagan administration's primary efforts were to negotiate an end to the hijacking.¹⁴ While Stethem was shown being thrown, still alive, though barely, onto the airport tarmac after being shot in the head, the American response—bluster aside—was one of weakness.¹⁵

While President Reagan responded forcefully to the killing of American servicemen in a Berlin disco by attacking Libyan targets, including a presidential palace,¹⁶ and allegedly killing one of Mu'amar Kadafi's children, serious international legal questions should have been raised at the time. The attack appears to have been retaliatory in both nature and scope, and thus in violation of international law, which does

10. Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures, 1960-2000*, 13 *TERRORISM AND POLITICAL VIOLENCE* 15 (Fall 2001).

11. See Frontline: Target America, Terrorist Attacks on Americans, 1979-1988: The Attacks, the Groups, and the U.S. response, <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/cron.html> (last visited Apr. 5, 2005) [hereinafter Terrorist Attacks on Americans].

12. *Id.*

13. See also John Nichols, *A Case For Exiting Iraq*, CBSNEWS.COM, Oct. 24, 2005, <http://www.cbsnews.com/stories/2005/10/24/opinion/main970016.shtml>.

14. Frontline: Target America, Lessons Learned from the 1980s, <http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/lessons.html> (last visited Nov. 14, 2005) [hereinafter Lessons Learned]; see also Terrorist Attacks on Americans, *supra* note 11; see also David Silverstein, *An American Strategy Against Terrorism* (Aug. 23, 1991), <http://www.heritage.org/Research/HomelandDefense/BG847.cfm>.

15. See Lessons Learned, *supra* note 14.

16. See Terrorist Attacks on Americans, *supra* note 11.

not permit acts of reprisal. Therefore, while Reagan's administration took strong action, the legality of the attacks was nonetheless questionable.

Furthermore, while the United States was actively encouraging, if not aiding, the Mujahidin in Afghanistan who were engaged in a pitched battle with the Soviet Union following the invasion of Afghanistan, Osama Bin Laden was developing the skills that would serve him well in the decades to come.¹⁷ America's singular focus on the Soviet Union in the context of the Cold War prevented the Reagan administration from correctly identifying the next threat to world order and stability: terrorism.

E. The First Bush Administration

The first Bush administration's response to the 1988 Pan Am 103 terrorist attack, which led to the deaths of 270 innocent civilians (including 189 Americans), was to invoke the criminal law paradigm by initiating legal proceedings against the Libyan agents who were responsible for blowing up the plane over Scotland.¹⁸ The administration was arguably hamstrung because the attack occurred over Scottish territory, but clearly Americans flying in an American commercial airliner were the intended targets. Not only did the administration choose not to respond operationally against Libya, but its policy response was limited to implementing a criminal law proceeding.

The issue of an appropriate paradigm for terrorism—criminal law, traditional warfare (whereby prisoner of war status is granted to enemy combatants), or a new paradigm recognizing that terrorism and counterterrorism are neither criminal acts nor acts of war—is a most important question, but beyond the scope of this article.

F. The Clinton Administration

The first significant legislative effort against terrorism was the Antiterrorism and Effective Death Penalty Act of 1996 (Act).¹⁹ President Clinton had previously submitted antiterrorism legislation, but it was bogged down in Congress. Not until the Oklahoma City and World

17. See *Relating to Reestablishment of Representative Government in Afghanistan*, H.R. Con. Res 414, 106th Cong. (2000), <http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:H60645>.

18. See *Arlington National Cemetery, Pan Am Flight 103 Memorial Cairn-Lockerbie Cairn*, http://www.Arlingtoncemetery.org/visitor_information/Pan_Am_memorial.html (last visited Oct. 16, 2005).

19. See *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Trade Center bombings did Congress and the administration agree upon counter-terrorism legislation.²⁰

The Act established a list of designated foreign terrorist organizations (FTOs) and made it illegal for any person in the United States or subject to the jurisdiction of the United States to provide funds or other material to any group on the list. Representatives and members of a designated FTO, if aliens, could be denied visas or otherwise excluded from the United States. Finally, the Act forced American financial institutions to block funds of designated FTOs and their agents, and report this action to the Office of Foreign Assets Control in the Department of the Treasury.²¹

Against the backdrop of the first World Trade Center bombing, which killed six people, the Subcommittee on International Operations of the House Foreign Affairs Committee held a hearing on July 13, 1993.²² One of its primary purposes was for the Clinton administration to articulate its counter-terrorism strategy. During the course of the hearings, Assistant Secretary of State Timothy Wirth set forth that policy:

The Clinton administration is committed to exerting strong and steady leadership in a rapidly-changing world. History has taught us the United States and all nations can meet that challenge by maintaining a commitment to democratic institutions and to the rule of law. Promoting democratic governments and institutions that are fully accountable to their citizens is our most basic tool for advancing free markets and our long-term national security, and addressing the great and complex global issues of our time. Democracy does not sponsor terrorism. It is no accident that states that do—Iraq, Iran, Libya, Cuba—are also among the most repressive for their own citizens.

Mr. Chairman, let me assure you the Clinton administration will remain vigilant in countering whatever threats may be posed by international terrorists to U.S. interests.

Working in close consultation with the Congress, successive administrations have developed a set of principles which continue to guide us as we counter the threat posed by terrorists. These include making no concessions to terrorists, continuing to apply increasing pressure to state sponsors of terrorism; forcefully applying the

20. *Hearings and Markup of H. Res. 118, To Condemn the Release by the Government of Malta of Convicted Terrorist Mohammed Ali Rezaq: Before the Subcomm. on International Security, International Organizations and Human Rights of the H. Comm. on Foreign Affairs*, 103rd Cong. (1993) [hereinafter *House Hearing on U.S. Anti-Terrorism Policy*].

21. See Antiterrorism and Effective Death Penalty Act of 1996, *supra* note 19, § 219(a)(2)(C).

22. *House Hearing on U.S. Anti-Terrorism Policy*, *supra* note 20.

rule of law to international terrorists; and helping other governments improve their capabilities to counter the threats posed by international terrorists.²³

The policy as expounded by Wirth was strong on rhetoric, but weak on concrete operational counter-terrorism and practical legal and policy initiatives that would have taken the fight to the terrorists. A common recurrence in American counter-terrorism strategy is rhetoric that is not matched by sustained action:

Another major element of our counter-terrorism policy is a firm response. When President Clinton ordered the cruise missile strike against the headquarters of Iraq's intelligence service, he delivered a firm, proportional and necessary response to the continuing threat against the United States posed by Iraq, as shown by the outrageous Iraqi attempt against the life of former President Bush. The strike demonstrates that the Clinton administration will respond vigorously, decisively and effectively to the terrorist threat around the world.²⁴

To describe this response as "firm" is inaccurate: the administration ordered the raid to be carried out in the middle of the night in order to minimize collateral damage, as required by international law. Nevertheless, a night-time bombing of a largely empty military building by the world's only super-power in response to an attempted assassination of a former president raises acute legal and policy questions.

Regarding the policy aspects of the attack, the issue is that of effectiveness. Military-political doctrine suggests that an underwhelming response negatively affects a nation's future deterrence ability. If indeed Iraqi military intelligence played a significant role in the failed assassination attempt, then the question that policy and decision makers must ask is whether an attack on the building at night-time serves the intended purpose.

A lack of response is arguably more effective, because the other side is left guessing when a response will occur. A weak response—such as the bombing of the building at night—may backfire from a policy perspective, Wirth's assessment notwithstanding.

International law mandates that actions such as the bombing of the Iraqi military intelligence building meet certain requirements, such as military necessity, proportionality, lack of alternatives to bombing, and the minimizing of collateral damage. Furthermore, international law clearly prohibits retaliatory attacks. However, Article 51 of the United Nations Charter provides that a nation may attack in self-defense if an armed attack occurs.²⁵ Because this action appears to be more reactive than proactive, one must question its legality.

23. *Id.* at 84.

24. *Id.*

25. U.N. Charter art. 51.

III. POST 9/11

A. Introduction

Since 8:43 a.m. on 9/11, the United States has been playing catch-up, trying to make up for lost time and attempting to level the playing field between itself and global terrorism. As American history demonstrates, there is a tendency to go overboard under such circumstances.²⁶ For example, during World War II, an order promulgated by General Dewitt mandated the exclusion of Japanese-American citizens from the West Coast war area.²⁷ The Supreme Court upheld Dewitt's exclusion order, because it bore a direct relationship to the prevention of espionage and sabotage, and because it was "in accordance with congressional authority."²⁸

In an atmosphere of "bringing terrorists to justice" (President George W. Bush's frequent phrase), a skewed moral compass is a real possibility, threatening the foundation of our liberal democratic society and placing its values in at least temporary abeyance. One of the critical tests for a society is how it reacts in times of crisis. In attempting to determine the response of the nation's leadership (elected and otherwise), the following questions must be asked and subsequently addressed:

- 1) Did the leadership preserve core values?
- 2) Was caution thrown to the wind?
- 3) Did the leadership know how to differentiate between real enemies and perceived enemies?
- 4) Did decision makers know how to protect the rights of real enemies and protect perceived enemies from the anger of its citizenry?
- 5) Were leaders able to restrain their worst instincts and develop a sound and coherent policy based on fundamental principles of the rule of law, or did the response resemble the reaction that led to the internment of thousands of loyal American citizens without due process after the attack on Pearl Harbor?

26. See, e.g., *The Prize Cases*, 67 U.S. 635 (1862); *Korematsu v. United States*, 323 U.S. 214 (1944).

27. *Korematsu*, 323 U.S. at 217-18.

28. *Id.* at 218.

*B. The Current Bush Administration Response—Military
Commissions, Patriot Act, National Security
Strategy Document*

President George W. Bush's response can best be studied by examining three documents: the U.S.A. Patriot Act, overwhelmingly supported by the Congress on October 25, 2001 by a vote of 98 yeas, 1 nay, and 1 abstention;²⁹ the presidential order establishing military commissions (November 2001); and the National Security Strategy Document (NSSD), articulating the Bush preemption doctrine in the context of international affairs (October 2002). The time line is significant: While the first two documents were drafted in the immediate aftermath of the 9/11 attack, the NSSD was signed by President Bush a year later.

Post-9/11 American policy must be examined from both a domestic and an international perspective. The Patriot Act is the legislative response to an attack on American soil, and represents the tools and measures Congress provided the administration in order to defend America.

The presidential order implements a quasi-judicial process for those detained on the battlefield in Afghanistan or elsewhere and are suspected of involvement with terrorism—be they foreigners or aliens living in America, including those legally in the United States.³⁰ However, the NSSD reflects the administration's post 9/11 foreign policy, in that it clearly articulates a determination to take the fight to terrorists.³¹

1. The USA Patriot Act³²

The Patriot Act has been much discussed, debated, criticized and misunderstood. Critics of the Bush administration see it as reflective of the administration's disdain for basic civil liberties. Supporters of the administration uphold it as the appropriate legislative response to an attack on America. The sections of the Act that are of particular relevance to this article are 203, 206, 213, 215, 218, and 411. To summarize, section 203 allows information from grand juries to be shared with the CIA without prior approval by a judge.³³ Section 206 grants roving

29. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

30. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) [hereinafter Military Order Terrorism].

31. See generally The White House, The National Security Strategy of the United States of America, (Sept. 23, 2002), <http://www.whitehouse.gov/nsc/nss.html> (on file with author) [hereinafter National Security Strategy].

32. Patriot Act, *supra* note 29.

33. *Id.* § 203.

surveillance authority under the Foreign Intelligence Surveillance Act (FISA), but requires a court order approving an electronic surveillance to direct any person to furnish necessary information, facilities, or technical assistance in circumstances where the court finds the actions of the surveillance target may thwart the identification of a specified person.³⁴ Section 213, also known as the “sneak and peek” exception to the “knock and announce” rule, states that notification of searches can be delayed if it would seriously jeopardize the investigation.³⁵ Section 215 authorizes the government to seize any tangible items sought for an investigation to protect against international terrorism or clandestine intelligence activities.³⁶ This may include records from banks, credit bureaus, telephone companies, hospitals, or libraries. Section 218 amends FISA to require that an application for an electronic surveillance order or search warrant certify that a *significant* purpose (formerly “the sole or main purpose”) of the surveillance is to obtain foreign intelligence information.³⁷

Section 411 of the Patriot Act addresses the issue of the definition of terrorist activity:

[Section 411] [i]ncludes within the definition of “terrorist activity” the use of any weapon or dangerous device, redefining “engage in terrorist activity” to mean, in an individual capacity or as a member of an organization, to: (1) commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for terrorist activity; (4) solicit funds or other things of value for (aa) a terrorist activity or (bb) a terrorist organization [with an exception for lack of knowledge]; (5) solicit any individual (aa) to engage in prohibited conduct . . . (bb) or for membership in a terrorist organization [with an exception for lack of knowledge]; or (6) commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training (aa) for the commission of a terrorist activity; (bb) to any individual who the actor knows or reasonably should know has committed or plans to commit a terrorist activity; (cc) or to a terrorist organization [with an exception for lack of knowledge]. . .

34. *Id.* § 206; see Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1805(c)(2)(B) (1978) [hereinafter FISA].

35. Patriot Act, *supra* note 29, § 213.

36. *Id.* at § 215.

37. *Id.* at § 218; FISA § 1805(c)(2)(B).

The term “terrorist organization” means . . . a group: (1) designated under [the immigration and nationality act]; (2) [by the secretary of state]; or (3) a group of two or more individuals, whether organized or not, which engages in [terrorist-related activities]. . . .³⁸

Section 411 further provides for the retroactive application of amendments under the Act.³⁹ It stipulates that an alien shall not be denied entry or face deportation because of a relationship to an organization that was not designated as a terrorist organization prior to enactment of this Act.⁴⁰ It also states that the amendments under this section shall apply to all aliens in exclusion or deportation proceedings, on the date of or after the enactment of this Act.⁴¹ The Act further directs the Secretary of State to notify specified congressional leaders seven days prior to designating an organization as a terrorist organization.⁴²

Professor Steven Schulhofer has written about the necessity of the Patriot Act and whether its provisions fundamentally changed the ability of American law enforcement to conduct counter-terrorism operations within the parameters of the Constitution. According to Schulhofer, the pre-September 11 regime of constitutional and statutory limits on surveillance and intelligence gathering was a complex mixture of stringent restraints, permissive powers, and awkward compromises. The Patriot Act shifted this balance in the direction of greatly expanded investigative power, especially by increasing opportunities to use e-mail and internet searches to conduct clandestine physical searches, to search under flexible FISA standards, and to use all of these new opportunities to investigate crimes entirely unrelated to terrorism.⁴³

An important Fourth Amendment safeguard is the requirement of immediate notification when a search is conducted. Officers executing a warrant must knock and announce their presence before entering, except when doing so would expose them to danger or risk destruction of the evidence sought. Similarly, the officers must give a copy of the warrant to the occupant or leave it at the premises if she is not present, again subject to a narrow exception for situations where such notice would endanger lives or seriously impede an investigation. These notice provisions serve to ensure that the target of the search will know that it occurred and have an opportunity to ensure that the particularity limitations of the warrant were respected.⁴⁴

Schulhofer argues that until September 11, exceptions to these notice requirements were governed by judicial decisions that examined on a

38. Patriot Act, *supra* note 29, § 411.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See STEPHEN SCHULHOFER, THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11, 50–51 (2002).

44. *Id.* at 43.

case-by-case basis the need for conducting a clandestine search (a “sneak-and-peek”) without immediate notification. Schulhofer states that “[t]he PATRIOT Act adds to federal law a provision that for the first time gives statutory authorization for clandestine intrusions and defines in broad terms the grounds that can justify delay in notifying the target that her home was searched.”⁴⁵

Furthermore, Schulhofer has written that:

[a] reasonable argument can be made that the case law on clandestine searches needed to be clarified by legislation. A reasonable argument can likewise be made that the broad sneak-and-peek authority codified in the PATRIOT Act is preferable to the more restrictive view endorsed in some of the cases. Arguments can fairly be made in the other direction as well. But however that debate might best be resolved, this problem has nothing to do with the fight against terrorism. For international terrorism cases, authority to conduct clandestine searches already existed—in much broader terms—under FISA. The new authority conferred by the PATRIOT Act is simply not needed for such cases, nor is it limited to terrorism cases; it is available in *any* criminal investigation. And because the new sneak-and-peek authority is exempted from the PATRIOT Act’s sunset provision, it will remain in effect indefinitely. There was no justification for adding this issue to an already large emergency agenda after September 11 and for using the momentum of that occasion to obtain endorsement for the Justice Department’s preferred approach to an unrelated problem.⁴⁶

2. The Military Order

The 2001 Military Order⁴⁷ issued by President Bush was based on a previous presidential order issued by President Roosevelt. In *Ex Parte Quirin*, following the arrest of German saboteurs caught in New Jersey and Florida,⁴⁸ the U.S. Supreme Court generally upheld the president’s authority to create military tribunals for war crimes.⁴⁹ As a result of the findings of the commissions, the saboteurs, including an American citizen, were executed.⁵⁰ President Bush’s order, which established military commissions for the purpose of trying non-American citizens allegedly

45. *Id.*

46. *Id.*

47. Military Order Terrorism, *supra* note 30.

48. Memorandum from Timothy H. Edgar, Legislative Counsel for ACLU, to Congress on President Bush’s Order Establishing Military Tribunals (May 6, 2002), at <http://www.aclu.org/Privacy/Privacy.cfm?ID=10312&c=39>; see also George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal: 1942 Precedent Invoked by Bush Against al Qaeda*, WASH. POST, Jan. 13, 2002, at W12 [hereinafter Lardner, *Nazi Saboteurs Captured!*].

49. *Ex Parte Quirin*, 317 U.S. 1, 47–48 (1942).

50. Lardner, *Nazi Saboteurs Captured!*, *supra* note 48.

supporting, aiding and abetting al-Qaeda throughout the world, has been widely criticized in the United States and abroad. Critics⁵¹ have repeatedly commented on what have been described as serious violations of due process in both the Military Order and the subsequently issued military instructions.⁵² Liberal democratic societies countering terrorism while balancing legitimate national security requirements against equally legitimate individual rights must be guided by the principle that even alleged terrorists have rights. The Bush Administration has been repeatedly criticized, even by U.S. courts, for its denial of fundamental due process rights.

The initial criticism focused on a number of issues:

- 1) The failure to consult with Congress before issuing the order;
- 2) The fact that Congress's resolution authorizing the use of force, enacted September 14, 2001, does not provide for the establishment of the commissions;
- 3) The lack of an independent appeals process;
- 4) The detainee's inability to challenge the cause for detention;
- 5) A reduced evidentiary standard allowing the introduction of any evidence found to be of "probative value to a reasonable person."⁵³

During the course of the military operation conducted by the United States and the coalition members in Afghanistan, 650 men who were either captured in connection with the war or alleged to have connections to al-Qaeda were transferred to Guantanamo Bay, Cuba.⁵⁴ Much has been made of the decision to establish the detention camp at Guantanamo. In retrospect, the decision seems to have been based on two primary considerations: a desire to detain the captured men far from the zone of

51. See Ronald Dworkin, *Terror & the Attack on Civil Liberties*, THE NEW YORK REVIEW OF BOOKS, Nov. 6, 2003, at 37–38.; see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002).

52. Katyal & Tribe, *supra* note 51, at 1277; Department of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), <http://www.dtic.mil/whs/directives/corres/mco1.pdf> (on file with author) [hereinafter Military Commission Order, Procedures].

53. See Dworkin, *supra* note 51; see also Katyal & Tribe, *supra* note 51, at 1266–67, 1277.

54. Human Rights First, *The Guantanamo Detainees*, http://www.humanrightsfirst.org/us_law/after_911/PDF/Guantanamo%20Detainees.pdf (last visited Oct. 17, 2005) (on file with author).

combat, and to not detain them in the United States, where the argument could be made that they must be granted full constitutional rights and privileges.⁵⁵

3. *Congressional Hearings*

Hearings held before the Senate Judiciary and Armed Services Committees in December 2001⁵⁶ brought to focus many of these criticisms. Members of the committee, including Senators Leahy, Kennedy, and Levin among others, roundly criticized the administration, emphasizing that it had failed to consult Congress prior to issuing the order, and questioning the order's constitutionality from a separation of powers perspective.⁵⁷

Administration witnesses—Deputy Secretary of Defense Wolfowitz and Department of Defense General Counsel Haynes—were adamant that the president was constitutionally authorized to issue the order without consulting with Congress, based on its “authorization for use of military force.”⁵⁸ Senators Warner and Sessions argued that issuing such an order is an inherent presidential power in a time of war.⁵⁹

4. *Department of Defense Instructions*

Notwithstanding the administration's testimony before the Senate, in the months that followed, the Department of Defense issued a series of instructions intended to serve as rules for the commissions.⁶⁰ Unlike the administration's issuance of the Military Order, the Department of Defense published the instructions and invited public response prior to

55. Transcript of Dep't of Defense News Briefing with Secretary Rumsfeld and General Pace, June 14, 2005, <http://www.defenselink.mil/transcripts/2005/tr20050614-secdef3042.html> (last visited Nov. 7, 2005) (stating that Guantanamo Bay was chosen because the U.S. need a safe and secure location to detain and interrogate enemy combatants); Clive Stafford-Smith, *No Justice in Guantanamo Bay*, THE OBSERVER, Dec. 1, 2002, <http://observer.guardian.co.uk/waronterrorism/story/0,1373,851565,00.html> (last visited Nov. 7, 2005) (arguing that Guantanamo Bay was chosen to “create a legal pretext” that detainees were not on American sovereign territory).

56. See Testimony before the Senate Armed Services Committee on Military Commissions (Dec. 13, 2001), <http://www.defenselink.mil/speeches/2001/s20011212-depsecdef1.html>.

57. See *id.*

58. See *id.*

59. See *id.*

60. Military Commission Order, Procedures, *supra* note 52.

their implementation.⁶¹ Many human rights organizations responded, mainly negatively.⁶²

5. Results

To date the commissions have not issued a single ruling. The process has been continuously held up, both because of intervention by American courts, and also because the commissions were confronted with issues that might have been avoided had the administration chosen to consult with Congress. Equally importantly, the administration failed to consult with constitutional and international law experts and instead relied solely on problematic precedent (namely *Quirin*, whose relevance is doubtful because it took place in the “declared war” of World War II). Administration advisors (lawyers and non-lawyers alike), whose rush to action was possibly understandable in the short term, have in the long run ill served the President and the nation. The failure to consider that detainees might demand to represent themselves and the implications of such a legitimate desire, is but one example of a rushed and not carefully considered internal process.

6. Combatant Status Review Tribunals

Furthermore, as a direct result of a judicial finding,⁶³ the administration was forced to establish “combatant status review tribunals” in order to determine both the status of the detainees and whether their continued detention was warranted based on the available intelligence information. These combatant status review tribunals are intended to reflect the guidance provided by the Supreme Court’s decisions in *Rasul* and *Hamdi*, namely that a detainee must be afforded notice and opportunity to contest the determination that he is an enemy combatant.⁶⁴ According to the Department of Defense’s combatant status review tribunal summary, as of March 29, 2005, in 558 hearings, 520 detainees have been deemed enemy combatants, and 38 have been deemed not to be enemy combatants.⁶⁵

In the aftermath of 9/11 the administration debated the detainees’ status and the applicability and relevance of the Geneva Conventions. In

61. *Id.*

62. See Human Rights Watch, Briefing Paper on U.S. Military Commissions (June 25, 2003), <http://hrw.org/background/usa/military-commissions.pdf> (on file with author).

63. *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

64. See generally *Rasul*, 542 U.S. 466; *Hamdi*, 542 U.S. 507. See also Defense Department Background Briefing on the Combatant Status Review Tribunal (July 7, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html>.

65. Combatant Status Review Tribunal Summary, <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> (last visited Oct. 14, 2005) (on file with author).

a memo written by Assistant Attorney General Jay S. Bybee to White House General Counsel Alberto Gonzales, the administration's position is clearly presented: Geneva Convention protections do not pertain to the detainees.⁶⁶ Similarly, the question of the detainees' status had to be addressed: were they to be considered prisoners of war or enemy combatants, and might they be held indefinitely? Prisoners of war have clearly defined rights and protections, and the state holding them has commensurate obligations according to the laws of war and the Geneva Conventions.⁶⁷ Enemy or illegal combatants also have protected rights although, unlike prisoners of war,⁶⁸ they may be brought to trial.⁶⁹ Neither may be tortured.⁷⁰

To date, seven members of the U.S. Armed Forces have been tried for the severe violations committed at the Abu Ghraib prison in Iraq, and two additional cases are pending. Furthermore, two independent investigations, the Schlesinger Commission and the internal Army review, contain important and disturbing information on the torture and mistreatment of prisoners in Afghanistan, Iraq, and Guantanamo.⁷¹

While U.S. policy is not to condone torture, the Bybee memo and subsequent statements and actions on the part of administration officials appear to have created a climate where such basic violations of human rights are acceptable, if not encouraged. In the context of counter-terrorism, a failure by senior leadership to clearly and unequivocally address the rights of detainees and to issue command directives, combined with a forceful response to known violations, will inevitably lead to violations such as those the United States is confronted with today.

66. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel for the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (on file with author).

67. Geneva Convention Relative to the Treatment of Prisoners of War arts. 4, 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

68. *Id.* art. 99.

69. See *Ex Parte Quirin*, 317 U.S. 1, 2 (1942).

70. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 67, art. 3, 17; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 4, 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

71. See James Ross, *Hold Officials Responsible*, USA TODAY, Aug. 27, 2004, available at <http://www.hrw.org/english/docs/2004/08/27/usdom9275.htm>.

C. *The National Security Strategy Document*

The following clauses of the NSSD clearly articulate the proactive foreign policy developed and espoused by the Bush administration after 9/11, and implemented throughout the world. U.S. policies in Afghanistan, Iraq, Egypt are only the most obvious examples of this implementation.

- 1) “America will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.”
- 2) “We will cooperate with other nations to deny, contain, and curtail our enemies’ efforts to acquire dangerous technologies. . . . And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. . . . In the new world we have entered, the only path to peace and security is the path of action.”
- 3) “We make no distinction between terrorists and those who knowingly harbor or provide aid to them.”
- 4) “[W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people.”
- 5) “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. . . . [T]he United States cannot remain idle while dangers gather.”⁷²

72. National Security Strategy, *supra* note 31, at Introduction, ch. III, V.

IV. ISRAEL

Over the years, Israel has often been criticized for its response to terrorism. For those who believe that the occupation of the West Bank and the Gaza Strip is inherently illegal under international law, any response to terrorism in these areas is consequently illegal. This article does not seek to address the political and legal issues related to the occupation, which resulted from the 1967 Six-Day War. Rather, the focus will be Israel's legal and policy responses to significant terror attacks.

A. Introduction

Since Israel has been under attack literally from the moment of inception (May 1948), it is arguable that an article analyzing how the state responds to significant attacks is irrelevant to the Israeli experience. However, over the past four years Israel has faced a different form of terror threat, and therefore addressing the change in its response is clearly relevant.

As these lines are written, there is talk of a "window of opportunity" created by the death of Yassar Arafat. Shortly after Arafat's death, Prime Minister Sharon and Palestinian Authority President Abbas met for a summit hosted by President Mubarak of Egypt and King Abdullah of Jordan.⁷³ Prior to the summit, the government of Israel voted to freeze the policy of targeted killing, though it reserved the right to renew it if the Palestinians should prove unable or unwilling to eliminate terrorism.⁷⁴ In addition, the defense minister adopted the recommendation of a high-level Israel Defense Forces committee report recommending the halting of house demolitions.⁷⁵ High-level joint security committees have met to plan the implementation of the transfer of security from the Israeli Defense Forces (IDF) to the Palestinian Authority (PA). Furthermore, Israel began disengaging its settlements from the Gaza Strip and four Jewish settlements in the northern part of the West Bank in the summer of 2005.⁷⁶

73. David R. Sands, *Egypt Readies Troops to Ensure Peace Deal*, THE WASH. TIMES, Feb. 15, 2005, at A1.

74. *The Day that Peace Broke Out?*, THE ECONOMIST, Feb. 11, 2005, available at http://www.economist.com.agenda/displayStory.cfm?story_id=3643056; *The Middle East Peace Summit*, THE ECONOMIST, Feb. 11, 2005.

75. Greg Myre, *Israel Halts Decades-Old Practice of Demolishing Militants' Homes*, N.Y. TIMES, Feb. 18, 2005, at A1.

76. Steven Erlanger, *No Honeymoon for Palestinian Chief*, N.Y. TIMES, Jan. 17, 2005, at A6.

It has been Israel's policy since 1967 to respond to terrorism with a combination of measures—some intended to punish the individual terrorist, others aimed at deterring those who might contemplate acts of terrorism. Israeli methods have included the following measures: (1) demolishing the home of terrorists; (2) imposing curfews on neighborhoods and towns, either in response to intelligence information indicating a terrorist attack is imminent, or in response to a completed attack; (3) deporting terrorists; (4) placing suspected terrorists in administrative detention when criminal evidence is unavailable, or when concern for informants' security prevents the presentation of the evidence in a court of law; and (5) trying terrorists in a court of law. All of these measures have been based on Israeli law, international law, or regulations inherited from the British mandate.

All actions undertaken by the executive in Israel are reviewable by the judiciary—namely the Supreme Court sitting as the High Court of Justice. Thus, the Israel Defense Forces (the executive in the occupied territories) must always remain cognizant of the possibility that the Court will intervene and order the IDF to refrain from a particular course of action.

B. Post-2000 Policy

Since 2000, Israel has significantly changed the counter-terrorism methods it applies to combat Palestinian terrorism. Rather than relying on measures that were considered appropriate and effective between 1967 and 2000, the IDF has implemented a far more aggressive policy. Israel has defined the present situation as an “armed conflict short of war,” rather than an intifada (an Arabic word that literally means a throwing or riding off). The Intifada of 1987–1993, characterized by stone throwing, Molotov cocktails, massive demonstrations, multiple stabbings and the closing of businesses, was fundamentally different from the threat of the past four years, which has been characterized by Kassam missiles, mortar shells and suicide bombers.

To understand Israel's change in strategy and tactics, the reader must ask how the threat emanating from the Intifada differs from that presented by the armed conflict of the past four years, and why the present situation enables—in the state's eyes—such a fundamental change in the state's counter-terrorism policy and legislation. In the past four years, Israel has introduced a number of new policies, of which two will be analyzed: targeted killings and the construction of the security fence.

C. *Suicide Bombers*

The change in Israeli counter-terrorism policy is primarily a response to the threat presented by Palestinian suicide bombers. A successful suicide bombing is the work of a well-orchestrated, difficult to penetrate, highly disciplined, financially solvent terror organization—not the act of a lone individual. The reality of the post-9/11 suicide bomber and the need for a strategy to counter it is something that all nations must take into account, as the United States, Russia, Great Britain, Spain, Indonesia, and Saudi Arabia can well attest. While suicide bombers do not threaten the very existence of these nations, they greatly affect the daily lives of millions of innocent civilians. Governments' response in terms of law and policy to this relatively new threat is one of the major topics to be addressed in this article. Israel's responses, discussed below, are instructive in the context of the global reaction to terrorism.

D. *What Is Targeted Killing?*

Targeted killing reflects a deliberate decision to order the death of a particular terrorist. It is important to emphasize that an individual will be targeted only if he presents a serious threat to public order and safety, based on criminal evidence and/or reliable, corroborated intelligence information that clearly implicates him.⁷⁷ (To date, women have not been targeted.) Intelligence information is considered corroborated when it is confirmed by at least two separate, unrelated sources. In addition, a reasonable alternative to the targeted killing must not exist. Stated differently, the authorities must pursue all other reasonable means to incapacitate the terrorist under international law, and such efforts must prove fruitless before these authorities may resort to targeted killings.⁷⁸

According to international law, it is imperative that every effort be made to ensure that collateral damage is limited to an absolute minimum. Accordingly, when military commanders plan a targeted killing, they must do their best to avoid injury and damage to innocent civilians.⁷⁹

77. Amos N. Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 322 (2004) [hereinafter Guiora, *Targeted Killing as Active Self-Defense*].

78. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187, 198–99 (1984).

79. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 57.

According to the Jerusalem Post, the IDF has expanded the scope of targeted killing to include terrorists training for an attack.⁸⁰ In September 2004, an Israel Air Force helicopter attacked terrorists who were training at a base in Syria. The attack was not aimed at a specific terrorist who was engaged either in planning or executing a specific attack, and can therefore be considered an expansion of the targeted killing policy. The attack on the training base, which followed a double suicide bombing in Beer Sheva,⁸¹ a city in southern Israel, was aimed at terrorists in training, without specific knowledge as to their particular intentions. The raid raises important questions regarding violations of another nation's sovereignty in the context of counter-terrorism, and the limitations on active self-defense.

1. Israel's Legal Arguments for Targeted Killing

The best way to understand Israel's policy is to examine its response to a petition filed in Israel's Supreme Court, sitting as the High Court of Justice, against the practice of targeted killings. In *Public Committee Against Torture, Committee for Clean Environment and Human Rights vs. The State of Israel* (decision pending),⁸² the state, arguing that the petition should be denied, made a number of points:

The State first argued that the present conflict between Israel and Palestinian terror organizations is an "armed conflict."⁸³ As part of the law of armed conflict, terrorists taking part in attacks against civilian or public targets are illegal combatants, not civilians, and are therefore legitimate targets. "Acts of terrorism against a country by non-state sponsored organizations or individuals should be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation."⁸⁴ In the *State of Israel vs. Marwaan Baraghuti*,⁸⁵ the

80. Arie O'Sullivan, *The Army Redefines the 'Ticking Bomb,'* THE JERUSALEM POST, Sept. 13, 2004, at 2.

81. See *Israel Holds Syria Responsible for Double Suicide Bombing*, Sept. 1, 2004, http://www.usatoday.com/news/world/2004-09-01-mideast_x.htm.

82. HCJ 769/02 Public Committee Against Torture vs. The State of Israel, (decision pending).

83. *Id.* (This characterization had been previously accepted and adopted by the Supreme Court in a number of decisions). There are at least three different schools of thought about how to classify the fight against terrorism (which has been referred to as the new form of warfare): as an international armed conflict; as not an international armed conflict; as a unique form of armed conflict between a state and a non-state actor that has not been addressed in international conventions and requires separate, distinct international law agreements.

84. Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1, 4 (2002).

85. CrimC (TA) 092134/02 Israel v. Marwan Barghouti [2002] IsrDC_, available at <http://www.newyork.israel.org/mfa/go.asp?MFAH0mz80>.

Tel Aviv District Court ruled that terrorists who attack civilians are not "lawful combatants" entitled to POW status.

The principle of proportionality must be respected when implementing the policy of targeted killing. Additionally, targeted killing is used only when the targeted terrorist cannot be arrested using reasonable means, and is therefore in accordance with international principles requiring exhaustion of all reasonable alternatives.

The state cited the following: "legal scholars who have examined the jus ad bellum dimensions of the terrorism question would appear to agree on at least four basic principles:"

- i. If a state has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly;
- ii. A victim state's forcible self-defense measures should be timely;
- iii. A victim state's forcible self-defense measures should be proportionate;
- iv. A victim state's forcible self-defense measures should be discriminate and taken against targets responsible in some way for the armed attack.⁸⁶

One of the critical questions that must be answered is whether suicide bombers and those involved in terrorist infrastructure are legitimate targets even though they are not soldiers in the traditional sense of the word. In the present conflict, terrorists who play a direct role in attacks are viewed as illegal combatants, who are not entitled, *inter alia*, to POW status, and are viewed as legitimate targets. Furthermore, the scope of a legitimate target is not limited to the potential suicide bomber who, according to corroborated and reliable intelligence, is on his or her way to carry out a suicide bombing. Rather, the legitimate target is identified as any Palestinian who plays a significant role in the suicide bombing infrastructure—that is, "doers" who execute attacks, and "senders" who orchestrate them.⁸⁷

Targeted killings are primarily criticized based on the premise that they constitute either extrajudicial killings or assassinations.⁸⁸ It should be added that targeted killings have been carried out by various

86. Robert J. Beck & Anthony Clark Arend "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 187-90 (1993).

87. Guiora, *Targeted Killing as Active Self-Defense*, *supra* note 77, at 328.

88. *Id.* at 329.

governments, including the United States and the United Kingdom. The United States executed a targeted killing in response to the attack on the U.S.S. Cole, despite the fact that one of its targets was evidently a U.S. citizen.⁸⁹ While it is true that the targeted individual is not afforded a hearing or granted the right to appeal the decision to target him, he is not an innocent civilian according to the Geneva Conventions.⁹⁰ Rather, he is an illegal combatant who has either participated in terror attacks or ordered them to be carried out.

An extrajudicial killing, according to Amnesty International, “is an unlawful and deliberate killing carried out by order of a government or with its acquiescence . . . [reflecting] a policy . . . to eliminate specific individuals as an alternative to arresting them.”⁹¹ Unlike military forces that practice extrajudicial killing, the IDF resorts to targeted killing only when arrest is not an option. Furthermore, targeted killing is neither punishment nor reprisal for the commission of an act that is illegal under international law.⁹² Its primary objective is the prevention of a terrorist act intended to kill innocent Israeli civilians, and therefore it does not fall under the definition of extrajudicial killings. Extrajudicial killings reflect a government policy to kill the enemies of the state not for operational or self-defense purposes, but as a means of punishing opponents of the state. In almost all instances of extrajudicial killings, the victims are domestic political opponents by whom regimes feel threatened. Rather than arrest these opponents, regimes prefer to eliminate them.

It is critical to distinguish between targeted and extrajudicial killing. Targeted killings occur when arrest of the individual poses an extraordinary operational risk, whereas extrajudicial killing occurs when the incapacitation of political opponents through arrest is clearly operationally possible.⁹³ Furthermore, extrajudicial killings are domestic in orientation: they violate civil rights and are not part of counter-terrorism operations. By contrast, a state fighting terrorism must take all measures to protect itself against terrorists whose *modus vivendi* is

89. See John Diamond & Dave Moniz, *Missile Takes Out Cole Attack Suspect*, USA TODAY, Nov. 5, 2002, http://www.usatoday.com/news/world/2002-11-04-yemen-side-usat_x.htm; see also *U.S. kills al-Qaeda suspects in Yemen*, USA TODAY, Nov. 5, 2002, http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm.

90. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *supra* note 79, 1125 U.N.T.S. 3 at art. 50.

91. J. Nicholas Kendall, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C. L. REV. 1069, 1071 n.13 (2002).

92. Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 185–86 (2003) (stating that “[r]eprisals under international law are *prima facie* unlawful”).

93. See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 179 (April, 2005).

killing, and not political dissent. Targeted killing is a form of preemption and is not punitive in its purpose. Thus, the connotations of extrajudicial killing are inappropriate in the context of targeted killing.

Targeted killing is also distinguishable from assassination. An assassination is the killing of a political leader or a statesman and, according to international law, involves treachery or perfidy.⁹⁴ Terrorists are not political leaders or statesmen and should never be considered as such. The difference between a terrorist and a political leader is an important one in targeted killings. For example, Arafat, though he supported terrorism, would not have been an appropriate object of targeted killing because of his status as a political leader.

2. Policy Concerns

Israel's policy of targeted killings has been highly criticized. Professor Michael Scharf suggests four arguments to show why, even if targeted killings are legal, the policy permitting them may still be misguided:

- 1) Instances of collateral damage;
- 2) Instances of mistaken identity;
- 3) Cascading threats to the world order;
- 4) Strengthening enemy morale via martyrdom.⁹⁵

Examining counter-terrorism requires more than arguing the law in what is considered a gray area by most international law experts, but also understanding the policy aspects involved in the decision-making process. Accordingly, the effectiveness of the policy must be addressed. Israel considers the policy of targeted killing effective for the following reasons:

- 1) Terrorists understand that Israel has been able to penetrate informants into their cells.
- 2) Terrorists have had to change their living and sleeping habits on a regular basis.
- 3) A significant number of terrorists have been killed.

94. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 621 (1992).

95. Michael P. Scharf, *In the Cross Hairs of a Scary Idea*, WASH. POST, Apr. 25, 2004, at B1.

3. *Post-Arafat*

At the request of the Palestinian Authority, Israel recently decided to halt targeted killings.⁹⁶ The request reflects the significance Palestinians attach to the matter. Furthermore, the Minister of Defense has adopted the recommendations of an internal IDF commission to halt the policy of razing the homes of suspected Palestinian terrorists.⁹⁷

Over the course of the past twenty years, the IDF has justified its house-razing policy as a deterrent: those considering committing an attack of terrorism would be deterred if they understood what fate awaited their family's home. This argument was repeatedly made by the state to the High Court of Justice, and has received judicial sanction over the course of twenty years. After careful review, the internal IDF commission reached the conclusion that the policy did not have a deterrent effect, and therefore recommended that it be halted.⁹⁸

The freezing of targeted killings must be understood in the context of renewed relations between the Palestinian Authority and Israel in a post-Arafat age. While the Sharon government has clearly indicated that the policy may be re-implemented should the Palestinian Authority prove unable or unwilling to curtail Palestinian terrorism, the government's decision reflects a major change in policy. It must be noted that Israel considers both the policies of targeted killings and housing demolitions to be legal according to international law, and its decision to freeze them is policy based. This decision serves to reinforce one of the guiding principles of this article: counter-terrorism must be examined from legal and policy perspectives equally.

4. *The Security Fence*

The approximately 385 mile security fence that Israel has erected on the Palestinian side of the Green Line has been described by Israel as a self-defensive measure implemented in response to Palestinian terrorism.⁹⁹ According to the Israeli government, the primary purpose of the fence is to prevent infiltration into Israel by Palestinian terrorists.¹⁰⁰ Though the fence has been heavily criticized both domestically and internationally,

96. Ben Wedeman, Guy Raz & Andrea Koppel, *Mideast Cease-fire Expected Tuesday*, CNN.COM, Feb. 7, 2005, <http://www.cnn.com/2005/WORLD/meast/02/07/mideast/>.

97. Myre, *supra* note 75.

98. *Id.* (stating that the decision could be re-examined "if an extreme change in circumstances takes place").

99. See Israel's Security Fence, <http://www.jewishvirtuallibrary.org/jsource/Peace/fence.html> (last visited Nov. 5, 2005).

100. *Id.*

Israel has responded in the legal and political arenas by pointing to statistics showing that the fence has been highly effective in fulfilling its primary purpose as defined by the government—protecting innocent Israeli civilians.¹⁰¹ According to the Israeli government, there has been a 90% reduction in Palestinian terrorist acts in areas in which the fence stands,¹⁰² proving, from the government's perspective, that the fence is effective.

The legality of the fence has been challenged both in the Israeli Supreme Court¹⁰³ and in the International Court of Justice.¹⁰⁴ The government defended its decision to erect the security barrier by arguing that it balanced the nation's legitimate national security concerns—the protection of its citizens—against the rights of the residents of the Palestinian Authority. In arguing that the fence was constructed on the Palestinian side of the West Bank for strategic and topographic reasons, the state denied that the ultimate purpose of the fence was an illegal grab of Palestinian land.¹⁰⁵ Nevertheless, the Israeli Supreme Court ruled that, while the fence is legal, it affects “the fabric of [Palestinian] life” by separating farmers from their land, children from their schools, friends from neighbors, and making it very difficult for Palestinians to move freely within the Palestinian Authority's area.¹⁰⁶ Accordingly, the Court ordered the state to re-contour the fence in order to minimize the damage.¹⁰⁷

As has previously been noted, balancing legitimate national security concerns and the rights of the individual is in many ways the essence of counter-terrorism policy, when it is developed and implemented by liberal democratic states. The fence is emblematic of the balancing dilemma. According to many jurists, the fence represents a major violation

101. The Anti-Terrorist Fence—An Overview, <http://securityfence.mfa.gov.il/mfm/Data/48152.doc> (last visited Nov. 7, 2005).

102. *Id.*

103. H CJ 2056/04 Beit Sourik Village Council v. The Government of Israel & Commander of the IDF Forces in the West Bank [2004] IsrSC, available at <http://www.jewishvirtuallibrary.org/jsource/Peace/fencesct.html> (last visited April 5, 2005) [hereinafter Beit Sourik].

104. See generally The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, No. 131, 43 I.L.M. 1009 (July 9, 2004).

105. See Beit Sourik, *supra* note 103, at paras. 12–15.

106. *Id.* at paras. 82–85.

107. *Id.* at para. 85.

of international law.¹⁰⁸ On the other hand, a state must take all legal measures to protect its citizens. Herein lies the core of the dilemma: how does a state implement self-defensive measures while protecting civil rights?

It is important to note that active self-defense, as a policy, is very much exemplified by the fence. Ultimately, Israel decided to construct the fence (which is assiduously not referred to as a wall) because of a belief—ultimately shown to have statistical validity—that it would prove effective in preventing the infiltration of suicide bombers into Israel.¹⁰⁹

According to Israel, the two issues discussed above—targeted killing and the security fence—serve a common purpose: preventing suicide bombers from achieving their goal. International law requires states to actively seek alternatives and to develop and implement policies that will minimize property damage and the loss of innocent lives in their efforts to combat terrorism. In facing a new threat—suicide bombers—Israel implemented a double-edged approach: the policy of targeted killing, advocating the killing of terrorists based on intelligence information and/or criminal evidence (as will be discussed later) and the construction of the security fence, creating a barrier that negatively impacts one group of innocent civilians while attempting to save the lives of other innocent civilians. Though the policies have been deemed successful by the enacting state (Israel), the criticism has been consistent and severe. These policies exemplify the need to not only balance national security concerns and individual rights, but also to consider what actions a state ultimately takes and the attendant criticism of its policies.

V. RUSSIA

A. Introduction

Over the past few years post-Soviet Union Russia has faced terrorism similar to that faced by the United States and Israel. Chechen terrorist groups—whether acting alone or assisted by international terrorists—have made enormous efforts to disrupt Russian life. There is little doubt that the attack on the schoolhouse at Beslan¹¹⁰ was the most egregious form of terrorism: the willful killing of hundreds of children at school.

An understanding of Russia's response to Chechen-based international terrorism requires a historical overview. After the 1917 Russian Revolution,

108. See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 91–94 (Jan. 2005).

109. The Anti-Terrorist Fence, *supra* note 101.

110. See Excerpts: State Department Noon Briefing, September 8: Russia, U.S. Department of State Daily Press Briefing (Sept. 8, 2004), <http://usinfo.state.gov/eur/Archive/2004/Sep/08-78370.html>.

the Chechens declared independence only to be occupied by the Bolsheviks, who later established the Chechen-Ingush Autonomous Region in 1934.¹¹¹ Like their Ingush neighbors, Chechens are predominantly Sunni Muslim.¹¹² "During World War II, Chechen and Ingush units collaborated with invading German Nazis. As a result, in 1944 Stalin deported many of them to Central Asia and Siberia."¹¹³ "The mass deportation of Chechens is estimated in the range of 400,000 to 800,000 with perhaps 100,000 or more of these people dying due to extreme conditions."¹¹⁴ After Stalin died in 1953, the deportees were repatriated, and the republic was reestablished in 1957.

Upon the Soviet Union's collapse in 1991, some regions broke away and gained independence. However, Boris Yeltsin, the president of the newly formed Russian Federation, refused Chechnya's declaration of independence and sent troops to Chechnya instead, though these troops withdrew when confronted by armed Chechens.¹¹⁵ Tensions between the Russian government and the Chechen president, Dzhokhar Dudayev, escalated into warfare in late 1994, when Russia invaded Chechnya and a bloody war ensued.¹¹⁶ In 1996, Russia withdrew defeated, but Chechnya's political situation continued to deteriorate. As the Chechen government's control over militias eroded, local warlords gained strength over Chechnya's citizens.¹¹⁷ Meanwhile, the Soviet-Afghan war had attracted Islamic militants and resistance fighters to Chechnya and neighboring Dagestan. In 1997, Dudayev (who had been killed in a 1995 rocket attack) was replaced by Aslan Maskhadov, who declared Islamic Shari-ah law in 1999.¹¹⁸ Following a Chechen defeat in Dagestan, Moscow and other Russian cities suffered bombings that killed more than 300 people.¹¹⁹ Chechens were blamed for the attacks, and the new Russian president, Vladimir Putin, responded forcefully and brutally.¹²⁰ By June of 2000, Chechens had begun to fight

111. Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 120 n.36 (1999).

112. *Id.* at 123.

113. Anup Shah, Crisis in Chechnya, (last updated Sept. 4, 2004), <http://www.globalissues.org/Geopolitics/Chechnya.asp?p=1>.

114. *Id.*

115. *Id.*; see generally Miriam Lansky, *Chechnya's Internal Fragmentation, 1996-1999*, 27 FLETCHER F. WORLD AFF. 185 (2003).

116. Shah, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

back with suicide attacks and increased guerilla warfare.¹²¹ Terrorist attacks continue to originate from Chechnya, and the harsh Russian response continues to be condemned by the international community.¹²²

While some argue that Chechen terrorism is a home-grown nationalist movement attempting to establish an independent Chechen state, the Islamic nature of this movement, in conjunction with the operational, financial, and logistical support provided by non-Chechen terrorists, suggests that Russia faces terrorism that is not purely domestic. Therefore, Russian operational, policy, and legislative responses directed against Chechnya cannot be considered only a response to domestic terrorism. Rather, Russia is confronted with international terrorism that is domestic in orientation.

Chechen terrorism is unlike the 9/11 attack or the bombing of the Madrid train station in March 2004, which were exclusively international in execution. It more closely resembles the terrorism confronted by Israel (Palestinian terrorist organizations with international assistance) or India (Kashmirian terrorists supported by Pakistan).

In examining the Russian response to international terrorist organizations that supports the Chechens, it must be noted that until recently, both the Soviet Union and post-Soviet Russia saw themselves as immune to domestic and international terrorism. In the context of the Cold War, the Soviet Union was the prime benefactor—covertly and overtly—of international terrorism. Today, the international geopolitical configuration has changed dramatically. Russia now faces a threat that is no less international than the threat the United States is confronting. While the threat is domestically based, the larger threat is similar—international Islamic fundamentalism.

B. Russian Policy—Deterrence and Toughness

The Russian counter-terrorism principles are put forth in the Russian Federation Federal Law no. 130-FZ, which was signed by President Yeltsin on July 25, 1998.¹²³

- 1) Legality;
- 2) The priority of measures to prevent terrorism;
- 3) The inevitability of punishment for terrorist activity;

121. *Id.*

122. *Id.*

123. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 130-FZ, ch. I, art. 2, available at http://www.fas.org/irp/world/russia/docs/law_980725.htm.

- 4) The combination of overt [glasnyy] and covert [neglasnyy] methods of fighting terrorism;
- 5) The integrated use of legal, political, socioeconomic, and propaganda based preventive measures;
- 6) The priority of defending the rights of persons exposed to danger as a result of terrorist action;
- 7) Minimal concessions to terrorists;
- 8) One-man command in the leadership of forces and resources involved in conducting counter-terrorist operations;
- 9) Minimal disclosure of technical methods and tactics for the conduct of counter-terrorist operations.

Chapter II, Article 5 of the Basic Principles of the Organization of the Fight against Terrorism¹²⁴ states counter-terrorism efforts aim to:

- 1) Protect the individual, society, and the state from terrorism;
- 2) Prevent, uncover, and stop terrorist activity and minimize its consequences;
- 3) Uncover and eliminate factors and conditions conducive to the implementation of terrorist activity.

Speaking at the College of the Federal Security Service on January 17, 2004, President Vladimir Putin called the struggle against terrorism “a key task of Russian special services. In the neutralization and liquidation of the terrorist network, special services should be tough and systematic. Any provocation of the terrorists should invite adequate tactics by the security bodies.”¹²⁵

Toughness is clearly of paramount importance to the Russian authorities, who are encouraged by the firm, popular opposition to attacks against civilian targets to adopt a harsh, uncompromising response. During the Moscow theatre hostage crisis, the use of an unspecified debilitating gas to neutralize explosive-loaded Chechen terrorists was apparently sanctioned by Vladimir Putin personally.¹²⁶ The Russian leadership was conscious

124. *Id.* ch. II, art. 5.

125. Andrei Shoumikhin, *Deterring Terrorism: Russian Views*, NATIONAL INSTITUTE FOR PUBLIC POLICY, Feb. 2004, at 1 (quoting Vladimir Mokhov, *Toughly and Systematically*, KRASNAYA ZVEZDA, Jan. 17, 2004), <http://www.nipp.org/Adobe/Russian%20Web%20Page/February%20webpage.pdf>.

126. See Matt Bivens, *Chechnya War Making Not Breaking Terrorism*, THE MOSCOW TIMES, Nov. 1, 2002, at 2557.

not only of the potential for a negative public reaction to any concession to the terrorists, but also of the possibility that a harsh and swift response might effectively deter similar acts in the future.¹²⁷

Russia's counterterrorism legislation and policy is telling: policymakers, politicians, and leaders unequivocally and openly define Russia's approach to counterterrorism as active and firm. The government has made it very clear that it fully intends to pursue an operationally active counterterrorism strategy, combined with maximum implementation of existing legislation. In many ways this approach mirrors, or at least resembles, the American and Israeli models. Accordingly, what must be analyzed is the government's success in balancing national security and civil rights, or alternately, whether President Putin, the legislature and the people do not place a significant emphasis on this balance, as some have suggested.

President Putin has been criticized for a policy—particularly as implemented by the Russian forces in Chechnya—of aggressive counterterrorism that violates basic human rights. It must be noted that both the Duma and the Russian Federation Council have clearly granted the executive wide latitude. The question is at what price. The criticism, as noted below, is not insignificant:

While Russia has described its actions in Chechnya as a tightly focused counterterrorism operation, it has produced vast civilian casualties. The first phase of the conflict involved the bombing and shelling of dozens of towns and villages to dislodge Chechen fighters. Research by Human Rights Watch and other organizations showed the shelling and aerial bombardment by Russian forces to be highly indiscriminate and disproportionate, causing about 3,000 civilian casualties. Between December 1999 and February 2000, Russian forces committed massacres after taking control of three villages, killing at least 130 people. During this period they also rounded up thousands of people, mostly males whom they called "potential terrorists," took them to detention centers, and tortured them.

By the spring of 2000, Russian troops had established nominal control over most of Chechnya and large-scale hostilities ceased. They continued to conduct many "sweep operations," to seek out rebel fighters and ammunition depots. Sweep operations have become synonymous with abuse, involving the arbitrary detention of large numbers of Chechen civilians (along with captured fighters), who are then beaten and tortured in detention.

This cycle of abuse, well established before September 11, continues to this day. Hundreds of people have "disappeared" since that date after being taken into Russian custody. Increasingly, Russian forces conduct targeted night operations, in which masked troops raid particular homes, execute targeted individuals, or take them away, never to be seen again.

127. Shoumikhin, *supra* note 125, at 1.

In December 2002, Human Rights Watch documented nine extrajudicial executions and seventeen forced disappearances by Russian forces, most of which had taken place in the two months following a mass hostage taking in Moscow by armed Chechens.¹²⁸

C. Russian Legislation

Russian Federation Federal Law No. 130-FZ¹²⁹ was signed by President Boris Yeltsin on July 25, 1998. Article 3 provides the following definitions: "Terrorist crimes are envisaged by articles 205-208, 277, and 360 of the Russian Federation Criminal Code. Other crimes envisaged by the Russian Federation Criminal Code may be categorized as terrorist crimes if they are committed for terrorist purposes. Penalties for the commission of such crimes are determined in accordance with the Russian Federation Criminal Code; a terrorist is a person participating in the implementation of terrorist activity in any form; a terrorist group is a group of persons united with a view towards implementing terrorist activity; a terrorist organization is one that is created with a view towards implementing terrorist activity, or deeming the use of terrorism possible in its activity. An organization is deemed to be terrorist if even one of its structural components carries out terrorist activity with the knowledge of even one of the organization's leading organs."¹³⁰

According to this legislation, terrorist activity is broadly defined: it includes the organization, planning, preparation and implementation of terrorist action. The significance of such a definition is that any individual involved in any stage of a particular terrorist action—no matter its significance or ultimate contribution to an attack—may be convicted of the crime of terrorism. Much like the material support clause of the Patriot Act,¹³¹ which led to the conviction of Lynne Stewart,¹³² this definition is very broad.

128. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (Mar. 25, 2003), at 18–19, available at <http://www.humanrightswatch.org/un/chr59/counter-terrorism-bck.pdf> [hereinafter HRW HUMAN RIGHTS ABUSES WORLDWIDE].

129. See Russ. Federation Fed. Law No. 130-FZ, July 25, 1998, translation available at http://www.fas.org/irp/world/russia/docs/law_980725.htm (last visited Nov. 14, 2005); see also Ugolovnyi Kodeks [UK] [Criminal Code] arts. 205–08, 277, 360 (Russ.) (translated into English by William E. Butler & Maryann E. Gashi-Butler, Criminal Code of the Russian Federation, 3rd ed.).

130. Russ. Federation Fed. Law No. 130-FZ, *supra* note 129, art. 3.

131. See Patriot Act, *supra* note 29, § 805, 115 Stat. at 377–78.

The historical backdrop for legislation must always be examined, for legislation is not drafted in a vacuum. Chechen attacks against Russian citizens have included the takeover of a schoolhouse, the bombing of Moscow apartment buildings, various suicide bombs—including some carried out by women—at popular events and the Moscow theatre takeover.

The Russian response to Chechen terrorism very much reflects a tough line. This approach has been repeatedly articulated and defended by Russian authorities: “Russian Police Demand Tightening of Laws in Struggle Against Terrorism” is but one example of a headline following the terrorist attack at Beslan. In 2003, the Russian Interior Minister stated he was drafting proposals on ways to invigorate the struggle against terrorism.¹³³ “I think the necessity to step-up the struggle against terrorism must be reflected in our laws. We shall submit a proposal to prolong the period of detention of those suspected of being involved in terrorist acts to 30 days.”¹³⁴ In the aftermath of an explosion in a Moscow subway this headline appeared: “Russian State Duma intends to toughen all laws relating to the fight against terrorism.”¹³⁵

According to an April 14, 2004 BBC report, the Russian Federation Council, following a vote in the lower house, adopted amendments to the Criminal Code, increasing the “period for bringing charges from 10 to 30 days in the case of an investigation of a terrorist nature.”¹³⁶ The Council adopted the resolution overwhelmingly (128 senators voting in favor, three against and three abstaining).¹³⁷

D. Russia Post-9/11

Following 9/11, Russia clearly toughened its counter-terrorism approach. Whether or not this was an attempt to equate the attacks against the United States with Chechen terrorism as a means to justify harsh internal measures is a matter of some debate. What is clear from a series of legislative issues initiated and acted upon is that 9/11 led the Russian Federation to understand that international terrorism potentially affects

132. See Associated Press, *Activist Lawyer Vows to Fight Terror Conviction*, MSNBC Feb. 11, 2005, <http://msnbc.msn.com/id/6948450/> (last visited Nov. 16, 2005).

133. Mark A. Smith, *Russian Domestic Policy: A Chronology July-September 2003*, DEFENCE ACADEMY: CONFLICT STUDIES RESEARCH CENTRE, Jan. 14, 2004, at 5, available at <http://www.da.mod.uk/CSRC/documents/Chronologies/J37/J37.pt1>.

134. *Id.*

135. *Russian State Duma Intends to Toughen All Laws Relating to Fight Against Terrorism*, RIA NOVOSTI [Russian News and Information Agency], Feb. 6, 2004, <http://en.rian.ru/onlinenews/20040206/39907054.html> (on file with author).

136. See Smith, *supra* note 133, at 5; see also *Russian Upper House Endorses Changes To Law On Handling Suspect “Terrorists”*, BBC MONITORING, Apr. 14, 2004.

137. *Russian Upper House Endorses Changes To Law On Handling Suspect “Terrorists”*, *supra* note 136.

Russia as much as it does other nations. That is, unlike the Cold War era, when the Soviet Union provided unending support to national liberation movements, the Russian Federation is now just as much a target of international terrorism as is the United States.

During the Cold War, the two great superpowers were polar opposites in their approach to various national liberation movements. International terrorism, as best exemplified by 9/11, clearly brought the Russian Federation to embrace anti-terrorism methods it would not have considered applying to international movements in previous years. Although the Soviet Union had enacted and implemented harsh, generally cruel measures against what it defined as internal dissent, its approach to nationalist movements overseas was fundamentally different: the Soviet Union actively encouraged such movements. The Russian response to the tragedy at the Beslan schoolhouse clearly reflects a significant change in this policy. Russia's response to international terrorism is very different from the way it engaged and supported Cold War national liberation movements.

International criticism has been leveled regarding the imbalance between national security and civil rights in some of the measures Russia has adopted.¹³⁸ However, there is little doubt that, in the context of policy and legislative initiatives, the Russian Federation has developed an understanding of terrorism that is diametrically opposed to that of its predecessor. While it is unclear whether this change is based solely on a response to 9/11, to Chechnya-based terrorism, or to a combination of the two (or perhaps an understanding that a link exists between the two and that Chechen terrorism is also international), little doubt exists that a significant transformation has occurred in Russia.

One of the most interesting international political developments in the post-Cold-War world is the growing realization by the nations of the world that terrorism—the only real threat to modern society—must be combated globally. If in the past the world was divided into three camps—the United States, the U.S.S.R. and the nonaligned nations—today there is only one superpower, the United States. However, defeating terrorism, or at least engaging terrorists in a protracted war of attrition, requires an international unification of efforts. It can perhaps be argued that terrorism and the resulting policies of counter-terrorism will significantly contribute to globalization. If in the past the Soviet Union

138. See Human Rights Watch: Human Rights News, *Russian Federation/Chechnya: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights*, Mar. 10, 2005, <http://hrw.org/english/docs/2005/03/10/russia10298.htm>.

had its own political agenda, today, particularly post-Beslan, there appears to be a growing realization in Russia that counter-terrorist efforts must be combined. While differences of approach—on both a tactical and a strategic level—and dissimilar political philosophies still exist, the fundamental change in Russia would have been unimaginable a few short years ago, and reflects the globalization of counter-terrorism efforts.

VI. SPAIN

A. Introduction

On March 11, 2004, 198 Spaniards were killed and more than 1,400 wounded in Madrid, as ten bombs exploded in commuter trains, just three days prior to a national election.¹³⁹ According to most commentators, the objective of the attacks was to influence the election and to compel Spain to withdraw its forces from Iraq, where they had been part of the coalition fighting against the regime of Saddam Hussein. Following the election, which was won by the Socialist Party's Luis Rodriguez Zapatero,¹⁴⁰ Spain withdrew from Iraq in spite of strong international political pressure to remain there.¹⁴¹

In the following months, Spanish authorities arrested 62 people in connection with the bombing, and more than 30 involved in the planning of further attacks intended to be carried out in October 2004.¹⁴² According to Spanish sources, some of those arrested had connections to international terrorism, suggesting not only that Spain is a target of international terrorism, but furthermore, it has become an “entry point to Europe” for terrorists.¹⁴³

In a separate investigation conducted by National Court Judge Baltasar Garzon, 35 individuals involved with al-Qaeda were indicted.¹⁴⁴ Judge Garzon compiled a 692-page dossier in late 2003, which called for the arrest of these men for their alleged involvement in the September 11 attack on the United States.¹⁴⁵

139. *Timeline: Madrid Investigation*, BBC NEWS (world ed.), Apr. 28, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3597885.stm>.

140. *Id.*

141. See Iraq: Spanish Troop Withdrawal a “Blow” to Coalition, GlobalSecurity.org, Apr. 23, 2004, <http://www.globalsecurity.org/wmd/library/news/iraq/2004/04/www40423.htm>.

142. Neil Docherty & Lowell Bergman, *Al Qaeda's New Front*, Frontline, Jan. 26, 2005, <http://www.pbs.org/wgbh/pages/frontline/shows/front/map/es.html> (last visited Nov. 16, 2005).

143. Renwick McLean, *Spain Arrested More than 130 suspects in Islamic terrorism in '04*, N.Y. TIMES, Jan. 6, 2005, at A6.

144. *Profile: Judge Baltasar Garzon*, BBC NEWS (UK ed.), Sept. 26, 2005, <http://news.bbc.co.uk/1/hi/Europe/3085482.stm>.

145. *Id.*

While today Spain is similar to the United States, Russia and Israel in that it also faces Islamic fundamentalist terrorism, Spaniards have encountered domestic terrorism for years. The Euskadi Ta Askatasuna (Basque Fatherland and Liberty, or ETA) has waged a decades-long campaign against the Spanish government in the hope of establishing an independent Basque state.¹⁴⁶ The Basques have killed hundreds, intimidated thousands, and forced Spaniards to live under the threat of violence.¹⁴⁷

Spain's counter-terrorism legislation and policy has over the years been tailored to the threat posed by ETA, rather than to international terrorism. Like many other countries that have been threatened by domestic or nationalist terrorism (e.g., the IRA in Britain, Hamas in Israel, and the Chechens in Russia), the Spanish response to terrorism was developed to meet a specific, internal threat. However, the Spanish government's response to domestic-based terrorism is outside the purview of this article, just as the American response to various right-wing militia groups and the Israeli government's policy toward right-wing extremism will not be examined. Russia has been included precisely because Chechen terrorism, while nationalist in orientation, is supported by, and therefore related to, global Islamic terrorism—much like the Hamas and Islamic Jihad in Israel. This article's emphasis is national legislative and policy responses to global terrorism, in particular, the way in which existing legislation and policy is implemented or modified in response to international terrorism. In the case of Spain, relevant legislation was initially enacted for the purpose of combating domestic terrorism only, and has been adapted to address international terrorism.

B. Spanish Domestic Legislation

Chapter VIII of the Spanish Criminal Code (Article 571) defines terrorism as “belonging, acting in the service of or collaborating with armed groups, organizations or groups whose objective is to subvert the constitutional order or seriously alter public peace”¹⁴⁸ The significance

146. Renwick Mclean, *Key ETA 'Commando' Leader Arrested*, THE INTERNATIONAL HERALD TRIBUNE, Oct. 3, 2005, at 3, available at <http://www.iht.com/articles/2005/10/03/news/spain.php>.

147. ERIK VAN DE LINDE ET AL., QUICK SCAN OF POST 9/11 NATIONAL COUNTER TERRORISM POLICYMAKING AND IMPLEMENTATION IN SELECTED EUROPEAN COUNTRIES 94 (2002).

148. JUDITH SUNDERLAND, HUMAN RIGHTS WATCH, SPAIN: SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN 16–17 (2005), available at <http://hrw.org/reports/2005/spain0105/> [hereinafter HRW COUNTER-TERRORISM IN SPAIN].

of this legislation is that mere support—either direct or indirect—of terrorism may lead to prosecution under the law. The low threshold required for prosecution is reminiscent of the “material support” clause of the Patriot Act.¹⁴⁹

The Spanish model serves as a point of discussion for an additional issue: whether the legislative response to international terrorism should differ from the response to internal terrorism. Over the years Spain’s domestic legislation has often been criticized for its human rights violations vis-à-vis ETA.¹⁵⁰ Terrorists in Spain are tried at the Audiencia Nacional (National High Court), which was created in 1977 and has jurisdiction over “crimes committed by persons belonging to armed groups or related to terrorist or rebel elements when the commission of the crime contributes to its activity, and by those who in some way cooperate or collaborate in the acts of these groups or individuals.”¹⁵¹

Appeals from the Audiencia Nacional are to be filed to the Criminal Appeals Chamber, though this court is presently not operational. Furthermore, Spain does not have a special antiterrorism law; terrorists are brought to trial based on Spain’s Criminal Code.¹⁵² The primary distinction between the treatment of terrorists and criminal defendants is that, whereas a non-terrorist must be brought before a judge within 72 hours, a suspected terrorist may be held for up to five days without seeing a judge (an additional 48 hours). Article 55(2) of the Spanish Constitution provides procedures whereby fundamental rights may be suspended in terror cases.¹⁵³ Furthermore, according to the Law of Political Parties (Party Act) introduced in 2001, a political party that supports terrorism may be outlawed.¹⁵⁴

Though these measures were enacted for the purpose of combating domestic terrorism, Spain’s response, in terms of legislation and policy to 9/11, and more significantly to a major international terror attack on its own soil should be considered. If in the past Spain’s counter-terrorism efforts were focused on the Basques, then the focus today must necessarily be split or doubled.

As will shortly be discussed, the Spanish response to the bombings at the train stations has been widely criticized for reflecting weakness, if not capitulation, in the face of international terrorism. Whether this is a

149. See Patriot Act, *supra* note 29, § 805, 115 Stat. at 377–78.

150. See Tracy Wilkinson, *Spain Could Do Better on Terror Suspects, Group Says; Human Rights Watch Asserts, Among Other Things, that Detainees Need Greater Legal Access*, L.A. TIMES, Jan. 27, 2005, at A6.

151. HRW COUNTER-TERRORISM IN SPAIN, *supra* note 148.

152. *Id.* at 17–18.

153. Constitución [C.E.] art. 55(2) (Spain).

154. *Id.*

result of Spain's experience with Basque terrorism or unrelated is unclear. What is apparent is that Spain was totally unprepared for international terrorism—despite having ample opportunity to apply the lessons learned by other nations.

C. Spanish Response to Terrorism

1. 9/11

According to a Human Rights Watch report, after 9/11 Spain applied its existing strict counter-terrorism regime to the investigation, apprehension, and detention of suspected al-Qaeda operatives. The climate created by the international campaign against terrorism provided Spanish authorities with a further pretext to crack down on Basque separatists and supporters of the pro-independence movement. Spanish authorities were also quick to issue public statements equating stricter controls on immigration with the war against terrorism, contributing to a climate of fear and suspicion toward immigrants, asylum seekers, and refugees.

Spain's anti-terror laws permit the use of incommunicado detention, secret legal proceedings, and pre-trial detention for up to four years.¹⁵⁵ The proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain in November 2001, July 2002, and January 2003, among others, have been declared secret (*causa secreta*). The investigating magistrate of the Audiencia Nacional, a special court that oversees terrorist cases, can request *causa secreta* status for thirty days, consecutively renewable for the duration of the four-year pre-trial detention period.¹⁵⁶

Secret proceedings bar the defense access to the prosecutor's evidence, except for information contained in the initial detention order. Without access to this evidence, detainees are severely hampered in mounting an adequate defense.

In November 2002 the United Nations Committee Against Torture (CAT) expressed serious concern about incommunicado detention under Spain's criminal laws.¹⁵⁷ A suspect can be held without access to an

155. HRW COUNTER-TERRORISM IN SPAIN, *supra* note 148.

156. *Id.* at 16.

157. U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Spain*, ¶ 10, CAT/C/CR/29/3 (Dec. 23, 2002); *European Parliament Hearing on Human Rights in the European Union: Counter-Terrorism Measures and the Prohibition against Torture and Ill-treatment*, Submission by Human Rights Watch, Apr. 24, 2003, available at <http://www.hrw.org/campaigns/migrants/docs/eu-counter-terrorism.pdf>.

attorney, family notification, services such as access to health care, or contact with the outside world. The CAT concluded that incommunicado detention under these circumstances could facilitate acts of torture and ill-treatment.¹⁵⁸ In Spain, most suspected terrorist detainees are held incommunicado for at least the first 48 hours in custody.

Human Rights Watch has reported that “[i]n the aftermath of September 11, then Spanish Foreign Minister Josep Pique told *El País* that ‘the reinforcement of the fight against illegal immigration is also the reinforcement of the fight against terrorism.’”¹⁵⁹ Furthermore, “[s]uch political rhetoric has been accompanied by increasingly restrictive immigration and asylum policies and practices, including police harassment in Muslim and Arab migrant communities, which undermine the right to seek asylum and contribute to the creation of a climate of hostility toward all immigrants in Spain.”¹⁶⁰

The Party Act adopted in June 2002 enables the state to declare a political party illegal if it fails to respect democratic principles and values. With two exceptions, the legislation is aimed at Batasuna and, accordingly, will not be further addressed. The Party Act allows the government to block financial accounts and operations when it considers that such a step might prevent terrorist activities. The bill authorizes the administration to act not only against terrorist groups, but also against those who support or help them.¹⁶¹ On June 27, 2002, the Spanish Congress of Deputies passed the LSSICE “Internet Law” which “obliges ISPs to retain traffic logs of their customers for at least a year. An opposition amendment bars police or intelligence officials from using such data without court permission.”¹⁶²

158. *Id.*

159. HRW HUMAN RIGHTS ABUSES WORLDWIDE, *supra* note, at 128.

160. *Id.*

161. Rachel Ehrenfeld, *Financing Osama*, FRONTPAGEMAGAZINE.COM, Feb. 25, 2005, <http://www.frontpagemag.com/articles/readarticle.asp?ID=17136&p=1> (last visited Nov. 14, 2005). Ehrenfeld states that,

Article 9 of the New Party Act, Organic Law 6/2002 of June 27, 2002 stipulates that a political party will be declared illegal if it systematically harms fundamental rights and freedoms by promoting, justifying or exonerating attacks against the right to life and the integrity of the individual, if it foments, facilitates or legitimizes violence, or complements and supports the actions of terrorist organizations.

Id.

162. REPORTERS WITHOUT BORDERS, THE INTERNET UNDER SURVEILLANCE 103 (2003), available at <http://www.rsf.org/IMG/pdf/doc-2236.pdf>.

2. March 2004

What then was the response of Spanish law enforcement to the March 2004 train attacks? This response must be considered not only from the criminal law and juridical perspective, but with respect to the political decision to withdraw forces from Iraq. While dozens of suspected al-Qaeda terrorists were arrested, indictments have not been filed, and additional actions have not been taken. Furthermore, seven suspected al-Qaeda terrorists committed suicide when an apartment they were in was surrounded by the Spanish police.¹⁶³

Since March 2004, Spain has not enacted special or emergency legislation in response to the death of 200 of its citizens. There are a number of possible reasons for this non-response (which is a response in and of itself):

- 1) The existing legislation was felt to be sufficient;
- 2) Spain did not want to be perceived as pursuing Islamic terrorists;
- 3) Spanish authorities thought that the criminal law model is appropriate for countering terrorism and therefore no special legislation was needed.

In sum, rather than implementing numerous potential measures intended to provide the law enforcement community additional powers, or undertaking vigorous policy initiatives, the Spanish government adopted, in response both to 9/11 and March 2004, a largely passive approach. Furthermore, the newly elected government promptly withdrew Spanish forces from Iraq.¹⁶⁴

In its response to an international terrorist attack on its own soil, Spain differs dramatically from the United States, Israel, and Russia. The legislative and policy models developed by those three countries in response to international terrorism have been proactive and aggressive. The Spanish government's inconsistency in dealing with domestic and international terrorism is palpable. Spain responded to domestic terrorism with political, legislative, and operational resolve. Its response to international

163. HRW COUNTER-TERRORISM IN SPAIN, *supra* note 148.

164. Luke Harding, *U.S. Reaches Deal with Leaders in Falluja: Threat to Seize City by Force if Demands are Not Met*, THE GUARDIAN (LONDON), Apr. 20, 2004, at 13, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1195640,00.html>.

terrorism has introduced a profoundly different model—one that is diametrically opposed to its approach to domestic terrorism.

There is no right or wrong answer to these questions, but if history is any guide, acquiescence in the face of aggression has not served liberal democracies well over the years. The Spanish response, in contrast to others discussed in this article, does not seem to be consistent with a developing global response to Islamic terrorism. As discussed in the section addressing the United States, administration after administration has struggled to develop a cohesive, consistent response. Apparently, the current Bush administration has developed such a policy, though it is under attack for failing to protect civil liberties in the United States. The question that nations need to address is how best to respond to international terrorism, while taking into account terrorists' likely interpretation of those policies.

VII. INDIA

A. Introduction

Over the years India has faced complicated terrorist threats from multilateral sources.¹⁶⁵ Israel's threat is Palestinian terrorism; Russia's is Chechen terrorism; Spain's was Basque terrorism until March 2004. The threats India faces come in many forms—ethnic separatists, nationalists, and the disenfranchised.¹⁶⁶

India's challenge in developing coherent legal and policy responses is to counter one threat without inviting criticism from another group, which may feel that a particular policy or legislation unfairly infringes their rights. Developing a response solely aimed at one group or one particular threat without trampling on or infringing the rights of another group or subset is extremely complicated and requires great sensitivity.

In examining Indian counterterrorism measures, what is clear is that the challenge is posed by multiple sources. Like the United States, Israel, Russia and Spain, India must develop policy and enact legislation that fairly weighs national security against civil and political rights. However, it must do so in a more complex environment than other nations have faced.

165. *The Current Crisis in South Asia: Hearing Before the Subcomm. on the Middle East and S. Asia of the H. Comm. On Int'l Relations*, 107th Cong. at 10 (2002) (statement of Michael Krepon, Founding President, The Henry L. Stimson Center).

166. See Law Commission of India, 173rd Report on Prevention of Terrorism Bill, 2000 § II 1.5–9 (2000), reprinted in L.K. Thakur, *ESSENTIALS OF POTA AND OTHER HUMAN RIGHTS LAWS* 58–60 (2002) (citing over 2000 militant-related deaths in the northeast region of India during the late 1990s); see also U.S. DEPT. OF STATE, *PATTERNS OF GLOBAL TERRORISM 2001*, 10–11, (2002), available at <http://www.state.gov/documents/organization/10319.pdf> (citing various terrorist threats in India).

Besides facing religious strife in the form of Hindu-Moslem and Sikh-based terrorism, the Indian government also faces terror threats emanating from Kashmir that is encouraged, if not actually supported by Pakistan.¹⁶⁷ All the while, India must be necessarily cognizant of the threat posed by a nuclear-capable Pakistan. Accordingly, the Indian government must develop counter-terrorism legislation and policy that can respond democratically to truly multiple threats: 1) external (Pakistan); 2) domestic (religious based); 3) mixed (Kashmirian terrorism partially supported by Pakistan). Indian counter-terrorism legislation must be all-encompassing, given the breadth of the threat, both quantitatively and qualitatively.¹⁶⁸ As the scope of this survey is limited to international terrorism, India's internal threats will not be addressed. Nevertheless, in discussing how a nation responds to international terrorism, additional realities—such as domestic terrorism—cannot be overlooked. The issue of India's counter-terrorism policy must then be considered through this unique perspective.

B. Legislation

1. Terrorism and Disruptive Activities Act

In 1985 the Indian government approved the Terrorism and Disruptive Activities (prevention) Act (TADA) (amended 1987).¹⁶⁹ TADA was enacted partly as a response to the death of Prime Minister Indira Gandhi, who was assassinated by militant Sikh extremists in 1984.¹⁷⁰ Rajiv Gandhi, Indira's son and successor as prime minister, also supported the legislation, because various militant groups throughout India were engaging in continuing guerrilla attacks against the Indian state.¹⁷¹ TADA expanded the government's power to deal with persons classified as terrorists.¹⁷² For example, it gave judges the discretion to hold trials of accused terrorists *in camera*.¹⁷³ Moreover, Section 21 of the Act presumed that

167. *Id.*

168. KSHITUJ PRABHA, *TERRORISM: AN INSTRUMENT OF FOREIGN POLICY* 78–79, 90 (2001); CYNTHIA KEPPELY MAHMOOD, *FIGHTING FOR FAITH AND NATION: DIALOGUES WITH SIKH MILITANTS* 10 (1996).

169. Terrorist and Disruptive Activities Prevention Act, No. 28 of 1987 (India) [hereinafter TADA].

170. Jayanth K Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 *LAW & INEQ. J.* 265, 267 (2004).

171. *Id.*

172. *Id.* at 268.

173. *Id.* at 267; TADA, *supra* note 169, at part III, 16(1)–(3).

suspected terrorists were guilty until proven innocent.¹⁷⁴ Additionally, the Act allowed the state to arrest anyone upon mere suspicion of terrorist activity, and hold that individual without bail.¹⁷⁵ During the trial, a defendant did not have an automatic right to face his accusers in court.¹⁷⁶

While the Act was created to enable the government to counter terrorism, the legislation died a natural death upon its expiration in 1995, when public pressure forced parliament not to renew it.¹⁷⁷ The reason for this appears to be the consistent internal and international criticism leveled against the government, accusing it of using the legislation as a means to target minorities and political opponents.¹⁷⁸ The TADA enhanced the state's power with regard to those it saw as a threat to India's national security, which was reminiscent of the emergency rule era. "During this nearly two-year period from 1975 to 1977, Indira Gandhi suspended the democratic constitution, jailed thousands of her opponents, and ruled by decree, arguing that the state faced a national security threat from opposition forces both inside and outside of the country." Many in India were concerned that "if the government's powers were not kept in check, democracy in India could once again be in jeopardy. By 1994, over 76,000 people had been arrested under TADA with only about one percent of these detainees ever being convicted of any crime."

Even though the TADA is no longer in effect, remnants of the law remain. The government can still charge suspected persons retroactively for crimes committed when the TADA was in effect. Additionally, the Supreme Court held one of the central provisions of the TADA, which allows uncorroborated witness statements gathered by the police to be admitted into evidence, constitutional in 1994. This ruling surprised many because "of the longstanding tradition, arising from a historic and widespread public distrust of the police, prohibiting the admissibility of this type of evidence."¹⁷⁹

2. *Prevention of Terrorism Act*

The December 13, 2001 attack on the Indian parliament carried out by five Muslim terrorists resulted in the enactment the Prevention of Terrorism

174. Krishnan, *supra* note 170, at 267–68; TADA, *supra* note 169, at part IV, 21.

175. Krishnan, *supra* note 170, at 268; TADA, *supra* note 169, at part IV, 24.

176. Krishnan, *supra* note 170, at 268.

177. Krishnan, *supra* note 170, at 268–69.

178. See K. Balagopal, *Law Commission's View of Terrorism*, *ECON. & POL. WKLY.*, June 17, 2000, vol. 35, no. 25, at 2114.

179. Krishnan, *supra* note 170, at 268–69.

Act (POTA).¹⁸⁰ POTA was a source of great concern, as it creates an overly broad definition of terrorism, while “expanding the state’s investigative and procedural powers.”¹⁸¹ POTA shares many similarities with the TADA, foreshadowing “a return to widespread and systematic curtailment of civil liberties.”¹⁸² POTA allows suspects to be “detained for up to three months without charge, and up to three months more with the permission of a special judge.”¹⁸³

Since its passage, POTA has been used against political opponents, religious minorities, Dalits, tribals and even children. In February 2003 alone, over three hundred people were arrested under the act.

On February 19, 2003, the Gujarat government charged 131 Muslims under POTA for allegedly attacking Hindus. Human Rights Watch investigations revealed that attacks against Muslims were carried out with extensive state participation and support and planned months in advance of the Godhra attack. The Hindu nationalist Bharatiya Janata party that heads the state government has not charged any Hindus under POTA for violence against Muslims.¹⁸⁴

Section 3 of the POTA defines terrorists and terrorist acts as:

(1) Whoever, (a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the government of India, any state government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act; (b) is or continues to be a member of an association declared unlawful under the unlawful activities (prevention) act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of

180. HRW HUMAN RIGHTS ABUSES WORLDWIDE, *supra* note 128; *see also Six Gunmen Open Fire on Indian Parliament*, OAKLAND TRIB., Dec. 13, 2001.

181. HRW HUMAN RIGHTS ABUSES WORLDWIDE, *supra* note 128.

182. *Id.* (Under TADA, tens of thousands of politically motivated detentions, acts of torture, and other human rights violations were committed against Muslims, Sikhs, Dalits (so-called untouchables), trade union activists, and political opponents in the late 1980s and early 1990s).

183. *Id.*

184. *Id.*

human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act. For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism.¹⁸⁵

On September 17, 2004, the new Indian government of Prime Minister Manmohan Singh announced that it would honor its election pledge to repeal POTA and amend its existing laws to target terrorist activity.¹⁸⁶ The new government has acknowledged that certain provisions of POTA allowed for widespread abuse, such as dispensing with the presumption of innocence, the compulsory denial of bail, and the admissibility of confessions despite the rampant use of torture and coercion by police and security forces.¹⁸⁷

The complexity and scope of the threat India faces are apparent. Unlike nations that face a single threat or a multitude of threats emanating from a single source, India must develop and implement a balanced response to three separate and distinct threats. This reality presents Indian leaders with enormous challenges, especially difficult because India is a democracy and is therefore obligated to balance legitimate national security considerations with equally legitimate civil rights concerns. None of the other nations surveyed here face challenges of such scope. Besides facing three distinct threats, India is an immense subcontinent with a large population, and must therefore contend with each of these threats on a huge scale.

Home Minister Advani was quick to point out (during the debate on the proposed legislation) that the Supreme Court had also made recommendations as to police conduct during investigations.¹⁸⁸ According to Advani, these recommendations were incorporated into the new bill.¹⁸⁹ For example, under POTA defendants could invoke the right to silence, and police had to provide warnings that anything defendants said in the course of the interrogation could be used in court against them.¹⁹⁰ Moreover, POTA explicitly barred the police from using coercion in order to obtain a statement from an individual.¹⁹¹ The state could punish any police official found to have abused this authority with a fine and up

185. The Prevention of Terrorism Act, 2002, Act No. 15 of 2002, available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm> (last visited Nov. 7, 2005) [hereinafter Prevention of Terrorism Act].

186. Human Rights Watch: Human Rights News, *India: POTA Repeal a Step Forward for Human Rights: Government Should Dismiss All POTA Cases* (Sept. 22, 2004), <http://hrw.org/english/docs/2004/09/22/india9370.htm>.

187. *Id.*

188. See V. Venkatesan, *POTA Prospects*, 19 FRONTLINE, Mar. 30–Apr. 12, 2002, available at <http://www.frontlineonnet.com/fl1907/19070220.htm>.

189. *Id.*

190. Prevention of Terrorism Act, *supra* note 185, art. 32(2).

191. Venkatesan, *supra* note 188.

to two years in prison. POTA also afforded defendants the statutory right to appeal a criminal conviction to a state high court.¹⁹² For these reasons, both Advani and Prime Minister Vajpayee promised that POTA could effectively combat terrorism, while protecting defendants' rights to due process and a fair trial.

Some members of the opposition who argued against POTA's passage charged that the Bhartiya Janta Party (BJP) was using POTA as a means of pandering to its Hindu fundamentalist constituency. Others suggested that POTA was not so much an anti-terrorism measure as a "terrorist law [that would be] . . . used to terrorise minorities." Still others worried that the BJP would employ POTA as a tool to harass or threaten political enemies who disagreed with government policy. These dissenting voices nevertheless failed to carry the day,¹⁹³ though ultimately the Act was repealed.

VIII. CONCLUSION

This article has addressed the policy and legislative responses of the five surveyed nations. All five nations face threats from international terrorism, some of which are similar, and some which are not. Terrorist threat that is domestic both in source and execution is not within the purview of the article. The United States is clearly under attack from international, radical fundamentalist Islamic terrorism, which has attacked Americans both domestically and overseas. The American response to 9/11, as detailed above, has been twofold: the enactment of the Patriot Act and establishment of the military commissions on the one hand, and the approach delineated in the National Security Strategy Document on the other. As noted, previous American administrations were unable to implement a consistent policy, although they certainly articulated one. Israel has responded over the years to Palestinian terrorism with a very consistent policy. Over the past four years, that policy has included new measures, such as targeted killings and the construction of a security fence. Some of these policies have been frozen in response to a change in Palestinian leadership. Russia has responded to Chechen terrorism forcefully both in terms of policy and legislation. Though Chechnya is seeking the creation of an independent state, the conflict is relevant to this survey, because it is Islamic in focus and supported by external

192. Prevention of Terrorism Act, *supra* note 185, art. 34.

193. Krishnan, *supra* note 170, at 271-73.

Islamic sources. According to some, if the United States had not attacked Iraq, Chechnya would have been the next great breeding ground for Islamic terrorism, as Afghanistan was during the Soviet occupation.

Spain's response to international terrorism has been fundamentally and diametrically opposed to that of the United States, Israel, and Russia. While Spain had established a policy and enacted legislation to counter the Basques that resembled the responses of the other countries in this survey, its response to international terrorism has been thoroughly out of step with these countries' response. India has confronted its multitude of threats by enacting legislation that gives law enforcement the tools necessary to counter terrorism. Though this legislation has received criticism—e.g., from the Human Rights Watch report—India is seemingly making significant efforts to implement a balanced approach in response to multiple threats.

All five nations have fully functioning legal systems that are available to try terrorists. All five have enacted legislation in response to terror attacks. Finally, all five have developed a national policy in response to such attacks. Four of the five have developed similar policies, while Spain has gone down a very different road in response to international terrorism.

As we are clearly in the age of international terrorism, counterterrorism measures must similarly be globalized. Undertaking a critical comparative analysis of different nations' response to similar threats will enable the targets of terrorism to develop the tools necessary to counter this great threat. While the five surveyed nations have different cultures, political systems, and pressures, histories and realities, their respective governments are all charged with the same basic mission: to protect innocent citizens. By examining, analyzing, and ultimately implementing theories and practices from other countries, these nations will better be able to perform this most important mission.