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# Autocatalytic Regime Theory and UNSC Spawned Cooperative Counterterrorism Part II: Addressing the Apprehension

Nawi Ukabiala

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# Autocatalytic Regime Theory and UN Spawned Cooperative Counterterrorism Part II: Addressing the Apprehension

Nawi Ukabiala\*

*Asymmetrical warfare is a euphemism for terrorism, just like  
collateral damage is a euphemism for killing innocent civilians.*

—Alan Dershowitz

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## I. INTRODUCTION

Part I of this project mapped the anatomy of the counter-financing of terrorism regime (1267 CFT Regime) generated by the United Nations Security Council's (UNSC) 1267 resolution.<sup>1</sup> It posited a novel descriptive framework for understanding certain cooperative enterprises in international relations termed "autocatalytic regime theory."<sup>2</sup> Autocatalysis is a self-sustaining reaction in which a molecule catalyzes a reaction, which in turn produces more of that molecule.<sup>3</sup> For example, UNSC+FATF=CFT is a reaction where two molecules, UNSC & FATF, combine to produce CFT. This reaction is autocatalytic if the product "CFT" itself acted as the catalyst for the production of more CFT. As Part I explained, an autocatalytic regime is characterized by autocatalysis—self-reinforcing and evolutionary interactions between elemental actors resulting in accelerated global dissemination of legal norms. The elements of an autocatalytic regime are as follows:

- (1) a supreme set of internationally binding legal rules;
- (2) a prime actor—a centralized authority with the power to formally modify the legal rules;
- (3) a polycentric landscape populated with distinct elemental actors sharing an overlapping interest in the legal rules;
- (4) autocatalytic and evolutionary interactions among the elemental actors and the prime actor; and
- (5) feedback loops to allow for accelerated norm dissemination and evolution.<sup>4</sup>

As discussed in part I, through the autocatalytic process the 1267 CFT Regime has developed into a formidable regulatory and enforcement system characterized by extensive cooperation and incorporation of its dictates into domestic laws.

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<sup>1</sup> See generally Nawi Ukabiala, *Autocatalytic Regime Theory and UNSC Spawned Cooperative Counterterrorism*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 33 (2015) [hereinafter AUTOCATALYTIC REGIME THEORY PART I].

<sup>2</sup> *Id.* at 48–51.

<sup>3</sup> *Id.* at 48.

<sup>4</sup> *Id.* at 50. Feedback loops are information channels that allow for monitoring, assessment, and then the application of support or coercion as necessary. See *id.* at 49–51.

Meanwhile, apprehending terrorists remains as challenging as ever. Terrorist networks are increasingly adept at exploiting the characteristics of democratic society—namely free press, open borders, and due process—to further their ends and avoid neutralization.<sup>5</sup> They are increasingly security conscious, creatively funded, and specialized in the use of advanced technology, biochemistry, and engineering.<sup>6</sup> The threat is ever evolving and characterized by diffuse and lethal groups that transcend national boundaries, forge ties with organized criminal enterprises, prey on power vacuums in weak states, use the internet to incite violence and recruit sympathizers, and empower themselves through cross-fertilization and inter-organizational learning.<sup>7</sup> Even the structure of the central target in the war on terror, Al-Qaida, has become transnational, polycentric, and evolutionary.<sup>8</sup> Yet, there is a lack of a globalized standard in regard to extradition requests and the grants of political asylum in terrorism cases.<sup>9</sup> Many important potential partners

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<sup>5</sup> See generally, Marvin Kalb & Carol Saivetz, *The Israeli-Hezbollah War of 2006: The Media as a Weapon in Asymmetrical Conflict*, 12 INT'L JOURNAL OF PRESS/POLS. 43 (2007) (discussing how terrorists exploit human rights protections and mass media).

<sup>6</sup> See e.g., Counter-Terrorism Comm., Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States 73–74, U.N. Doc. S/2011/463 (Sept. 1, 2011) [hereinafter GLOBAL SURVEY] (acknowledging CFT challenges posed by technological developments in payment methods); *Growing Evidence of Links Between Counterfeit Goods and Terrorist Financing: Interpol Highlights Potential Risk to Public Safety*, INTERPOL (Apr. 6, 2004), <http://www.interpol.int/News-and-media/News-media-releases/2004/PR012> (linking counterfeit goods produced by oppressed child laborers to terrorist groups such as Hezbollah).

<sup>7</sup> See e.g., GLOBAL SURVEY, *supra* note 6, at 6 (noting the diffuse nature of the Al Qaida network and its success in exploiting continued instability in certain States); Robert M. Chesney, *Postwar*, 5 HARV. NAT'L SEC. J. 305, 309 (2014) (“[A] Qaeda for years had been fragmenting, with its core gradually ceding center stage to a profusion of co-branded affiliates with varied objectives and considerable operational independence.”); Stephen I. Landman, Note, *Funding Bin Laden's Avatar: A Proposal for the Regulation of Virtual Hawalas*, 35 WM. MITCHELL L. REV. 5159, 5166 (2009) (discussing how terrorist groups use the internet for “propaganda, recruitment, and e-learning”).

<sup>8</sup> See Leah Farrall, *How Al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength*, 90 FOREIGN AFF. 128 (2011), available at <http://www.foreignaffairs.com/articles/67467/leah-farrall/how-al-qaeda-works> (explaining how Al Qaeda has evolved into an organization with a diffuse network hierarchy, “more members, greater geographic reach, and a level of ideological sophistication and influence it lacked ten years ago”).

<sup>9</sup> GLOBAL CENTER ON COOPERATIVE SECURITY, INTERNATIONAL PROCESS ON GLOBAL COUNTER-TERRORISM COOPERATION: A COMPILATION OF KEY DOCUMENTS 11 (2008), available at [http://globalcenter.org/wp-content/uploads/2008/09/international\\_process.pdf](http://globalcenter.org/wp-content/uploads/2008/09/international_process.pdf) [hereinafter INTERNATIONAL PROCESS].

lack the political will and operational capacity to pursue the sort of robust counterterrorism initiatives that could enhance interdiction and apprehension efforts.<sup>10</sup>

Partly, due to these difficulties the Obama Administration has expanded and systematized the Bush Administration's practice of utilizing drone strikes to target suspects.<sup>11</sup> Further, the United States and others regularly engage in renditions to justice and extraordinary renditions to injustice.<sup>12</sup> These problematic alternatives to lawful extradition are frequently characterized by collateral damage, violent breaches of sovereign boundaries to capture suspects, and seizures occurring without the permission of the host country. The willingness of the US to wield its enormous military and economic superiority with disregard for proportionality and with only the thinnest veil of multilateralism has provoked hostility even among allies.<sup>13</sup> In addition to raising significant concerns under human rights and humanitarian law, the status quo has detrimental implications for prospective cooperative efforts.

At this stage, it is imperative to recognize that (1) apprehension of terrorists is preferable to systematized targeted killing, and (2) a transnational, polycentric, and evolutionary threat mandates a response in kind. The diffuse, complex, and dynamic nature of the challenge presented makes it difficult to forecast the effects of regulation. This augments the appeal of a polycentric regulatory approach capable of flexible adaptation. As seen in the 1267 experience, a global autocatalytic regulatory regime is capable of addressing global collective

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<sup>10</sup> See U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2012 (May 30, 2013), available at <http://www.state.gov/j/ct/rls/crt/2011/195549.htm> (noting that over fifteen States contain terrorist safe havens—"ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both").

<sup>11</sup> Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1581 (2013) ("President Obama stated that the United States engages in targeted killing only when it lacks the ability to capture instead, and key White House adviser John Brennan asserted that lethal force was used only when capture was 'not feasible.'").

<sup>12</sup> See Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 THE LONG TERM VIEW 52, 55-60 (2006) (discussing the practice of "rendition to justice" and its policy-based transmogrification into the illegal practice of "extraordinary rendition").

<sup>13</sup> See José E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'?*, 24 AM. U. INT'L L. REV. 811, 813 (2009) ("Particularly since the United States' invasion of Iraq in 2003, European legal scholars have sometimes portrayed the United States as a renegade nation bent on defying global norms and threatening to create a 'lawless world' . . .").

action problems with accountability and transparency, while representing the interests of the world's most powerful actors, as well as its weakest.<sup>14</sup> The CFT experience provides the basal schematic for a UNSC spawned global apprehension regime. This project conceives the CFT regime as an exercise in polycentric global governance, refined through global administrative law (GAL). In addition to incorporating those refinements where applicable, this proposal seeks to leverage the 1267 CFT Regime's success in changing State behavior by generating a polycentric network characterized by autocatalytic cooperation. This perspective shifts the dialogue in a more constructive direction, eschewing false dilemmas and impelling relevant players into sustainable coordinative action within a more robust framework.

It is important to note at the outset, while this article advances an institutionalist reliance on cooperation between different types of international organizations (IOs), it does not advance the false promise that such a regime is a panacea for the tragedies associated with terror and counterterrorism. With a few notable exceptions, this article does not offer a normative perspective for approaching counterterrorism. Thus, while this article acknowledges the inevitable specter of a framework that remains somewhat endogenous to the geopolitical balance of power, it is more concerned with promoting effectiveness and fairness than promoting global democracy. Also, the article does not entertain the naïve presumption that its proposal could eviscerate the incidence of violence and intransigence by guaranteeing unwavering compliance. In other words, a complex political calculus will frequently affect a State's decision whether to pursue apprehension through the regime or cooperate with an apprehension request. This proposal seeks to alter that calculus by providing a platform with an effective alternative to violence, by providing for long-term socialization, and by raising the political costs of playing outside the rules. Thus, it is pragmatist at its core.

The article employs the autocatalytic regime conceptual framework, for the purpose of envisaging a global terrorist

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<sup>14</sup> See Navin Beekarry, *The International Anti-Money Laundering and Combating of the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law*, 31 NW. J. INT'L L. & BUS. 137, 189 (2011) (discussing the enhancement of FATF legitimacy, transparency, and accountability as well as continued shortcomings). See generally Jared Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169 (2006) (describing the procedural controls, checks, and balances that enhance FATF accountability).

apprehension regime. Part I provides the potential content of a UNSC global terrorist apprehension resolution—the fundamental legal rules that would underlie the regime. Part II seeks to identify potential transparency, accountability, and legitimacy problems the regime may face and address them using, *inter alia*, lessons learned from the 1267 experience. In Part III, the article proceeds to advance a system that is termed “dualistic,” in that initial apprehension determinations made by the UNSC are expressly subject to extradition review by local courts. Part IV seeks to diagram the anatomy of an autocatalytic apprehension regime, identifying prospective elemental actors and the autocatalytic interactions between them. Part V provides the theoretical bases justifying the employment of a UNSC incepted apprehension regime by, *inter alia*, developing two tragedies of the commons paradigms. This is achieved by positing both global counterterrorism and the global initiative to bring counterterrorism in consonance with human rights norms as global public goods.

## II. CONTENT OF A UNSC TERRORIST APPREHENSION RESOLUTION

Like the 1267 CFT Regime, the proposed apprehension regime is envisaged as the progeny of a UNSC resolution. The UNSC would adopt a resolution: *reaffirming* its unequivocal condemnation of networks supporting international terrorism;<sup>15</sup> “[r]eiterating its support for international efforts to root out terrorism, in accordance with the Charter of the United Nations;”<sup>16</sup> *condemning* States that knowingly allow their territory to be used as a base for terrorist training and activities, including the export of terrorism; *reaffirming* that acts of international terrorism constitute one of the most serious threats to international peace and security; *recognizing* the duty to lawfully apprehend terrorist suspects; “[b]earing in mind the necessity of respecting human rights and international humanitarian law in the fight against terrorism[;]”<sup>17</sup> and acting under Chapter VII of the Charter of the United Nations.

The resolution would call on States and IOs to “afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings.”<sup>18</sup> It would ideally, by reference to

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<sup>15</sup> See S.C. Res. 1373, preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>16</sup> See S.C. Res. 2120, preamble, U.N. Doc. S/RES/2120 (Oct. 10, 2013).

<sup>17</sup> Rep. of the Ad Hoc Comm., established by Gen. Assembly Resolution 51/210 of Dec. 17, 1996, 16th Sess., April 8–April 12, 2013, at 4, U.N. Doc. A/68/37; GAOR, 68th Sess., Supp. No. 37 (2013) [hereinafter DRAFT CONVENTION].

<sup>18</sup> *Id.* at art. 15(1).

the current draft Convention on International Terrorism (Draft Convention), define terrorism as unlawfully and intentionally causing:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article defines terrorism as resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.<sup>19</sup>

Additionally, the definition would criminalize attempts, credible and serious threats, accomplice participation, and organizing or directing a person to do one of the above acts.<sup>20</sup> These would constitute the proscribed acts. As set forth in the Draft Convention, joint criminal enterprise liability would be established where a person:

(c) Contributes to the commission of [a proscribed act] by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of the present article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of the present article.<sup>21</sup>

Additionally, the resolution would incorporate as terrorist offenses, any crimes identified “in the international conventions and protocols

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<sup>19</sup> *Id.* at art. 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



relating to terrorism.”<sup>22</sup> The resolution would also call on all States to “adopt such measures as may be necessary . . . to ensure that [terrorist acts] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”<sup>23</sup>

The resolution would require member States to recurrently provide reports regarding implementation of the measures contained therein. It would further establish the “Terrorist Apprehension Committee (TAC),” a subsidiary organ of the UNSC, consisting of all members of the Council. The TAC would monitor compliance by receiving and reviewing State reports regarding implementation of the resolution’s measures. The TAC would also review information regarding violations of the measures and issue reports to the UNSC identifying those in violation and recommending appropriate responses. The resolution would further establish a Monitoring Group, consisting of experts, tasked with assisting the TAC in monitoring compliance and issuing recommendations to member States. Thus, the Monitoring Group would coordinate with relevant UN bodies, States, IOs, and NGOs for the purpose of monitoring compliance with the resolution, identifying deficiencies, and recommending reforms on any level of implementation. Additionally, the resolution would direct Member States and the TAC to collaborate with the International Criminal Police Organization (INTERPOL) in coordinating apprehension efforts.<sup>24</sup>

Only Member States would be authorized to submit requests to designate individuals for apprehension to the TAC. States would be required to provide with submissions, “sufficiently solid factual evidence”<sup>25</sup> to allow the committee to make a “reasonable basis” determination that an individual had engaged in terrorist activity.<sup>26</sup> The resolution would encourage States to declassify and include relevant information designated as classified by its national authorities but would not require this. Also, it would require States to indicate which information the State wished to keep confidential. An Office of the Human Rights Advocate (HRA) would be established with a permanent mandate to protect the precepts of due process through vigorous inquisition of the Member State’s submission. The entire submission

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<sup>22</sup> S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

<sup>23</sup> DRAFT CONVENTION, *supra* note 17, at art. 7.

<sup>24</sup> S.C. Res. 1617, preamble & ¶¶ 8, 9, U.N. Doc. S/RES/1617 (July 29, 2005).

<sup>25</sup> Joined Cases C-584/10 P, C-593/10 P, & C-595/10, *Comm’n v. Kadi*, 2013 E.C.R. ¶ 119 (CJEU July 18, 2013) [hereinafter *Kadi II*].

<sup>26</sup> Rome Statute of the International Criminal Court art. 15, July 17, 1998, 2187 U.N.T.S. 90 [Hereinafter *ROME STATUTE*].

of the requesting State would be provided to the HRA. At this preliminary stage, the HRA, in her discretion, could challenge a Member States' decision to withhold classified information or keep certain information confidential throughout the TAC proceedings. This challenge would result in a "confidentiality hearing" in which the HRA would review the information to determine whether there was a "reasonable danger that compulsion of the evidence w[ould] expose military matters which, in the interest of national security, should not be divulged."<sup>27</sup> She would then issue a recommendation to the requesting State regarding whether the information should remain confidential. However, the final determination regarding confidentiality would rest with the requesting State.

The following stage would provide the HRA with a specified time frame to gather relevant information from the TAC, the Monitoring Group, the relevant States, and the UN bodies.<sup>28</sup> The HRA would then issue a report to the TAC containing a "reasonable basis" recommendation, which could only be overturned by a consensus decision of the TAC or by referral to the UNSC.<sup>29</sup> The TAC would then complete a detailed report containing the reasons for its decision. If the TAC determined that a "reasonable basis" existed, the name of the individual would be placed on a secret apprehension list. The TAC would then directly notify the foreign office in the jurisdiction where the suspect was believed to be located. The notification would include the entire TAC file including the request, the identity of the requesting State, the HRA report, and the TAC report. The presumption would be that any confidential information provided to the TAC should be included in the file. The resolution would require all States to maintain judicial procedures designed to protect the confidentiality of such information and report to the TAC in this regard. However, the requesting State would retain the authority to require the withholding of any information provided to the TAC. The absence of confidential information upon which the TAC determination was based would not prejudice the suspect in any related proceedings.<sup>30</sup>

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<sup>27</sup> United States v. Reynolds, 345 US 1, 10 (1953).

<sup>28</sup> S.C. Res. 1904, Annex II, ¶ 2, U.N. Doc. S/RES/1904 (Dec. 17, 2009). The corresponding stage is 60 days under Resolution 1904. A shorter time frame may be justified according to the time-sensitive nature of the apprehension attempt.

<sup>29</sup> U.N. S.C. Comm. on Al-Qaida Sanctions, Guidelines of the Committee for the Conduct of Its Work, ¶ 4(a) (Apr. 15, 2013).

<sup>30</sup> See Rep. of the Office of the Ombudsperson Pursuant to S/RES/1989 (2011), ¶ 42, U.N. Doc. S/2012/49 (2012).

The TAC notification would trigger a binding duty under international law for the State to undertake all appropriate measures to apprehend the individual without delay. The entire TAC file would be provided to the individual once he or she was taken into custody. At the earliest opportunity, the host State would be obliged to notify the TAC and the requesting State and indicate whether the host State planned to pursue a domestic prosecution against the individual for the offense underlying the request. If the host State was unable to establish jurisdiction or unwilling to prosecute, it would be required to initiate a judicial extradition proceeding.<sup>31</sup> Prior to the initiation of the proceedings, the requesting State would be required to certify its intention to criminally prosecute the suspect for a terrorism offense in accordance with the procedural safeguards established under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and other applicable rules of international law.<sup>32</sup> An extradition hearing would be required within thirty days unless the suspect requested a reasonable amount of additional time to prepare his or her defense. The suspect would be afforded the right to counsel, the right of appeal,<sup>33</sup> and

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<sup>31</sup> See generally, M. CHERIF BASSIOUNI, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (discussing the international legal duty of states to either prosecute for international crimes or extradite suspects for prosecution). The proposal does not empower the TAC to determine whether the host State is “unwilling or unable” to conduct prosecutions. See *ROME STATUTE*, *supra* note 26, at art. 17 (establishing specific guidelines for determining when a State is “unwilling” or “unable” to prosecute as a matter of ICC admissibility). Such a provision may impede cooperation by empowering the UNSC to overturn what should be a routine determination within the sovereign authority of the host State. Further, such a provision would render the proposal asymmetric. If the host State is unable to prosecute, what are the chances it is able to conduct satisfactory extradition proceedings? Why not have the UNSC make the final determination in both circumstances? As discussed *infra* at section IV, this proposal does not seek to remedy this line of obstacles by judicializing the UNSC and empowering it to make final judicial determinations. Rather, it seeks to remedy these obstacles through socialization and capacity building. In the same vein, the proposal does not empower the UNSC to assess a domestic trial to determine whether it is “inconsistent with an intent to bring the person concerned to justice.” See *id.* at art. 17(2)(b). There is no reason to believe a host State that conducts a sham trial will not also conduct a sham extradition proceeding. In addition to the judicialization concern, such a provision would also raise thorny *non bis in idem* issues. The UN Model Treaty on Extradition gives States the option to refuse extradition of a person who has already been tried in that state for the offense for which extradition is sought. Model Treaty on Extradition, G.A. Res. 45/116, arts. 3–4, U.N. GAOR 54th Sess., Supp. No. 49A, U.N. Doc. A/45/49, at 212 (Dec. 14, 1990).

<sup>32</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>33</sup> GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 142–43 (Kluwer Law International, 1998)

all of the due process protections required under international law as guaranteed by local extradition procedures.<sup>34</sup> In passing upon the question of whether extradition is warranted the local courts would only conduct a *de novo* determination of whether the requested State had demonstrated reasonable basis to believe the suspect had committed an act of terrorism as defined under the resolution. Such a determination would require a “sufficiently solid factual basis” as articulated by the CJEU in *Kadi II*.<sup>35</sup> In the absence of such a determination, the TAC would be required to remove the suspect from the secret apprehension list. On the other hand, a reasonable basis finding would trigger a binding duty to extradite the suspect to the requesting State without delay. If local authorities wished to indict and try the suspect for any other crime over which it had jurisdiction, extradition could be delayed until the trial and any relevant sentence was concluded. Finally, the resolution would require non-judicial officials in the host state to conduct a risk assessment regarding the prospect of persecution or unfair treatment if the suspect was transferred to the host State and make the final determination accordingly.<sup>36</sup>

### III. TRANSPARENCY, ACCOUNTABILITY, AND LEGITIMACY

Part I of this project recognizes the amplified concerns associated with the transnational exercise of regulatory power within an autocatalytic regime.<sup>37</sup> By definition the autocatalytic regime features binding, regulatory rules initially promulgated at the sole discretion of an anti-democratic prime actor. Subsequently, increasingly intrusive norm dissemination occurs at an accelerated rate due to the autocatalytic interactions between the elemental actors. Therefore, a sagacious employment of the 1267 CFT Regime as a blueprint for an apprehension regime must, at the outset, account for the transparency, accountability, and legitimacy deficiencies that have challenged the 1267 CFT Regime over the years. Further, it must anticipate novel

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(discussing the complications of restrictive rules regarding appeal and positing that “[f]ull appeal should be available on both sides.”).

<sup>34</sup> ICCPR, *supra* note 32, at art. 14, 999 U.N.T.S. 176-77.

<sup>35</sup> *Kadi II*, 2013 E.C.R. ¶ 119.

<sup>36</sup> See, e.g., International Convention Against the Taking of Hostages art. 9, Dec. 17, 1979, 1316 U.N.T.S. 205; G.A. Res. 45/116, art. 3, U.N. Doc. A/RES/45/116 (Dec. 14, 1990).

<sup>37</sup> See AUTOCATALYTIC REGIME THEORY PART I, *supra* note 1, at 44-46, for a discussion of the transparency, accountability, and legitimacy challenges faced by the 1267 CFT Regime, and how the regime evolved to address some of them.

challenges. Where appropriate, this proposal seeks to incorporate mechanisms that have been effective in remedying deficiencies in the administration of the 1267 mandate.<sup>38</sup> Further, the proposal seeks to identify the contextual idiosyncrasies associated with terrorist apprehension and advance familiar mechanisms particularly suited for the context. In order to achieve maximal accountability and legitimacy, the proposed framework must be promulgated as an effort to protect international peace and security, while simultaneously accounting for due process and human rights considerations. Thus, the proposed apprehension committee, as well as the elemental actors within the regime must take decisions with due regard for human rights. This requires not only the adherence to the rules and procedures built into the proposal, but also a venacularization of the discourse within and between the actors each of which should have a distinct human rights element that should not be marginalized.<sup>39</sup>

Numerous experts have asserted that terrorism should be understood as criminal activity addressed under a law enforcement model with all of the fundamental due process requirements.<sup>40</sup> While the Draft Convention acknowledges terrorism as a *criminal act*, it does not expressly preclude the application of a war model to counterterrorism policy.<sup>41</sup> As discussed *infra* at section VI.A., this article does not offer a normative program to address this question but does posit that, given the apparent gap in the law, apprehension of terrorist suspects is preferable to targeted killing. The proposed framework advances this normative preference by expressly stating it and affording suspects a standardized set of robust procedural safeguards on both the international and domestic level. This is intended to minimize the incidence of arbitrary

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<sup>38</sup> *See id.*

<sup>39</sup> INTERNATIONAL PROCESS, *supra* note 9, at 38.

<sup>40</sup> Carlos Fernando Diaz-Paniagua, coordinator of the negotiations on Draft Convention, commented that a comprehensive definition of terrorism must be grounded in “criminal law treaty principles” and “the basic human rights obligation to observe due process.” ROBERT P. BARNIDGE, JR., *NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* 17 (T.M.C. Asser Press 2008).

<sup>41</sup> DRAFT CONVENTION, *supra* note 17, at preamble, art. 6(a) (requiring State parties to establish terrorist acts “as criminal offences”). The draft convention does not unequivocally state whether human rights law or international humanitarian law determines the due process safeguards afforded terrorist suspects. However, the repeated reference to terrorism as a criminal act seems to preclude the war model approach to counterterrorism. Notably, developed democracies generally do not respond to terrorist elements within their borders by recourse to unqualified and lethal military force.

decision-making and enhance the accountability and legitimacy of the framework.<sup>42</sup>

For several reasons, the proposal expressly places the burden on the requesting State to provide sufficient evidence for a “reasonable basis” finding. Firstly, the “reasonable basis” standard is an institutionally familiar standard within the UNSC.<sup>43</sup> Secondly, the standard is prevalent in other international legal contexts, including the Rome Statute.<sup>44</sup> Thirdly, it is in accord with the *Kadi II* standard requiring “specific and concrete reasons” supported by a “sufficiently solid factual basis.”<sup>45</sup> The application of a consistent standard firmly rooted in international law promotes consistency and enhances the prospect of reasoned decision making. The proposal’s standardized procedures account for all elements of lawful extradition generally recognized under international law.<sup>46</sup> Traditional extradition law does not generally provide for the extradition of a suspect based on evidence not disclosed to the host country. By requiring sufficient evidence to support the allegations and adhering to normal extradition procedures, the framework ensures there is a valid legal basis for transfer.<sup>47</sup> Furthermore, it ensures the formal procedures designed to protect international law norms, such as the principle of legality and the essential rights of the person, are not being circumvented.<sup>48</sup>

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<sup>42</sup> Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

<sup>43</sup> Dominic Hoerauf, *The United Nations Al-Qaida Sanctions Regime After UN Resolution 1989: Due Process Still Overdue?*, 26 TEMP. INT’L & COMP. L.J. 213, 218 (2012).

<sup>44</sup> ROME STATUTE, *supra* note 26, at art. 15(3).

<sup>45</sup> *Kadi II*, ¶¶ 116, 119.

<sup>46</sup> There are five requirements typical of extradition treaties: reciprocity, double criminality, extraditable offense, non-inquiry, and specialty. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 384–93 (3d ed. 1996). For an in depth discussion, *see id.* Given human rights abuses that have been associated with the transfer of suspects, the proposed framework circumscribes the non-inquiry requirement by requiring requesting State certification of intent to criminally prosecute in accordance with Article 14 of the ICCPR. The proposed regime encourages dual criminality by requiring the incorporation into domestic legislation of the definition of terrorism contained in the Draft Convention. However, it treats the criminalization of terrorism dictate as self-executing and, thus, does not expressly require dual criminality for extradition. This feature is designed to circumvent the impasse what has been a major contributor to the present state of affairs.

<sup>47</sup> *See* CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, MINIMUM STANDARDS FOR TRANSFER: INTERNATIONAL LAW CONCERNING RENDITION IN THE CONTEXT OF COUNTER-TERRORISM 2–4 (2009), available at <http://chrgj.org/wp-content/uploads/2012/10/legaladvisory-detainees-2009.pdf>.

<sup>48</sup> *See id.*

Additionally, the certification of intent to prosecute for the terrorist offense at issue could reduce the incidence of refolement and preventive detention.

Unlike a listing determination in the 1267 process, the TAC apprehension determination is akin to an indictment. In this context, a lesser degree of transparency is appropriate because, in most cases, alerting the suspect of listing would substantially frustrate the apprehension process. Furthermore, the framework does not guarantee absolute transparency by mandating States declassify information or disclose confidential evidence. Such a requirement would be unrealistic and detrimental to the pursuit of cooperation, as key players would refuse to participate. On the other hand, by ensuring the refusal to disclose classified information will not prejudice the suspect, a significant incentive is provided to promote greater transparency and enhanced cooperation. Requiring that the suspect is apprised of the identity of the requesting State also enhances transparency and addresses a previous criticism of the 1267 regime.

#### IV. DUALISTIC INSTEAD OF DUELING, DUALIST DETERMINATIONS

This framework seeks to maximize procedural due process safeguards by promoting a wholesale incorporation of the Office of the Ombudsperson (OP) innovation as it subsists under Resolution 1989. In anticipation of full judicial proceedings at the State level, the Office of the HRA represents the optimal balance between security and human rights accountability within the UNSC. This dual level approach to the interaction between domestic/regional and universal legal orders is somewhat akin to that begotten by the Court of Justice of the European Union (CJEU) in the *Kadi* rulings.<sup>49</sup> The proposal is dualist-like or dualistic, because domestic courts are empowered to make a determination distinct from the UNSC determination. However, it is not purely dualist because the fundamental legal rules and procedures are in harmony. Various 1267 related proposals call for the UNSC to provide procedural protections at the UN level sufficient to satisfy human rights norms.<sup>50</sup> In the context of UNSC Chapter VII action, this approach is

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<sup>49</sup> The CJEU's approach in *Kadi* has been described as "sharply dualist." See Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 2 (2010).

<sup>50</sup> See, e.g., Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT'L & COMP. L. 187, 199–202 (2010) (proposing further reforms to the 1267 listing procedure designed to protect individual rights); Jared Genser & Kate Barth, *When Due*

bizarre. The UNSC is a purely political body responsible for international peace and security. That context is inimical to universally fair, robust, and impartial judicial proceedings, particularly when fundamental human rights are implicated. Moreover, given the absence of sovereign equality in the functioning of the UNSC, the rulings of an internal UNSC apprehension (or 1267) court may invoke unpalatable notions of hegemonic international law and kangaroo justice. It is one thing for the UNSC to revolutionize its mandate by recasting resolution-based authorizations as the primary collective security mechanism and promulgating a sweeping counterterrorism regime. It is an entirely different thing for the UNSC to start judicializing itself.<sup>51</sup> Compounding this legitimacy concern is the absence of mandatory review by a body normatively understood to be judicial in nature. Unlike the Bundesverfassungsgericht in *Solange II*,<sup>52</sup> domestic courts would not be reviewing the acts of an organ of a comprehensive governance structure that includes a court of universally binding jurisdiction empowered to protect fundamental rights. Thus, it is unlikely that any UNSC judicial mechanism could satisfy all domestic courts.

Due to these considerations, it is easy to imagine that some domestic and regional courts, in maintenance of their autonomy, will end up reversing decisions of an internal UNSC apprehension court. Indeed, this result is inevitable unless the UNSC judicial mechanism adopts the highest common denominator on every element of due process, notwithstanding the reality that attainment of due process in the aggregate depends on the relative strength of interdependent, indivisible protections. The failure to provide the most robust protection in regards to any one element could be fatal in any given judicial order. The resulting disaccord between a fully judicialized internal UNSC mechanism and domestic and regional courts would have a significant destabilizing effect on the credibility, legitimacy, and primacy of the UNSC. It could also have detrimental implications for the legitimacy of courts seeking to uphold domestic constitutional conceptions of due

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*Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1, 37–40 (2010) (essentially proposing full judicialization of the 1267 Committee).

<sup>51</sup> See U.N. CHARTER art. 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations.”).

<sup>52</sup> Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 339 (Ger.).



process.<sup>53</sup> For domestic and regional courts seeking to protect a treaty-based conception of due process, it would inevitably place them in the anomalous position of justifying a ruling defying the UNSC and Article 103 of the UN Charter. Such rulings could also have detrimental implications for the relevant State or the regional order.<sup>54</sup> In the context of terrorist sanctions or apprehension, this dilemma can be diffused by the adoption of a dualistic approach at the outset.<sup>55</sup>

With the innovation of the OP, the UNSC is increasingly making 1267 sanctions determinations with improved administrative safeguards and due regard for human rights considerations. The proposed apprehension regime incorporates this innovation. This is because it is preferable to have the UNSC take a decision, with due regard for human rights, which is normatively understood as a security decision, and then delegate the determination that is normatively understood as a due process decision to domestic courts.<sup>56</sup> In this context, a determination of a domestic court that is contrary to a UNSC listing determination would not be fundamentally understood as defying UNSC Chapter VII action. Rather, it would easily be understood as a distinctly judicial determination, with distinctive due process protections including the involvement of the suspect. Thus, this regime preempts the perceptions that domestic courts are undermining the institutional legitimacy and credibility of the UNSC, or that the UNSC is infringing on sovereign authority. This simultaneously diminishes the perception of both horizontal and vertical illegitimacy. Judges, presumably appointed or elected through domestic democratic processes, make the final determinations, not the UNSC, which inherently lacks sovereign

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<sup>53</sup> See U.N. CHARTER art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

<sup>54</sup> DE BÚRCA, *supra* note 49, at 3 (discussing how the CJEU holding in *Kadi I* undermines EU’s image as a “virtuous international actor” with an ambition “to carve out a distinctive international role for itself as a ‘normative power’ committed to effective multilateralism under international law”).

<sup>55</sup> See William Diaz, *Dualist, but not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime*, 5 LIBERTY U. L. REV. 333, 334 (2011) (discussing how US implementation of the 1267 measures has been dualist but adherent to the primacy of UNSC resolutions).

<sup>56</sup> Some jurists have argued that a system allowing for uncontrolled interaction between the 1267 regime and domestic courts may be desirable because it creates an incentive to “reach nuanced political compromises which balance the needs of security with the needs of civil- liberty.” Peter Guthrie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 521–22 (2004). It also creates the potential for a system destabilizing legitimacy crises. The controlled interaction proposed herein may be the compromise envisaged.

equality and democratic involvement. Domestic courts, employing the requisite due process safeguards fill the vital role of holding the UNSC accountable to the individuals affected by its decisions. Additionally, such a delegation, when accompanied with specific substantive and procedural requirements would still foster universal, judicial harmonization of due process procedures in the context of counterterrorism in a way the 1267 regime has struggled to do.

## V. DIAGRAMMING AN AUTOCATALYTIC APPREHENSION REGIME

The 1267 CFT experience provides a blueprint for diagramming an apprehension regime with the capacity to captivate transnational actors, States, jurists, scholars, and NGOs and catalyze autocatalytic cooperation between them. By appreciating the implications of autocatalysis demonstrated by the 1267 CFT Regime, a global terrorist apprehension regime can be deliberately designed to maximize the accelerated norm dissemination associated with autocatalysis. Professor Robert Keohane has long promoted a model of complex interdependence in which six criteria are necessary for an effective regime complex: coherence, accountability, determinacy, sustainability, epistemic quality, and fairness.<sup>57</sup> This section explores the prospect of incorporating actors, of differing scopes and purposes, to achieve a polycentric regime characterized by autocatalysis.<sup>58</sup> It also assesses the potential for built in feedback loops to provide for monitoring, assessment, support or coercion of the actors. These feedback loops are critical to the dynamism of the regime and the ability to achieve: (1) movement towards counterterrorism through “due process”; (2) increased transparency, accountability, and legitimacy;<sup>59</sup> and (3) cooperative phenomena such as capacity building and the scaffolding of institutional learning which will be transferred over time.

This proposal presumes the UNSC will reach out to relevant IOs and transnational actors to foster cooperation as it did in the 1267 CFT Regime. Again, one of those key actors would presumably be INTERPOL. INTERPOL already provides an immense contribution to

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<sup>57</sup> Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 16–17 (2011). Determinacy is not particularly at issue because an autocatalytic regime is essentially a regime complex without indeterminacy.

<sup>58</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277 (2004).

<sup>59</sup> Transparency is generally conceived as public accessibility and reasoned public decisions. However, increased information sharing between relevant actors can also be considered a qualified increase in transparency.

global collective action against international terrorism.<sup>60</sup> It is a critical forum for intelligence sharing, law enforcement training, and technical assistance. Furthermore, its counterterrorism resources including “its secure global police communication link, its terrorism-related databases, its police support services, and its training workshops” have been linked to 74 arrests in 2006 and 104 arrests in 2007.<sup>61</sup> One of the suspects from the 2004 Madrid train bombing was arrested in 2005 pursuant to an INTERPOL Red Notice.<sup>62</sup> The cooperative platform between Interpol and the UNSC is already extant. A modification of the UNSC Special Notice to include suspects on the TAC apprehension list is an easily conceivable autocatalytic interaction.

Counterterrorism capacity building in fragile States is imperative to the effectiveness of terrorist apprehension efforts. Such efforts require an “integrated approach to justice, security, governance, and development.”<sup>63</sup> In regards to implementation, each country is operating at different levels of effectiveness and efficiency. Thus, capacity building requires a progressive, phased approach with an eye to achieving effective implementation over time.<sup>64</sup> Like the FATF in the 1267 CFT Regime, the Global Counterterrorism Forum (GCTF) may provide an informal, multilateral forum for accelerated norm dissemination through the employment of process-based feedback loops. Built in mechanisms for monitoring and assessment of implementation and effectiveness can lead to targeted capacity building. Alternatively, the GCTF may provide a diplomatic platform to apply coercive pressure on uncooperative States. Furthermore, like the Egmont Group, the GCTF is a potential forum for enhanced operational coordination.

Launched by its co-chairs, the US and Turkey in 2011, the GCTF has 30 founding members (29 countries and the EU).<sup>65</sup> In order

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<sup>60</sup> For a comprehensive discussion of Interpol’s counterterrorism efforts, see Todd Sandler et al., *An Evaluation of Interpol’s Cooperative-Based Counterterrorism Linkages*, 54 J.L. & ECON. 79 (2011).

<sup>61</sup> *Id.* at 81, 90.

<sup>62</sup> *Id.* at 84–85.

<sup>63</sup> Center on Global Counterterrorism Cooperation, Policy Brief, *Criminal Justice and Rule of Law Capacity Building to Counter Terrorism in Fragile Institutional Contexts: Lessons From Development Cooperation*, at 1 (Dec. 2012), available at [www.globalct.org/wp-content/uploads/2013/04/MS\\_policybrief\\_1217.pdf](http://www.globalct.org/wp-content/uploads/2013/04/MS_policybrief_1217.pdf).

<sup>64</sup> INTERNATIONAL PROCESS, *supra* note 9, at 45–46.

<sup>65</sup> *Global Counterterrorism Forum*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/gctf/>.

to join, countries must endorse its core principles and objectives.<sup>66</sup> The GCTF regularly convenes key policymakers and practitioners, as well as experts from the UN and other multilateral bodies.<sup>67</sup> The primary aim of the forum is “to help countries around the world enhance their capacities—and especially those of their civilian institutions—to meet the terrorist threats within their borders and regions.”<sup>68</sup> It seeks to achieve this goal by “identifying critical civilian [counterterrorism] needs, mobilizing the necessary expertise and resources to address such needs[,] and enhance[ing] global cooperation.”<sup>69</sup> The GCTF focuses specifically on “strengthening criminal justice and other rule of law institutions” in order to “promotes a strategic, long-term approach to dealing with the threat.”<sup>70</sup> Currently, a central part of its mission is “the implementation of the UN Global Counterterrorism Strategy and, more broadly, its work complements and reinforces existing multilateral [counterterrorism] efforts, starting with those of the UN.”<sup>71</sup> Its founding declaration calls for “full, comprehensive, and balanced implementation of the UN Global Counter-Terrorism Strategy and the UN counterterrorism framework more broadly.”<sup>72</sup> The declaration simultaneously recognizes “that all counterterrorism measures must be fully consistent with international law, in particular the UN Charter, as well as international human rights, refugee, and humanitarian law.”<sup>73</sup>

The GCTF is structurally comprised of a Coordinating Committee, Working Groups, and an Administrative Unit.<sup>74</sup> The working groups have the potential to fulfill the legal and regulatory functions of the Financial Action Task Force (FATF) in the 1267 CFT Regime. Each working group focuses on “discrete thematic topics, as well as regional

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<sup>66</sup> See GLOBAL COUNTERTERRORISM FORUM, TERMS OF REFERENCE (Sept. 22, 2011) [hereinafter TERMS OF REFERENCE], available at <http://www.thegctf.org/documents/10162/13878/Terms+of+Reference.pdf>.

<sup>67</sup> See Press Release, U.S. Dep’t of State, No. 2012/1991, Ministerial Plenary Co-Chairs Fact Sheet: The Deliverables (Dec. 14, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/12/202090.htm>.

<sup>68</sup> *Id.*

<sup>69</sup> GLOBAL COUNTERTERRORISM FORUM, FOURTH MINISTERIAL PLENARY, CO-CHAIRS FACT SHEET: ABOUT THE GCTF 1 (Sept. 27, 2013), available at [https://www.thegctf.org/documents/10162/72297/13Sep19\\_Co-Chairs+Fact+Sheet-About+the+GCTF.pdf](https://www.thegctf.org/documents/10162/72297/13Sep19_Co-Chairs+Fact+Sheet-About+the+GCTF.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> GLOBAL COUNTERTERRORISM FORUM, POLITICAL DECLARATION, at II.7. (Sept. 22, 2011), available at <http://www.state.gov/j/ct/rls/other/gctf/173353.htm>.

<sup>73</sup> *Id.* at II.4.

<sup>74</sup> TERMS OF REFERENCE, *supra* note 66, at 1.

capacity and cooperation-building issues.”<sup>75</sup> The thematic working groups, which are broad in scope, engage in a range of activities, including the issuance of memoranda on best practices.<sup>76</sup> For example, in May 2012, the Criminal Justice Sector/Rule of Law Working Group issued fifteen “good practice” recommendations, including eleven on “criminal procedure tools” and four on the criminalization of terrorist offenses.<sup>77</sup> Notably, this list of good practices recommends criminalization of offenses contained in relevant UNSC resolutions,<sup>78</sup> international cooperation on matters such as extradition and mutual legal assistance,<sup>79</sup> and adherence to a framework that affords due process and protects civil liberties in accordance with the ICCPR.<sup>80</sup> It is conceivable that apprehension-related GCTF best practices could become global standards much like the FATF Recommendations.<sup>81</sup>

In light of the foregoing, it is highly noteworthy that the GCTF is essentially preprogrammed to become a principal actor in the proposed apprehension regime with the capacity for highly influential autocatalytic interactions. It is virtually invariable that the GCTF would formally incorporate any UNSC apprehension initiative into its mandate. Additionally, if GCTF best practices gain stature and esteem amongst relevant actors, it is foreseeable that a subsequent UN apprehension resolution could subsume GCTF best practices ossifying them into hard, binding standards. This sequence would serve as the paradigmatic autocatalytic reaction within the apprehension regime—UNSC apprehension rules catalyze a series of interactions between the UNSC and the GCTF generating more evolved UNSC apprehension rules. In order to accelerate the rate at which its recommendations gain stature and avoid some of the legitimacy and accountability deficit challenges the FATF faced, the GCTF should seek to expand its membership and

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<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> GLOBAL COUNTERTERRORISM FORUM, THE RABAT MEMORANDUM ON GOOD PRACTICES FOR EFFECTIVE COUNTERTERRORISM PRACTICE IN THE CRIMINAL JUSTICE SECTOR (2012) [hereinafter RABAT MEMORANDUM], available at <http://www.thegctf.org/documents/10162/38299/Rabat+Memorandum-English>. The other extant thematic working group is the Countering Violent Extremism Working Group. See also TERMS OF REFERENCE, *supra* note 66, at 3.

<sup>78</sup> RABAT MEMORANDUM, *supra* note 77, at 12.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 2, 6 n. 9, 8 nn. 13–16.

<sup>81</sup> *Id.* at 1.

engage in an inclusive, deliberate process before promulgating self-styled global standards.<sup>82</sup>

Meanwhile, the GCTF regional groups “focus on building counterterrorism capacities and cooperation in the relevant region,” paying “particular attention to the importance of ensuring effective capacity-building coordination at the country level.”<sup>83</sup> Thus, GCTF adoption of UNSC apprehension rules would autocatalytically become incorporated into the initiatives of the regional working groups. Such a series of autocatalytic reactions, rapidly disseminating norms down a vertical chain would be analogous to the praxis of the FATF and FATF-style regional bodies (FSRBs) in the 1267 CFT Regime.<sup>84</sup> Much like the FSRBs, these regional working groups have the potential to serve as important sub-elemental actors utilizing feedback loops to catalyze implementation through monitoring, assessment, capacity building, and mobilization of international pressure. Simultaneously, GCTF working groups can channel back information about deficiencies in the content of the rules or the praxis of the regime actors leading to the evolutionary development of more advantageous traits. The existing regional working groups are for the Sahel region, the Horn of Africa, and Southeast Asia.<sup>85</sup>

The Coordinating Committee is the consultation and coordination mechanism of the GCTF.<sup>86</sup> It oversees the activities of the Working Groups and the Administrative Unit.<sup>87</sup> Because all members should be “represented by the national counterterrorism coordinator, focal point from the Ministry of Foreign Affairs, or other appropriate senior counterterrorism policymaker,” it is not inconceivable that the Coordinating Committee could become, or generate a cooperative operational and enforcement platform. Such a platform could play a role analogous to the Egmont Group in the 1267 CFT Regime. Presently, the Coordinating Committee meets to discuss “pressing counterterrorism challenges and shares experiences, strategies, ideas, and best practices on how to overcome them.”<sup>88</sup> Finally, the Administrative Unit, which provides support to the Coordinating Committee and the Working

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<sup>82</sup> See BEEKARRY, *supra* note 14, at 191 (“For a long time, the final adoption of the standards or their review lay solely with member countries and did not involve nonmembers and private sector participants, although nonmember countries have to comply with them.”).

<sup>83</sup> TERMS OF REFERENCE, *supra* note 66, at 3.

<sup>84</sup> AUTOCATALYTIC REGIME THEORY PART I, *supra* note 1 at 53–54.

<sup>85</sup> TERMS OF REFERENCE, *supra* note 66, at 4.

<sup>86</sup> *Id.* at 1–2.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.*

Groups, has the potential to enhance information sharing among GCTF members.<sup>89</sup>

Despite the subheading for this section, it is not the goal to provide a comprehensive blueprint for the proposed regime. A UNSC apprehension resolution would undoubtedly propel various actors into action and result in the generation of new actors, which would become elemental actors within the regime. One could imagine that, similarly to the International Process on Global Counter-Terrorism Cooperation<sup>90</sup> in the 1267 CFT Regime, new transnational actors and NGOs will emerge and become elemental actors within an apprehension regime. In the same vein, other important actors may modify their mandates, like the FATF after UNSC Resolution 1390, and become key actors contributing to regime reinforcement and evolution.<sup>91</sup>

## VI. THEORETICAL JUSTIFICATIONS

### A. *The Tragedies*

Within the international community, it is useful to view the suppression of terrorism as a classic public good, which implicates the tragedy of the commons.<sup>92</sup> Successful counterterrorism policy produces a non-excludable, non-rivalrous good enjoyed by all States in the international community.<sup>93</sup> For certain States, particularly where terrorist acts are predominantly aimed at foreign interests, pursuing robust counterterrorism policy may be accompanied by high political costs, costs that may include destabilizing resentment within the domestic political order and strained diplomatic relations with States

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<sup>89</sup> *Id.* at 4–5.

<sup>90</sup> In 2007, Switzerland, Costa Rica, Japan, Slovakia, and Turkey launched the International Process on Global Counter-Terrorism Cooperation (IPGCT) to assess the “overall UN contributions to the [post 9/11] fight against terrorism” and identify ways to better position national institutions to implement UN counterterrorism policy. INTERNATIONAL PROCESS, *supra* note 9, at i.

<sup>91</sup> AUTOCATALYTIC REGIME THEORY PART I, *supra* note 1 at 51.

<sup>92</sup> *Cf.* Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 644 (2013) (envisaging counterterrorism as a public good in the domestic context for the purpose of eliciting counterterrorism’s social production by private parties).

<sup>93</sup> The definition of a public good was classically set forth by renowned economist, Paul Samuelson, in 1954. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. STAT. 387, 387–89 (1954). A public good is nonexcludable and nonrivalrous. Nonexcludability entails that once the good is produced, no one is able to exclude another from enjoying its benefits. *Id.* Nonrivalrous means that one’s consumption does not deplete the good. *Id.*

having a similar domestic dynamic.<sup>94</sup> Such States are particularly disinclined to pursue counterterrorism initiatives because the benefits of declining will accrue only to those States while the global community, as a whole, will share the costs. The attendant depletion of the public good—the suppression of terrorism—is a negative externality. In our globalized and interconnected international order the dilemma requires collective action as a few weak links providing the fertile ground for terrorist phylogenesis is sufficient to destabilize the entire system.<sup>95</sup>

Of course, this theoretical schema requires a deconstruction of the persistent realist paradigm in which “the enemy of my enemy is my friend.” That is, certain States, may not view the suppression of terrorist activity against, for example, western democracies, as a public good. So, the States that are disinclined to pursue robust counterterrorism policy would not be free riders in a legal framework designed to resolve the tragedy, but rather rational actors who are intentionally impeding a liberal aspiration. In this case, successful counterterrorism policy presents these rational actors with a zero sum loss. There are several responses that conceptually undermine this position. The first, which is based in Kantian moral universalism and liberalist theory, would assert that suppression of terrorism is a universally accepted categorical imperative, which every legitimate State must embrace. This position would find support in the surfeit of international instruments condemning terrorism as *malum in se*.<sup>96</sup> The second response, which is more accordant with realist theory, would acknowledge that terrorist activity destabilizes the Westphalian global order by challenging the

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<sup>94</sup> See Michael J. Boyle, *Do Counterterrorism and Counterinsurgency Go Together?*, 86 INT’L AFF. 333, 350 (2010) (“[A] counterterrorism strategy requires [a] government to use its political capital in authorizing costly or unpopular missions.”).

<sup>95</sup> See Todd Sandler, *Collective Versus Unilateral Responses to Terrorism*, 124 PUB. CHOICE 75, 85–87 (2005).

<sup>96</sup> See, e.g., DRAFT CONVENTION, *supra* note 17, at 3 (citing thirteen international agreements criminalizing conduct-specific terrorist activity). See also Prosecutor v. Salim Jamil Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging 27 (App. Ch. Feb. 16, 2011) (UN Special Tribunal for Lebanon purporting to identify terrorism as a crime in customary international law); PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 80 (2004) (articulating an argument that in the context of violence against civilian populations “no one’s terrorists are ‘freedom fighters’”).



sovereign authority of States.<sup>97</sup> Every sovereign government presumably has an interest in maintaining this order.

The next response directly challenges the “enemy mine” paradigm in the context of counterterrorism. Even on the interstate level, it has been repeatedly demonstrated that States uniting against a common enemy can quickly become mortal enemies themselves.<sup>98</sup> A terrorist organization is arguably even more likely to turn against a government that harbors it as a result of more fluid political ideology and aspirations. Finally, it has long been contemplated, even by early political theorists such as Vattel, that attacks by violent non-state actors provide a justifiable basis for military retaliation.<sup>99</sup> Indeed, this supposition has gained normative and functional preeminence evinced by UNSC resolution 1373, as well as state acquiescence and participation in US retaliation against the Taliban.<sup>100</sup> Therefore, given the geopolitical balance of military power, the long-term net gains a State stands to incur by harboring terrorists are significantly diminished vis-à-

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<sup>97</sup> BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 42, 46 (2006) (explaining that terrorist attacks are intended to challenge the “effective sovereignty” of the State which serves as the “premise of social order”).

<sup>98</sup> For example, the U.S. and Russia after WWII.

<sup>99</sup> See also Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1867–69 (2009) (“Vattel assumed that nations could retaliate against those who engaged in informal warfare or otherwise violated the law of nations, this being the standard method of punishment or enforcement in the law of nations.”). In its advisory opinion on the *Legal Consequences of the Wall*, the International Court of Justice (“ICJ”) took the position that only an attack by a State can be interpreted as an armed attack under Article 51 of the UN charter. *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9). However the Court left open the possibility of imputation. *Id.* Further, numerous prominent jurists have posited that such attacks may be imputed to a host state when it harbors or sponsors a terrorist group, and perhaps even if it fails to take action to prevent its territory from being used as a base for terrorist attacks against another state. See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 187 & n. 172 (2005) (citing authorities).

<sup>100</sup> ALVAREZ, *supra* note 13, at 817 (explaining how resolution 1373 characterizes large scale terrorist attacks as “armed attacks” under Art. 51 triggering “the inherent right of individual or collective self-defence” (citing S.C. Res. 1373, preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001))). See also Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L & FOREIGN AFF. 361, 368 (2005) (describing the “involuntary sovereignty waiver” theory by Dr. Richard Haas of the US State Department under which a State declining to take action against terrorist elements waives its claim to territorial sovereignty); EMMERICH DE VATEL, *THE LAW OF NATIONS* 154, § 53 (stating that when a State supports terrorism all other States “have a right to form a coalition in order to repress and chastise that nation, and to put it for ever after out of her power to injure them”).

vis the benefits. Even persuasive ex-post claims of noninvolvement will likely fall on deaf ears and may not avert reprisals.

Meanwhile, a liberalist global governance model would view the balancing of human rights and counterterrorism initiatives as a global public good, the attainment of which is undermined by weak and powerful states alike. In this context, western military powers may be inclined to prioritize national security over human rights. Accordingly, these States may contribute to the production of negative externalities by, for example, engaging in a systematized practice of targeted drone strikes resulting in untold collateral damage. Again, collective action is required. Now, the strongest become the weakest links. Even if most States invest in bringing counterterrorism policy in line with human rights norms, one or two States can undermine this entire global initiative.<sup>101</sup>

This theoretical schema implicates a counterargument positing that the systematized practice of targeting killing does not disrupt the balance between human rights and counterterrorism. Indeed, the post 9/11 use of force paradigm has raised difficult and complex questions regarding the international legal duties of a States engaging in ongoing military hostilities with a violent non-state entity. Under humanitarian law, targeted killing of combatants can be authorized pursuant to a status-based determination and collateral damage can be justified. Under human rights law, targeted killing is much more difficult to justify.<sup>102</sup> Very smart people have called for a new international legal framework regulating conflicts against violent terrorist organizations.<sup>103</sup> Without wading too deep into that thicket, this proposal merely submits

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<sup>101</sup> Cf. NONPROLIFERATION LAW AS A SPECIAL REGIME: A CONTRIBUTION TO FRAGMENTATION THEORY IN INTERNATIONAL LAW 62 (Daniel H. Joyner & Marco Roscini eds. 2012) (“[The] entry into force [of several major arms control treaties] is conditional upon the adherence of those states that are militarily or technologically the most significant with respect to the subject matter of the treaty.”).

<sup>102</sup> Under the human rights conception targeted killing is an illegal extra-judicial execution. On the other hand, jurists and commentators have sought to apply the law of armed conflict to counterterrorism. All of the classifications afforded terrorists under this framework are problematic and highly controversial: (1) combatants who may be terminated at will; (2) civilians who can be terminated only “for such time as they take a direct part in hostilities” or; (3) unlawful combatants, a category not enumerated in the Geneva Conventions. See generally, KRETZMER, supra note 99. Others have attempted to fit counterterrorism policy into the law of non-international armed conflict. *Id.*

<sup>103</sup> See *id.*; Roy Schöndorf, *Extra-State Armed Conflict: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT’L L. & POL. 1 (2004); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675(2004).

that, as a matter of international law, apprehension of terrorist suspects should be required when feasible. The preference clearly has significant normative and political appeal given that it is the current policy position of the United States government.<sup>104</sup> Moreover, while the matter is the subject of intense academic debate, there is ample support for the apprehension preference as a legal proposition. Indeed, at least one leading jurist has argued that a duty to capture when feasible exists even under international humanitarian law.<sup>105</sup>

The foregoing explication demonstrates the long-recognized inefficiencies that result when there are externalities and public goods.<sup>106</sup> For lawyers, the tragedy of the commons is classically remedied by a well-enforced legal regime to ensure collective action by forcing actors to internalize the externalities.<sup>107</sup> An effective global terrorist apprehension regime would, in theory, remedy both tragedies and resolve the underproduction of both public goods—the suppression of terrorism, and the balancing of human rights with counterterrorism policy. This is a strong Pareto improvement rationally appealing to all States.<sup>108</sup> An apprehension regime would change the payoff matrix by raising the political costs of playing outside the rules. Military powers would be castigated in global fora for engaging in targeted killings and surreptitious kidnappings without resorting to the apprehension mechanism. Similarly, the envisaged autocatalytic apprehension regime would provide various “soft power” platforms to co-opt weaker States and reluctant partners and provide them with critical support.<sup>109</sup> Alternatively, these States could be blacklisted and coerced into

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<sup>104</sup> See CHESNEY, *supra* note 7, at 322–23.

<sup>105</sup> See generally Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 824 (2013) (reviewing the negotiating history of the 1977 First Additional Protocol to the Geneva Conventions and arguing that even under the laws of war, Article 35's “rule on superfluous injury and unnecessary suffering prohibits manifestly unnecessary killing”).

<sup>106</sup> Joseph E. Stiglitz, *Multilateral Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. PROC. 3, 21 (Mar. 28–31, 2007).

<sup>107</sup> Danielle Archibugi & Iris Marion Young, *Envisioning a Global Rule of Law, in* TERRORISM AND INTERNATIONAL JUSTICE 158, 166 (James P. Sterba ed., 2003).

<sup>108</sup> Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1457 (2006) (“If the only difference between world P and world Q is that in P, individuals i1 and i2 engage in an exchange (money for widgets, chickens for shoes) where both prefer the result of the exchange, then the exchange is Pareto efficient—and hence satisfies the strong Pareto principle.”).

<sup>109</sup> JOSEPH S. NYE, *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* 31 (1991) (defining soft power as the capacity to socialize others to “want what you want,” instead of resorting to military and economic coercion).

making good faith efforts to implement and comply with the required measures.

### *B. The Specter of Hegemonic International Law*

The specter of hegemonic rule achieved by using the UNSC to circumvent the more egalitarian and deliberative treaty process has been raised, particularly in the context of UNSC counterterrorism resolutions. This phenomenon has been said to be underinclusive, detrimental to sovereign equality and UNSC institutional credibility, and undesirable in that it shields the hegemon from the traditional political costs of “changing the rules.”<sup>110</sup> A UNSC spawned apprehension regime, as it were, would arguably perpetuate these phenomena and empower the UNSC to engage in further global legislative exercises. While the democratic deficit inherent in the proposal is palpable, the primary rationale underlying the UNSC counterterrorism resolutions is that UN member States have signed up for centralized decision-making in circumstances where lack of consensus threatens international peace and security.<sup>111</sup> As noted by Lord Bingham, writing for the majority in *Al-Jedda*,<sup>112</sup> and supported in a robust body of persuasive scholarship, UNSC resolution-based authorizations have essentially replaced the UN Charter’s collective security mechanism as it was originally envisaged.<sup>113</sup>

A convention that would define international terrorism and require parties to prosecute or extradite suspects has been in negotiation in the General Assembly since 1996. Its adoption and widespread ratification would undeniably be preferable to a UNSC spawned apprehension regime. However, transaction costs are highest in the context of treaty negotiations. They are expensive, time-consuming, and difficult to conclude.<sup>114</sup> The end result is rigid and frequently must be ratified to

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<sup>110</sup> See generally José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003).

<sup>111</sup> U.N. CHARTER arts. 39, 41, & 42.

<sup>112</sup> R (on the application of Al-Jedda) v. Sec’y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332, ¶¶ 33–34 (appeal taken from Eng.).

<sup>113</sup> Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT’L L. 69, 78 (2009).

<sup>114</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 35 (1999). In his report to the Security Council concerning the establishment of the International Criminal Tribunal for the former Yugoslavia, former Secretary General Kofi Annan highlights the attractiveness of U.N.S.C. action circumventing these treaty negotiation transaction costs in exceptional matters of peace and security. U.N. Secretary-General, *Report of the Secretary General Pursuant to*

take effect. In the context of peace and security, UNSC action has two arguable benefits over the treaty process—it avoids the time-consuming, expensive process attendant to universal negotiation and allows for flexible adaptation.<sup>115</sup> The 1267 experience and the existence of a highly sophisticated UN counterterrorism policy significantly reduce the anticipated transaction and implementation costs. Like Resolution 1267, UNSC action would galvanize relevant players into action and generate the polycentric network complete with the autocatalysis necessary to make a future treaty regime immediately effective. Furthermore, a UNSC apprehension regime may invigorate efforts by relevant players to finalize and ratify the convention and the convention may be informed by the content of the resolutions that make up a UNSC apprehension regime.

Also, in the context of terrorist apprehension the lesser evil principle is implicated. The UN counterterrorism regime is here to stay, and its design does not include an effective cooperative mechanism for apprehension. Meanwhile, there is a plausible risk that, while we wait for an international convention, the US and its allies are already in the process of normatively ossifying the practice of targeted killing even when apprehension is feasible.<sup>116</sup> The absence of a universally binding apprehension framework provides justification for the phenomenon we are witnessing—the resort to global militarism including the ad hoc use of force while “defying or twisting universally binding laws of war beyond recognition.”<sup>117</sup> We are witnessing the emergence of a vicious cycle of violence as the presumed beneficiary of counterterrorism, the

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*Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 20–22, U.N. Doc. S/25704 (May 3, 1993).

<sup>115</sup> GUY STESSENS, *MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 18* (2000) (explaining that the FATF’s “deliberate choice not to cast the recommendations into the mould of a treaty” was made to avoid a time-consuming ratification process and allow for ex-post flexible adaptation of the Recommendations).

<sup>116</sup> See DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 117–143 (2012) (discussing how targeted killings became the Obama Administration’s preferred form of recourse for combating terrorism due to a number of diplomatic, political, and legal considerations including the complications associated with detentions at Guantanamo Bay). See generally ALVAREZ, HIL, *supra* note 110, at 873 (noting hegemonic tendency to breach the rules of “customary international law, confident that its breach will be hailed as a new rule”).

<sup>117</sup> See Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects and Fundamental Human Rights at the ICC*, 8 SANTA CLARA J. INT’L L. 69, 72 (2010). Other frequent justifications posit that terrorists are undeterrable, do not respect the rule of law, and the global war on terror is “exceptional.” For a deconstruction of the undeterrable rationale see Samuel Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830 (2014).

individual, is subjected to increasingly frequent violent human rights violations in its name. The proposed apprehension regime would seek to counteract this process by establishing a normative preference for apprehension. This would delegitimize hostile engagement as the most attractive approach to counterterrorism.

Furthermore, those rightfully critical of the sovereign inequality associated with UNSC legislative activity must acknowledge that the output of international agreements always has been, in some respects, endogenous to the geopolitical power relationships underlying them. For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs agreement), a sweeping multilateral effort, has been described as a “triumph of corporate interests in the United States and Europe over the broader interests of billions of people in the developing world.”<sup>118</sup> Furthermore, with relatively low political costs, the Organisation for Economic Co-operation and Development (OECD) countries have consistently imposed TRIPS-plus preferential trade agreements that change the agreed upon rules by establishing higher IP protections and disregarding the public health considerations contained in TRIPs and acknowledged in the Doha Declaration.<sup>119</sup> Thus, while a universal convention to achieve increased cooperation in apprehending terrorist suspects would be optimal, it is less than clear that the ultimate yield would be significantly more attuned to the interests of the less powerful States.

### C. Feasibility

Another potential critique would rightly recognize that, in order to improve the welfare of both militarily weak and strong States, both tragedy paradigms must be resolved. However, one might argue that no legal regime can ever fully resolve both tragedies. To apply a typology developed by Professor Stephen Krasner, a State such as Afghanistan may enjoy “international legal sovereignty” (recognition by international actors) but lack “Westphalian sovereignty” (the ability to prevent foreign interference within their borders) and more pertinently “domestic sovereignty”—the ability to exert authority within an

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<sup>118</sup> J. E. STIGLITZ, *MAKING GLOBALIZATION WORK* 105 (New York: W.W. Norton & Company, 2007).

<sup>119</sup> See Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 379–86 (2006) (explaining the belief of developing countries that implied in the bargain was a general understanding that TRIPs would be an upper limit to US IP demands). See also World Health Assembly, *Scaling Up Treatment and Care Within a Coordinated and Comprehensive Response to HIV/AIDS*, WHA Res. 57.14 (May 22, 2004), available at [http://apps.who.int/gb/ebwha/pdf\\_files/WHA57/A57\\_R14-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R14-en.pdf).

artificially cadastral territory.<sup>120</sup> Said more concisely, certain States cannot control, much less apprehend, violent non-state actors within their territory. Therefore, the militarily powerful States will not realize the welfare gain anticipated and will not buy into the arrangement. Moreover, even when apprehension is feasible, military powers will undoubtedly continue to utilize hostile forms of engagement under a range of circumstances including those where the evidence necessary for extradition is too sensitive to disclose. The proposed regime will solely be viewed as another tool to be utilized only if politically expedient.

The response to this critique is as follows: what matters is greater conformity with the “rules than would otherwise be the case, and not perfect conformity.”<sup>121</sup> No legal regime ever applied to a tragedy of the commons paradigm has been perfect, and it is unfair to imagine that any legal regime will, in practice, immediately eliminate all inefficiencies. To maintain the TRIPS example, that agreement was negotiated knowing that China would not be able to immediately arrest the vast counterfeit market that exists within its borders. This proposal rests, in part, on the presupposition that it is better to take many small steps in the right direction than stumble backward.<sup>122</sup>

Notably, US government positions prevailing at least since 2011 make it clear that a policy favoring apprehension when feasible is already in place and thus, politically viable.<sup>123</sup> Furthermore, in addition to diplomatic pressure, the US executive branch has faced extensive pressure from internal constituencies advocating a curtailment of the use of military force in counterterrorism. Thus, the political costs and negative implications for those States engaging in systematized

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<sup>120</sup> THOMAS C. HELLER & ABRAHAM D. SOFAER, SOVEREIGNTY, IN PROBLEMATIC SOVEREIGNTY 24, 5–14 (Stephen D. Krasner ed., 2001).

<sup>121</sup> Samantha Besson & John Tasioulas, *The Emergence of the Philosophy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 12 (2010).

<sup>122</sup> This is an adaptation of an ancient Chinese proverb. See DAVID M. GLOVER ET AL., MODELING METHODS FOR MARINE SCIENCE 299 (Cambridge University Press 2011) (“It is better to take many small steps in the right direction than to make a great leap forward only to stumble backward.”).

<sup>123</sup> See CHESNEY, *supra* note 7, at 322–23 & 323 n. 57. In his recent article, Professor Chesney explains that the use of lethal force outside Afghanistan has been made subject to an “imminent threat” requirement as a matter of US policy. *Id.* As he notes, President Obama in a 2013 speech stated, “drone strikes would occur only when capture is not an option, when no other authority can address the threat, and when the persons to be attacked ‘pose a continuing and imminent threat to the American people.’” *Id.* (citation omitted). See also GOODMAN, *supra* note 105, at 824–25 n. 25 (noting that, as a practical matter, many states exercise restraint on the use of force in a variety of conflicts (citing authorities)).

targeted killing are already high, and arguably unsustainable considering the continued evolution of human rights law, the diffusion of the Al-Qaida organization, and the winding down of the quasi-traditional conflict in Afghanistan.<sup>124</sup> For example, present collateral damage estimates suggest that innocent civilians could be anywhere from 10 to 39 percent of the 2,467–3,976 individuals killed in US drone strikes in Pakistan alone.<sup>125</sup> To the extent terrorism should be viewed as criminal activity subject to normal criminal justice processes, these numbers are incredibly troubling. One can easily imagine the intense backlash if those figures were associated with US domestic law enforcement efforts. The proposed apprehension regime would provide the apparatus and mobilization of diffuse interests necessary to begin the long-term socialization of all players necessary to resolve the tragedies in both paradigms. It would also enhance State executive branches' capacity to successfully engage in "two level games" where internal constituencies may be opposed to the curtailment of the use of military force or to the adoption of robust counterterrorism initiatives.<sup>126</sup> Perfect compliance with a legal regime is always impossible. However, this does not undermine the feasibility of pursuing a regime that utilizes binding obligations and autocatalytic cooperation in contemplation of "public international law [a]s the aggregate of the legal norms governing international relations."<sup>127</sup>

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<sup>124</sup> CHESNEY, *supra* note 7, at 310–11 (discussing a speech by Jeh Johnson, former General Counsel of the US Defense Department, in which he acknowledges the inevitability of a "tipping point" where "it would no longer be appropriate to drape counterterrorism efforts in the mantle of armed conflict"). *See also id.* at 332–33 (discussing the significant diplomatic costs associated with the persistence of militarized counterterrorism policy including vocalization of displeasure and decreased cooperation on security issues as well as other issues).

<sup>125</sup> *Get the Data: Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited June 20, 2015).

<sup>126</sup> For the classic explication of two-level game theory, *see generally* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988) (explaining a two level game where "domestic groups pursue their interests by pressuring the government to adopt favorable policies [and] [a]t the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.").

<sup>127</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 413 (1983).



## VII. CONCLUSION

In the context of a global apprehension regime, we face a transnational, polycentric, and evolutionary threat in which a single centralized unit is incapable of managing the global collective action challenges posed. Autocatalytic regime theory provides a framework for reconceptualizing global governance in the context of counterterrorism. Its polycentric approach can impel various organizations and governments to work at multiple levels to normatively reinforce the underlying objective of a global apprehension regime. This can increase levels of cooperation, implementation, and compliance, while enhancing flexibility and adaptability over time.<sup>128</sup> Through mimesis of the autocatalytic processes characterizing the 1267 CFT Regime, the proposed apprehension regime would seek to generate an effective platform for apprehension. In doing so, it would address the threat posed by terrorism while minimizing the resort to more hostile alternatives.



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<sup>128</sup> KEOHANE & VICTOR, *supra* note 57, at 9.