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WAR ON TERROR OR TERROR WARS: THE PROBLEM IN DEFINING TERRORISM

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I. INTRODUCTION

The definition of terrorism has emerged as a central focus of power politics and propaganda. Differential and ideological posturing, the absence of boundaries of conflict and fixed enemies, messages of fear, legal narratives, and creating, remaking and reconfiguring judicial reality have a profound tendency to make terrorism a never-ending battle. As Foucault suggests, “. . . knowledge, power, oppression and resistance always circulate around one another, alternately feeding off and nourishing one another.”² The ultimate goal of law is to maintain justice by facilitating human dignity and worth, while defining substantive aspects of rights and duties of individuals and nations in the international legal context. Law then lays out procedural arrangements to realize those substantive rights and duties. The ultimate goal of politics is to obtain or maintain power within the legal and constitutional framework of a nation. When a group of people, a government, or a nation instills terror to obtain or maintain power, terrorism exists; even though such terror, particularly when used by governments, is molded within a framework of legal or other justifications. Terrorism is a psychological phenomenon, with criminal acts being used to fight for political power or to maintain a political status quo. This particular characteristic of terrorism and the techniques employed to eliminate it, create a narrative, on a normative scale, that threatens the potential for global consensus in defining terrorism. At the same time, domestically, governments willfully scare the populace into uncritical and unquestioning faith in governmental actions. Powerful countries replicate this approach on an international level.

1. Assistant Professor of Law, Gonzaga University School of Law. I would like to express my special thanks to Professor Mary Pat Treuhart, Professor George Critchlow, Attorney Jeannie Young and Matthew McGaughy for their insightful suggestions. I also would like to express my appreciation to Professor Ved Nanda and Professor James Nafziger for their valuable input and for encouraging me to write this article. I also am thankful to my student research assistant, Estee Lewis, for her hard work, insight and support.

2. HELEN M. STACY, *POSTMODERNISM AND LAW: JURISPRUDENCE IN A FRAGMENTING WORLD* 61 (Tom Campbell ed., Dartmouth Publishing Company Ltd.) (2001).

II. TERRORISM: A NEBULOUS CONCEPT

The *employment* of terrorism is an age-old practice.³ However, the *term* terrorism was first used in English in 1528.⁴ It was subsequently used in France to describe the political violence of the Jacobian Party.⁵ After the Second World War, peoples in the colonized countries initiated self-determination movements to free their nations from state occupation and terrorism.⁶ This struggle focused in particular on the state terrorism of colonial powers.⁷ Similarly, the advent of the Cold War initiated ideological confrontations and tensions in which ideology-based terror was employed by both sides, simultaneously creating or provoking rebels and supplying money, training and weapons for use against the opposing ideology-based government.⁸

At present, the violence that uses terrorism as a tactic includes not only state-sponsored regimes of fear, but also a religious ideology-based terrorism that calls for securing and protecting sacred lands and sacred religious and cultural practices.⁹ The fatwa declared by the 1998 World Islamic Council, of which Bin Laden was a co-author, can be considered an ideology-based statement of terrorism

3. Whether in the building of ancient Rome, Greece and Egypt or in maintaining the Julio-Claudian Dynasty or in the targeting of Romans by the Zealots of Judea or in the actions of the unified South Asian kingdoms led by Acharya Chanakya against the Roman empire, state and non-state actors have employed terrorism to obtain or maintain power. See LAURA K. DONOHUE, TERRORISM AND COUNTER-TERRORISM DISCOURSE, IN GLOBAL ANTI-TERRORISM LAW AND POLICY, 15-17 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005).

4. ALEX P. SCHMID, THE PROBLEMS OF DEFINING TERRORISM, ENCYCLOPEDIA OF WORLD TERRORISM, 12 (Martha Crenshaw & John Pimlott eds., 1997).

5. Maximilien Robespierre's Jacobian Party in France imposed its "*regime de la Terreur*", in which mass executions and extensive use of the guillotine paralyzed the population -- 17,000 people were publicly executed -- in response to the aristocratic threat to the revolutionary government. See *id.* at 12-13; see also PETER J. VAN KRIEKEN, TERRORISM AND THE INTERNATIONAL LEGAL ORDER WITH SPECIAL REFERENCE TO THE UN, THE EU AND CROSS-BORDER ASPECTS, 12 (2002).

6. "The earliest states to gain independence were Libya, from Italy, in 1951 and Egypt, from Britain, in 1952... The vast majority of African nations became independent in the 1960s." Scott Flatto, *Too Much of a Good Thing?: Reassessing the Proliferation of African Regional Trade Agreements*, 30 SUFFOLK TRANSNAT'L L. REV. 407, 411 n.27, (citing BASIL DAVIDSON, MODERN AFRICA: A SOCIAL AND POLITICAL HISTORY 283 (3d ed., Longman 1994).

7. *Id.*

8. Among a few examples are the United States' financing, equipping, and training of Contra rebels to overthrow the Sandanista government in Nicaragua. See *Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 242, (June 27, 1986); the United States' training of Cuban exiles in efforts to overthrow Fidel Castro's government in Cuba. See Michelle Arendt, *The Cuban Liberty And Democratic Solidarity (Libertad) Act Of 1996: Isolationist Obstacle To Policy Of Engagement*, 30 CASE W. RES. J. INT'L L. 251, 256 n.30 (1998) (citing MAX AZICRI, CUBA: POLITICS, ECONOMICS AND SOCIETY 31 (1988)); and the Soviet subsidy to the Zimbabwe African Peoples' Union in its efforts against the Zimbabwe African National Union, supported by China. See Ian Martinez, *Rhodesian Anthrax: The Use Of Bacteriological & Chemical Agents During The Liberation War Of 1965-80*, 13 IND. INT'L & COMP. L. REV. 447, 452 (2003).

9. See Stephanie R. Nicolas, *Negotiating In The Shadow Of Outlaws: A Problem-Solving Paradigm For Unconventional Opponents*, 9 J. TRANSNAT'L L. & POL'Y 385, 400 (2000) (citing Bashir Maan, *Missiles Will Only Make Matters Worse*, THE HERALD (Glasgow), Aug. 24, 1998, at 13).

translated into action on September 11, 2001.¹⁰ This fatwa calls for “kill[ing] Americans and their allies – civilians and military. . . in order to liberate the Al-Aqsa [Jerusalem] Mosque and the Holy Mosque [Mecca] from their grip, and in order for their armies to move out all of the lands of Islam. . . and plunder their money wherever and whenever. . . and launch the raid in satan’s U.S. troops and Devil’s supporters allying with them. . .”¹¹ The 9/11 event, a recent example of ideology-based terrorism, established state and non-state terrorist activities and forced the world to ponder once again the nature, meaning and understanding of terrorism. With 9/11 came fluctuations in the political agenda of powerful nations and oppressed groups,¹² artificially manufactured, ideologically motivated or naturally evolving to address internal or external political situations.

Terrorism remains a nebulous concept for the international legal system mainly because it has no acceptable definition.¹³ In the absence of a definition, there is a free and open tendency for the persons using the term, whether states, organized groups or scholars, to define it as suits their purposes at the moment, leading to uncertainty as to how to fashion a legal structure to address terrorism.¹⁴

III. THE PROBLEM IN DEFINING TERRORISM

For some, terrorism is an offense, and for others, it is an activity assigned by God; for some, it is a distinctive act of maintaining power pride, and for others, it is a justified action against oppression; for some, it is an attack on the peace and security and for others, it is a quest for identity.¹⁵ It follows that it has been difficult to reach a definition of terrorism that is acceptable to the international community. It is worth noting the statement made by Robespierre in 1794 in the context of the complexity of the distinction between terrorist and freedom fighter: “Terror is nothing but justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of

10. See YOSSEF BODANSKY, *BIN LADEN: THE MAN WHO DECLARED WAR ON AMERICA*, 226-27 (2001).

11. See *id.*; see also Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 *FORDHAM INT’L L. J.* 299 (2003).

12. Suppressed groups have been identified with devaluation and ideology, poverty, relative deprivation, sense of injustice, difficult life conditions, repressive societies, and us-them differentiation. These suppressed groups are a potential root cause of non-state terrorism. See Ervin Staub, *Notes on Terrorism: Origin and Prevention*, 8 *PEACE & CONFLICT: J. PEACE PSYCHOL.* 207, 209-12 (2002).

13. See Sami Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, 29 *HASTINGS INT’L & COMP. L. REV.* 215 (2006); FOREIGN AFFAIRS, DEFENSE, AND TRADE DIVISION, *ISSUE BRIEF FOR CONGRESS: TERRORISM, THE FUTURE, AND US FOREIGN POLICY* 13 (2003), available at <http://www.fas.org/irp/crs/IB95112.pdf>.

14. See, Amnesty International, *Iraq in Cold Blood: Abuses by Armed Groups*, 2 (2005) (AI Index: MDE 14/009/2005) (Noting that “[t]here is no internationally agreed definition of what constitutes “terrorism” and in practice the term is used to describe different forms of conduct); see also Zeidan, *supra* note 13, at 227-28 (recognizing the adage that one man’s terrorist is another’s freedom fighter).

15. See Daniel Lazare, *We are all Terrorists*, 29 *RADICAL SOC’Y: REV. CULTURE & POL.* 13 (2002). See also Zeidan, *supra* note 13, at 216-19.

the general principle of democracy applied to our country's most urgent needs."¹⁶ Such divisive views have created a pendulum approach, in which the definition of terrorism oscillates from favorable to unfavorable.

The problem of defining terrorism is further complicated in modern days by one party's tactical use of characterizing another party as a terrorist.¹⁷ Generally, weak, less militarily equipped and marginalized people are identified as terrorists. Their quest for self-governance or self-determination is generally undermined by powerful actors either in the national or international arena. When their legitimate demands are unmet, they react—sometimes with and sometimes without violence. In this situation, each side labels the other a terrorist, each seeking to justify its own violence while condemning the other's violence.

The question is where to draw the line between the quest for nationalist identity and an act of terrorism, between legitimate political demands within a country and suppression of those who make demands. Once a terrorist, always a terrorist? Are Palestinians¹⁸ terrorists? Are Irish¹⁹ terrorists? Are Maoists²⁰ in Nepal terrorists? Are the LTTE²¹ in Sri Lanka terrorists? Are Hezbollah²² terrorists? Are the Taliban²³ terrorists? The focus is not or should not be whether a group is a terrorist group, but rather what activities or actions constitute terrorism. A group labeled as terrorist at one time may eventually become a viable partner in international peace and security. Unfortunately, our focus is now more on rushing to identify (with political motives) groups as terrorists rather than on identifying terrorist activities. This (de)focus on terrorism is caused by the

16. Lois T. Flaherty, *Youth, Ideology, and Terrorism*, 27 *ADOLESCENT PSYCHIATRY* 29, 33-34 (2003).

17. See Zeidan, *supra* note 13, at 227-28.

18. See *United States v. Yousef*, 327 F.3d 56, 106 n.41, 107 n.42, (2d Cir. 2003).

19. *Id.* See also Mark Pieth, *Criminalizing the Financing of Terrorism*, 4 *J. INT'L CRIM. JUST.* 1074, 1076 (2006) (addressing the difficulty of drawing a clear line between "freedom fighters" and "terrorists" especially when dealing with money collectors).

20. See Keshav Bhattarai, Gunanidhi Nyaupane, *Terrorism, Counter-Terrorism and Civil Liberties: A Review From Global and Regional Perspectives*, 2003 *J. INST. JUST. INT'L STUD.* 116, 126 (2003) ("There are good reasons for blaming political parties because they seldom have had fixed opinions about the Maoists' approach. Some political parties have romanticized Maoist violence as an expression of the real aspirations of the people and called the Maoist movement a 'people's war.' These political parties as soon as they were out of power combined their political strategies with the Maoists, while the same parties called the Maoists terrorists once they are put in power.").

21. *Id.* at 121-22. See also Professor Beverly Allen, *Talking "Terrorism": Ideologies and Paradigms in a Postmodern World*, 22 *SYRACUSE J. INT'L. L. & COM.* 7, 8 (1996) ("[T]he Tamil Tigers in Sri Lanka, who were rehabilitated by The New York Times in the space literally of about a week back in 1988 from "terrorists" to "guerrillas" to "freedom fighters" as the priorities of U.S. foreign policy shifted. These are some of the more blatant examples in recent times of the manipulation of the term according to ideology.").

22. See Yosouf, *supra* note 18, at 107 n.42; see also Pieth, *supra* note 19, at 1076.

23. See Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest For Identifying The Specter Of Terrorism*, 36 *CORNELL INT'L L.J.* 491, 492 (2004) ("The Taliban and Osama bin Laden were once called freedom fighters (mujahideen) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Now they are on top of the international terrorist lists.").

absence of a definition of the term. In this modern age of globalization of terrorism, it is important that we conduct a historical evaluation and determine, not *who* is a terrorist, but *what* is a terrorist act. This will help us understand what we are fighting against and how to bring the world together while excluding terrorist acts, but not excluding people. Such a historical evaluation and analysis of the present legitimate demands and conditions²⁴ of different non-state groups and underdeveloped (oppressed) societies is necessary to arrive at a comprehensive and inclusive approach to defining terrorism.

IV. ANTI-TERRORISM CONVENTIONS

To date there is no universally accepted definition of terrorism in the context of international law.²⁵ International terrorism has been labeled, at least by Western leaders, as a threat to Western democracy and civilization, and this label has been consistent during the pre-²⁶ and post-9/11 eras.²⁷ This label alone is problematic in tackling international terrorism for two reasons. First, while democracy is a universal value, its modus operandi and implementation may differ from society to society and nation to nation. It is not accurate to claim that Western democracy and its modus operandi reflect the only permissible (inevitable) universal practice and that other societies and nations should adapt to it. Second, it dictates that only the civilization of the (self-styled) civilized nations is important to the extent that it should be promoted at any cost, which, in turn, may undermine civilizations of other regions and societies. Let us at least assume (if not believe) that whether a people belong to a historically recorded civilization or to a historically non-recorded civilization, they may be proud of their group's structure and culture.

Notwithstanding this *labeling problematique*, the international community has made efforts to address and outline the definition of international terrorism. In 1930, during the League of Nation period, a definition of the term was proposed at the Third Conference for the Unification of Penal Law at Brussels.²⁸ This proposed definition²⁹ is important for one reason: it addressed both state and non-state terrorism. In its 1937 Convention for the Prevention and Punishment of Terrorism,³⁰ the League of Nations defined acts of terrorism as "criminal acts

24. For conditions of the suppressed groups and those conditions being the root causes of terrorism, see generally Arendt, *supra* note 8, and accompanying text.

25. See Zeidan, *supra* note 13, at 215.

26. See Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peace Time Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 247 (1987).

27. Jim Garamone, *Iraq a Grave and Gathering Danger, Bush Tells U.N.*, AM. FORCES PRESS SERV., Sept. 12, 2002, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=43466>.

28. See M.K. Nawaz and Gurdip Singh, *Legal Control of International Terrorism*, 17 INDIAN J. INT'L L. 66, 66 (1977).

29. *Id.* "The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas...." *Id.*

30. *The League of Nations Convention for the Prevention and Punishment of Terrorism*, League of Nations Doc. C.546M(I).M.383(I).1937.V (1937) [hereinafter *LoN Convention of Terrorism*]. This followed the 1934 assassination by Croation separatists of the French Foreign Minister and King

directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”³¹ This is perceived to be the first international effort to define terrorism.³² The 1937 Convention, which avoided the issue of terrorism by state actors,³³ was ratified by only one country³⁴ and signed by another 25 countries.³⁵ So this Convention never came into force, and was soon voided by World War II.³⁶ Under the 1937 Convention, countries were required to enact legislation criminalizing terrorism and certain other acts.³⁷ While its definition of terrorism was not limited by an express reference to political objective, its failure to address state actors led Hitler to justify his “Proclamation on the German occupation of Bohemia and Moravia. . . [in] March 1939. In this [Hitler] referred to ‘assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities.’”³⁸

After the Second World War, as was the case during the League of Nations era, efforts to address the definition of international terrorism were scattered and in reaction to particular events.³⁹ Prior to 9/11, there were a total of thirteen international conventions related to terrorism in particular contexts⁴⁰—safety of civil aviation,⁴¹ maritime issues,⁴² internationally protected persons,⁴³ plastic

Alexander I of Yugoslavia while on a state visit to France. The suspects fled to Italy, and France requested their extradition under a treaty of 1870, which excluded political crimes from extradition. The Court of Appeal of Turin (Italy) refused to surrender the accused because regicide and related offences were politically motivated and thus non-extraditable. The League of Nations faced political pressure, which contributed to the drafting of this Convention. Ben Saul, *The Legal response of the League of Nations to Terrorism*, 4 J. INT'L CRIM. JUST. 78, 81 (2006). The draft of the Convention was prepared upon French request, by a panel known as the Committee for the International Repression of Terrorism (CIRT), which represented Belgium, Chile, France, Hungary, Italy, Poland, Romania, Spain, Switzerland, U.K. and U.S.S.R. The conference of this Convention had considered a complementary convention creating an international criminal court. See *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations Doc. C.94.M47.1938 V (1938) at 49.

31. LoN Convention of Terrorism, *supra* note 30, art. 1, ¶ 2.

32. *Id.*; see also Saul, *supra* note 30, at 79-82.

33. See LoN Convention of Terrorism, *supra* note 30, art. 2.

34. India was the only country to ratify this Convention. See Saul, *supra* note 30, at 82.

35. See LoN Convention of Terrorism, *supra* note 30; see also Saul, *supra* note 30, at 81-82. The countries that signed were: Albania, Argentina, Belgium, Great Britain, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, India, Norway, the Netherlands, Peru, Romania, Czechoslovakia, Turkey, U.S.S.R., Venezuela, and Yugoslavia. *Id.*

36. See Thomas M. Franck & Bert B. Lockwood Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 70 (1974).

37. See LoN Convention of Terrorism, *supra* note 30, art. 1(2) and 2(1)-(5).

38. Cf. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 340 (Clarendon Press 1963).

39. See Saul, *supra* note 30, at 82.

40. See M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001* (Hotei Publishing 2001) (1937); see also M. Cherif Bassiouni, *Legal Control Of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 91 (2002).

41. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 546565, 974 U.N.T.S. 177 [hereinafter *Montreal Convention*].

42. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime

explosives,⁴⁴ nuclear material,⁴⁵ suppression of the financing of terrorism,⁴⁶ suppression of terrorist bombings,⁴⁷ continental shelf safety,⁴⁸ taking of hostages,⁴⁹ suppression of unlawful seizure of aircraft,⁵⁰ offenses committed on board aircraft,⁵¹ and unlawful acts of violence at airports.⁵² These Conventions do not adopt a generic means of arriving at an understanding of terrorist acts, but rather reflect a case-by-case approach addressing particular events.⁵³ Most of these treaties were adopted in order to alleviate the fears of the West. For example, the 1963 Tokyo Convention⁵⁴ and the 1970 Hague Convention⁵⁵ were a direct response to air piracy by the Palestinians.⁵⁶ Similarly, the 1979 Hostages Convention⁵⁷ was adopted in response to the 1976 *Entebbe* case, in which a group of Palestinians hijacked an Air France Airbus and forced it to land in Entebbe (Uganda), demanding the release of 53 accused terrorists detained in Israel in

Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 27 I.L.M. 668 [hereinafter *Maritime Convention*].

43. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter *Internationally Protected Persons Convention*]; see also Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Supp. No. 49, at 299, U.N. Doc. A/49/49 (1994).

44. See Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 359 [hereinafter *Plastic Explosives Convention*].

45. See Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. No. 11080, 1456 U.N.T.S. 101 [hereinafter *Nuclear Materials Convention*].

46. See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 [hereinafter *Financing Convention*].

47. See International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249 [hereinafter *Bombings Convention*].

48. See Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304 [hereinafter *Fixed Platforms Convention*].

49. See International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter *Hostages Convention*].

50. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter *Hague Convention*].

51. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter *Tokyo Convention*].

52. See Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the [Montreal Convention], Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474 [hereinafter *Montreal Airports Protocol*].

53. See, e.g., Franck and Lockwood, *supra* note 36, at 70.

54. Tokyo Convention, *supra* note 51.

55. Hague Convention, *supra* note 50.

56. Ikechi Mgbеoji, *The Bearded Bandit, The Outlaw Cop, and The Naked Emperor: Towards a North-South (De)construction of the Texts and Contexts of International Law's (Dis)engagement with Terrorism*, 43 OSGOOD HALL L.J. 105, 110 (2005); see also Monica Serrano, *The Political Economy of Terrorism*, in *TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11 198, 198* (Jane Boulden & Thomas G. Weiss eds., 2004).

57. Hostages Convention, *supra* note 49.

exchange for the life of the hostages.⁵⁸ The 1988 Maritime Convention⁵⁹ and its Protocol⁶⁰ were responses to the attacks on the *Achille Lauro* in 1985⁶¹ and *City of Poros* in 1988.⁶² The 1982 Convention on the Law of the Sea⁶³ applied only to a sea piracy, a non-politically motivated act.⁶⁴

While recognizing that these international legal instruments aptly employed legal bases to address problems of terrorism, some have argued that there has been no consideration of global responses to the acts of terror initiated either by Western regimes or their proxies.⁶⁵ That deficiency is analogous to the weakness of the 1937 Convention for the Prevention and Punishment of Terrorism that allowed its abuse by Hitler, who justified occupation of other countries' territories by claiming to suppress terrorism.⁶⁶ The non-definition approach to terrorism reflected in the post-World War II treaties has left the United Nations (UN) open to charges of applying double standards, which undermines its goals of legitimacy and universality.⁶⁷

V. TERRORISM – AN ACT OF CRIME OR AN ACT OF WAR?

All of these international treaties and protocols require states to: a) criminalize the acts covered and make them punishable by appropriate penalties;⁶⁸ b) establish jurisdiction over offenses committed;⁶⁹ c) take alleged offenders into

58. See Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 n.1 (1997) (citing JOSEPH J. LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW: A COMMENTARY ON THE HOSTAGES CONVENTION 1979 2-3 (1990) (providing a brief description of the Entebbe Hijacking Events).

59. Maritime Convention, *supra* note 42.

60. Fixed Platforms Convention, *supra* note 48.

61. See *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gesftione Motonave Achille Lauro in Amministrazione Straordinaria*, 795 F. Supp. 112 (S.D.N.Y. 1992); see also M. Cherif Bassiouni, *Assessing "Terrorism" Into The New Millennium*, 12 DePaul Bus. L.J. 1, 7 n.21 (1999-2000).

62. U.S. DEPT OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, at 87 (2002), available at <http://www.state.gov/documents/organization/10319.pdf> (noting that terrorists attacked a day excursion ship in Greece).

63. United Nations Convention on the Law of the Sea, Dec. 10, 1982 1833 U.N.T.S. 397 [hereinafter *UNCLOS*].

64. *Id.* art. 101.

65. See Ole R. Holsti, *The Three-Headed Eagle: The United States and System Change*, 23 INT'L STUD. Q. 339 (1979); Brian K. Landsberg, *United States in Vietnam: A Case Study in the Law of Intervention*, 50 CAL. L. REV. 515 (1962); Susanne Jonas, *Eurasia Letters: Dangerous Liasons: The U.S. in Guatemala*, 103 FOREIGN POL'Y 144 (1996).

66. See LoN Convention, *supra* note 30; Saul, *supra* note 30, at 81; *Proceedings of the International Conference on the Repression of Terrorism*, *supra* note 30.

67. Jane Boulden & Thomas G. Weiss, *Whither Terrorism and the United Nations*, in TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11 3,3 (Jane Boulden & Thomas G. Weiss eds., 2004).

68. See Montreal Convention, *supra* note 41, art. 3; Maritime Convention, *supra* note 42, art. 5; Internationally Protected Persons Convention, *supra* note 43, art. 2(2); Nuclear Materials Convention, *supra* note 45, art. 7(2); Financing Convention, *supra* note 46, art. 4-6; Bombings Convention, *supra* note 47, art. 4-5; Fixed Platforms Convention, *supra* note 48, art. 3(2), 3(5); Hostages Convention, *supra* note 49, art. 2; Hague Convention, *supra* note 50, art. 2; Montreal Airports Protocol, *supra* note 52, art. 2-3.

69. See Montreal Convention, *supra* note 41, art. 5; Maritime Convention, *supra* note 42, art. 6;

custody;⁷⁰ d) notify, either through the UN Secretary General or directly, states involved in the actions taken;⁷¹ e) submit the case for prosecution if extradition does not take place;⁷² f) deem the offense to be extraditable for the purpose of any extradition treaty between the parties;⁷³ and g) assist one another in connection with criminal proceedings regarding the offenses covered.⁷⁴

These treaties and conventions establish international standards that designate specific criminal acts as terrorism. With regard to civil aviation, the 1963 Tokyo Convention⁷⁵ applies to acts committed on board of an aircraft in flight over the surface of the high seas or outside the territory of any state.⁷⁶ This Convention was reinforced by the 1970 Hague Convention,⁷⁷ which specifically outlaws any seizure or exercise of control of any aircraft unlawfully by force or threat thereof, or by any other form of intimidation.⁷⁸ The 1971 Montreal Convention⁷⁹ further bans both the seizure of an aircraft and any conduct that may endanger the safety

Internationally Protected Persons Convention, *supra* note 43, art. 3; Nuclear Materials Convention, *supra* note 45, art. 8; Financing Convention, *supra* note 46, art. 7(1); Bombings Convention, *supra* note 47, art. 6; Fixed Platforms Convention, *supra* note 48, art. 3(1); Hostages Convention, *supra* note 49, art. 5; Hague Convention, *supra* note 50, art. 4; and *see generally* Montreal Airports Protocol, *supra* note 52.

70. *See generally* Montreal Convention, *supra* note 41, art. 6(1); Maritime Convention, *supra* note 42, art. 4, 6(1); Internationally Protected Persons Convention, *supra* note 43, art. 6(1); Nuclear Materials Convention, *supra* note 45, art. 9; Financing Convention, *supra* note 46, art. 9(2); Bombings Convention, *supra* note 47, art. 7(2); Hostages Convention, *supra* note 49, art. 6(1); Hague Convention, *supra* note 50, art. 6(1); and *see generally* Montreal Airports Protocol, *supra* note 52.

71. *See* Montreal Convention, *supra* note 41, art. 6(4), 13; Maritime Convention, *supra* note 42, art. 7(3), 7(5), 15; Internationally Protected Persons Convention, *supra* note 43, art. 6, 11; Nuclear Materials Convention, *supra* note 45, art. 14; Financing Convention, *supra* note 46, art. 7(3), 9(6); Bombings Convention, *supra* note 47, art. 7(6); Fixed Platforms Convention, *supra* note 48, art. 3(3); Hostages Convention, *supra* note 49, art. 6(2), 7; Hague Convention, *supra* note 50, art. 6(4); and *see generally* Montreal Airports Protocol, *supra* note 52.

72. *See* Montreal Convention, *supra* note 41, art. 7; Maritime Convention, *supra* note 42, art. 6(4), 10; Internationally Protected Persons Convention, *supra* note 43, art. 7; Nuclear Materials Convention, *supra* note 45, art. 10; Financing Convention, *supra* note 46, art. 7(4), 10(1); Bombings Convention, *supra* note 47, art. 8(1); Fixed Platforms Convention, *supra* note 48, art. 3(4); Hostages Convention, *supra* note 49, art. 8; Hague Convention, *supra* note 50, art. 7; and *see generally* Montreal Airports Protocol, *supra* note 52.

73. *See* Montreal Convention, *supra* note 41, art. 8(1); Maritime Convention, *supra* note 42, art. 11(1); Internationally Protected Persons Convention, *supra* note 43, art. 8(1); Nuclear Materials Convention, *supra* note 45, art. 11(1); Financing Convention, *supra* note 46, art. 11(1); Bombings Convention, *supra* note 47, art. 9(1); Hostages Convention, *supra* note 49, art. 10(1); Hague Convention, *supra* note 50, art. 8(1).

74. *See* Montreal Convention, *supra* note 41, art. 11; Maritime Convention, *supra* note 42, art. 6(2), 12, 13; Internationally Protected Persons Convention, *supra* note 43, art. 5, 10; Nuclear Materials Convention, *supra* note 45, art. 13; Financing Convention, *supra* note 46, art. 12; Bombings Convention, *supra* note 47, art. 10; Hostages Convention, *supra* note 49, art. 4, 11; Hague Convention, *supra* note 50, art. 9, 10.

75. Tokyo Convention, *supra* note 51.

76. *Id.* art. 1.

77. Hague Convention, *supra* note 50.

78. *Id.* art. 1.

79. Montreal Convention, *supra* note 41.

of civil aviation.⁸⁰ This Convention was supplemented in 1988 by the Montreal Protocol,⁸¹ which extends its scope over terrorist acts at airports serving international civil aviation.⁸² These treaties seem to apply in peacetime only, not in wartime.⁸³ These aircraft safety and hijacking conventions include prosecution or extradition provisions,⁸⁴ which experience has shown to be problematic, as in, for example, the *Lockerbie Case*.⁸⁵

Among all thirteen treaties⁸⁶ the 1999 Financing Convention⁸⁷ recognizes a new form of terror—any act of funding to carry out an act that constitutes an offense as defined in one of the treaties listed in the annex of the Convention.⁸⁸ However, all these treaties are discriminatory in that they conclude that terrorist activities can be committed only by non-state actors and, conversely, that state actors can never be terrorists or that a state will never employ terror for its political benefit. For example, the 1997 Bombings Convention⁸⁹ identifies terrorism on the basis of the means used⁹⁰ and the place of occurrence,⁹¹ but then clearly provides

80. *Id.* art. 1.

81. Montreal Airports Protocol, *supra* note 52.

82. *Id.* art. 2.

83. See Montreal Convention, *supra* note 41, art. 4 (the common language of these conventions is that they “shall not apply to aircraft used in military, customs or police services.”); Hague Convention, *supra* note 50, art. 3(2); Tokyo Convention, *supra* note 51, art. 1(4).

84. See Montreal Convention, *supra* note 41, arts. 5, 6, 8; Hague Convention, *supra* note 50, arts. 4, 6-8; Tokyo Convention, *supra* note 51, art. 13, 16(2).

85. The Lockerbie Case deals with the December 21, 1988 bombing of Pan Am Flight 103 over Lockerbie (Scotland), in which several UK and US citizens lost their lives. Two Libyan nationals were suspected of the terrorist attack and on November 27, 1991, the US and the UK jointly demanded their extradition from Libya. However, Libya refused on the grounds that the 1971 Montreal Protocol permitted Libya to conduct its own prosecution. After several years of litigation, (*see* Questions of Interpretation and Application of 1971 Montreal Convention Arising From Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 115-16 (Apr. 14)) as well as economic sanctions by the United Nations Security Council, (*see* SC Res. 748, ¶¶ 3-7, available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/011/07/IMG/NR001107.pdf?OpenElement>) against Libya, an agreement was arrived at to hold the trial in a neutral state-Holland-under Scottish law. It has been said that witnesses lied to identify the suspects and the trial was not fair. See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, A PROBLEM ORIENTED APPROACH 963-972 (2006).

86. See the following treaties and accompanying text: Montreal Convention, *supra* note 41; Maritime Convention, *supra* note 42; Internationally Protected Persons Convention, *supra* note 43; Convention on the Safety of United Nations and Associated Personnel, *supra* note 43; Plastic Explosives Convention, *supra* note 44; Nuclear Materials Convention, *supra* note 45; Financing Convention, *supra* note 46; Bombings Convention, *supra* note 47; Fixed Platforms Convention, *supra* note 48; Hostages Convention, *supra* note 49; Hague Convention, *supra* note 50; Tokyo Convention, *supra* note 51; Montreal Airports Protocol, *supra* note 52.

87. Financing Convention, *supra* note 46.

88. *Id.* art. 2(1)(a); *see also* the following treaties from the Financing Convention annex: Montreal Convention, *supra* note 41; Maritime Convention, *supra* note 42; Internationally Protected Persons Convention, *supra* note 43; Nuclear Materials Convention, *supra* note 45; Bombings Convention, *supra* note 47; Fixed Platforms Convention, *supra* note 48; Hostages Convention, *supra* note 49; Hague Convention, *supra* note 50; Montreal Airports Protocol, *supra* note 52.

89. Bombings Convention, *supra* note 47.

90. *Id.* art. 1(3).

that states are not covered under this convention but are covered under international humanitarian law.⁹²

Another important aspect of these treaties further demonstrates their discriminatory nature: all the offenses are defined in terms of acts occurring in times of peace and therefore those offenses are acts of crime⁹³ rather than acts of war. Non-state sponsored terrorism committed against the citizens, property, or territory of a state is a violation of domestic criminal law of the victim state or the state where the act of terrorism occurs.⁹⁴ The prescribed mechanism under these treaties requires states to rely upon one another to effectively combat the crime of terrorism.⁹⁵ In other words, these international legal instruments provide a framework for international cooperation among states to prevent or suppress terrorism by requiring state parties to cooperate in the prevention and investigation of terrorist acts,⁹⁶ criminalize terrorist acts,⁹⁷ and either prosecute or extradite terrorists.⁹⁸

The states are designated enforcers of anti-terrorist measures from which they themselves are exempt. This state terrorism exemption is one of the legal

91. *Id.* art. 2(1).

92. The Preamble of the Bombings Convention provides that “the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws[.]” *Id.* at pmb1.

93. *See* Maritime Convention, *supra* note 42, art. 2; Financing Convention, *supra* note 46, art. 2; Hostages Convention, *supra* note 49, art. 12.

94. *See* Montreal Convention, *supra* note 41; *see also supra* text accompanying note 41.

95. *See* Montreal Convention, *supra* note 41, art. 6(4), 8, 11, 13; Maritime Convention, *supra* note 42, art. 6(2)-(3), 7(5), 11(1), 12-13, 15; Internationally Protected Persons Convention, *supra* note 43, art. 5, 6, 8(1), 10, 11; Nuclear Materials Convention, *supra* note 45, art. 11(1), 13-14; Financing Convention, *supra* note 46, art. 7(3), 9(6), 11(1), 12; Bombings Convention, *supra* note 47, art. 7(6), 9(1), 10; Fixed Platforms Convention, *supra* note 48, art. 3(3); Hostages Convention, *supra* note 49, art. 4, 6(2), 7, 10(1), 11; Hague Convention, *supra* note 50 art. 6(4), 8(1), 9-10; Montreal Airports Protocol, *supra* note 52.; *see also supra* text accompanying notes 71, 73-74.

96. *See* Montreal Convention, *supra* note 41, art. 11; Maritime Convention, *supra* note 42, art. 6(2), 12-13; Internationally Protected Persons Convention, *supra* note 43, art. 5, 10; Nuclear Materials Convention, *supra* note 45, art. 13; Financing Convention, *supra* note 46, art. 12; Bombings Convention, *supra* note 47, art. 10; Hostages Convention, *supra* note 49, art. 4, 11; Hague Convention, *supra* note 50, art. 9-10; Montreal Airports Protocol, *supra* note 52.; *see also supra* text accompanying note 74.

97. *See* Montreal Convention, *supra* note 41, art. 3; Maritime Convention, *supra* note 42, art. 5; Internationally Protected Persons Convention, *supra* note 43, art. 2(2); Nuclear Materials Convention, *supra* note 45, art. 7(2); Financing Convention, *supra* note 46, art. 4-6; Bombings Convention, *supra* note 47, art. 4, 5; Fixed Platforms Convention, *supra* note 48, art. 3(2), 3(5); Hostages Convention, *supra* note 49, art. 2; Hague Convention, *supra* note 50, art. 2; Montreal Airports Protocol, *supra* note 52; *see also supra* text accompanying note 68.

98. *See* Montreal Convention, *supra* note 41, art. 7, 8; Maritime Convention, *supra* note 42, art. 6(4), 10, 11(1); Internationally Protected Persons Convention, *supra* note 43, art. 7, 8(1); Nuclear Materials Convention, *supra* note 45, art. 10, 11(1); Financing Convention, *supra* note 46, art. 7(4), 10(1), 11(1); Bombings Convention, *supra* note 47, art. 8(1), 9(1); Fixed Platforms Convention, *supra* note 48, art. 3(4); Hostages Convention, *supra* note 49, art. 8, 10(1); Hague Convention, *supra* note 50, art. 7, 8(1); Montreal Airports Protocol, *supra* note 52.; *see also supra* text accompanying notes 72-73.

narratives existent in these treaties that has given states the incentive to employ terror in their counter-terrorism actions by declaring that a terrorist attack against them or their subjects is an act of war. Thus, states do not have to be responsible for their terrorist activities other than through observance of the necessity/proportionality doctrine of international humanitarian law in their use of force.⁹⁹

The paradox of these conventions is that states have responded internationally to individual events as they occur without adopting a comprehensive approach to the problem of terrorism. This makes it convenient for states to characterize issues as falling within the treaties' legal parameters, and then to argue for response to an event as either an international issue or a domestic issue, whichever stance may suit the objective of the state involved.¹⁰⁰

VI. TERRORISM AS A CRIME UNDER GENERAL ASSEMBLY AND SECURITY COUNCIL RESOLUTIONS

The General Assembly has responded to terrorism for more than four decades by adopting a multitude of resolutions condemning acts of terrorism. In 1965, the General Assembly adopted a resolution stating that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State. . . ."¹⁰¹ This prohibition was recognized again in 1970.¹⁰² In 1972 terrorism found a permanent place on the General Assembly agenda when Resolution 3034 addressed the problem of terrorism directly and specifically.¹⁰³ This resolution was titled

99. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, 57, 1125 U.N.T.S. 3; Lieutenant Commander Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, Of A Customary Norm Requiring The Use Of Precision Munitions In Urban Areas*, 47 NAVAL L. REV. 115, 167 (2000) ("[T]he most 'current' treaty language regarding the concepts of necessity and proportionality is contained in the Additional Protocol I to the 1949 Geneva Conventions."); see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

100. The Lockerbie incident provides one example. The United States and the United Kingdom did not agree with Libya's assertion of its right to prosecute the bombing suspects in its territory. Libya justified its demand to prosecute and refusal to extradite by reference to the 1971 Montreal Protocol and its own domestic law. However, the US and the UK took the issue to the United Security Council and secured two resolutions to warn Libya to comply with their request and to impose economic sanctions against Libya. See Questions of Interpretation and Application of 1971 Montreal Convention Arising From Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14, 1992), *supra* note 85, at 115-16.

101. G.A. Res. 2131, ¶ 2, U.N. Doc. A/RES/2131 (Dec. 21, 1965).

102. G.A. Res. 2625, U.N. Doc. A/RES/2625 (Oct. 24, 1970).

103. G.A. Res. 3034, U.N. Doc. A/RES/3034 (Dec. 18, 1972). G.A. Res. 2625, *supra* note 102.

“Measures To Prevent International Terrorism Which Endangers Or Takes Innocent Human Lives Or Jeopardizes Fundamental Freedoms, And Study Of The Underlying Causes Of Those Forms Of Terrorism And Acts Of Violence Which Lie In Misery, Frustration, Grievance And Despair And Which Cause Some People To Sacrifice Human Lives, Including Their Own, In An Attempt To Effect Radical Changes.” This Resolution expressed concern over the increasing number of terroristic acts and urged states to find “just and peaceful solutions to the underlying causes which give rise to such acts of violence.”¹⁰⁴

While there is still a lack of a clear and acceptable definition of terrorism, starting in 1979, the General Assembly made the distinction that terrorism is a crime which should be prosecuted within the legal system, rather than viewing terrorism as an act of war. In Resolution 34/145, the General Assembly called upon states to work together in order to prevent and combat terrorism through the exchange of information, and creation of treaties allowing for the “extradition and prosecution of international terrorists.”¹⁰⁵ In Resolution 40/61, the General Assembly recognized the importance of the relevant international conventions addressing terrorism and the necessity of States to take “appropriate law enforcement measures. . . in connection with the offences addressed in those Conventions.”¹⁰⁶ Additionally, Resolution 40/61 condemned “*as criminal*, all acts, methods and practices of terrorism wherever and by whoever committed, including those which jeopardize friendly relations among States and their security.”¹⁰⁷ In 1987, the General Assembly, again condemned terrorism, and called upon States to co-operate with one another “on a bilateral, regional and multilateral basis, which will contribute to the elimination of acts of international terrorism and their underlying causes and to the prevention and elimination of this criminal scourge.”¹⁰⁸

In 1991, the General Assembly recognized all of the above provisions and determined that the issue of terrorism should be included in its provisional agenda under the shortened title “Measures to Eliminate International Terrorism.”¹⁰⁹ In 1995, the General Assembly appeared to take a more direct stance that terrorism is

This title was utilized in subsequent resolutions, *see* G.A. Res. 31/102, U.N. Doc. A/RES/31/102 (Dec. 15, 1976); G.A. Res. 32/147, U.N. Doc. A/RES/32/147 (Dec. 17, 1977); G.A. Res. 34/145, U.N. Doc. A/RES/34/145 (Dec. 17, 1979); G.A. Res. 36/109, U.N. Doc. A/RES/36/109 (Dec. 10, 1981); G.A. Res. 38/130, U.N. Doc. A/RES/38/130 (Dec. 19, 1983); G.A. Res. 40/61, U.N. Doc. A/RES/40/61 (Dec. 9, 1985); G.A. Res. 42/159, U.N. Doc. A/RES/42/159 (Dec. 7, 1987); G.A. Res. 44/29, U.N. Doc. A/RES/44/29 (Dec. 4, 1989).

104. G.A. Res. 3034, *supra* note 103, ¶ 1-2.

105. G.A. Res. 34/145, *supra* note 103, ¶ 11. This provision was included again in G.A. Res. 38/130, *supra* note 103, ¶ 6; G.A. Res. 40/61, *supra* note 103, ¶ 8. *See also* G.A. Res. 42/159, *supra* note 103, ¶ 5; G.A. Res. 44/29, *supra* note 103, ¶ 4.

106. G.A. Res. 40/61, *supra* note 103, at pmb1.

107. *Id.*, ¶ 1 (emphasis added); *see also* G.A. Res. 42/159, *supra* note 103, ¶ 1; G.A. Res. 44/29, *supra* note 103, ¶ 1.

108. G.A. Res. 42/159, *supra* note 103, pmb1. and ¶ 7. *See also* G.A. Res. 44/29, *supra* note 103, pmb1. and ¶ 5.

109. *See* G.A. Res. 46/51, U.N. Doc. A/RES/46/51 (Dec. 9, 1991).

a crime, not an act of war, by approving the Declaration on Measures to Eliminate International Terrorism, attached in the annex of the resolution. In the Preamble, this Declaration listed terrorism as a crime closely connected to crimes such as “drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials. . . ” and reiterated that those responsible for acts of terrorism “must be brought to justice.”¹¹⁰ Additionally, in the Declaration, the General Assembly appears to have created a cursory definition of terrorism, which stated “[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”¹¹¹ This Declaration clearly views terrorism as a criminal act, rather than an act of war. This “definition” was cited throughout the subsequent resolutions issued up until September 11, 2001.¹¹²

After the terrorist attacks on September 11, 2001, the General Assembly could have taken steps to change the dimension of terrorism from a crime, to an act of war; however, in Resolution 56/1, the General Assembly condemned the terrorist attacks on the United States and called for those responsible to be “brought to justice.”¹¹³ The wording of this Resolution indicates that the General Assembly continued to view terrorism as a “crime” rather than an act of war. By January 2002, the General Assembly reiterated the “definition” that terrorism is a crime, as set forth in the Declaration on Measures to Eliminate International Terrorism.¹¹⁴ Resolution 56/88 also stressed the need for states to become parties to those conventions and protocols that address terrorism, and to enact the legislation “necessary to implement the provisions of those conventions and

110. G.A. Res. 49/60, pmb1, U.N. Doc. A/RES/49/60 (Feb. 17, 1995).

111. *Id.*

112. See G.A. Res. 55/158, ¶ 2, U.N. Doc. A/RES/55/158 (Jan. 30, 2001); G.A. Res. 54/110, ¶ 1-2, U.N. Doc. A/RES/54/110 (Feb. 2, 2000); G.A. Res. 52/165, ¶ 2, U.N. Doc. A/RES/52/165 (Jan. 19, 1998); G.A. Res. 51/210, ¶ 2, U.N. Doc. A/RES/51/210 (Jan. 16, 1997) (containing a supplement to the 1995 Declaration on Measures to Eliminate International Terrorism); G.A. Res. 50/53, ¶ 2, U.N. Doc. A/RES/50/53 (Jan. 29, 1996).

113. G.A. Res. 56/1, ¶ 3, U.N. Doc. A/RES/56/1 (Sept. 12, 2001).

114. See *supra* note 109-110, and accompanying text. See also G.A. Res. 56/88, ¶ 2, U.N. Doc. A/RES/56/88 (Jan. 24, 2002). There were a number of additional resolutions issued from 2002-2008 indicating that terrorism is a crime. See, e.g., G.A. Res. 62/175, ¶ 3, 9, U.N. Doc. A/RES/62/175 (March 20, 2008); G.A. Res. 62/159, U.N. Doc. A/RES/62/159 (March 11, 2008); G.A. Res. 61/181, ¶ 3, 4, 6, U.N. Doc. A/RES/61/181 (March 8, 2007); G.A. Res. 61/151, ¶ 9, U.N. Doc. A/RES/61/151 (Feb. 14, 2007); G.A. Res. 60/288, ¶ IV(4), U.N. Doc. A/RES/60/288 (Sept. 20, 2006); G.A. Res. 60/177, U.N. Doc. A/RES/60/177 (March 20, 2006); G.A. Res. 59/290, pmb1, U.N. Doc. A/RES/59/290 (April 15, 2005); G.A. Res. 58/162, ¶ 9, U.N. Doc. A/RES/58/162 (March 2, 2004); G.A. Res. 58/140, pmb1, 2, 5, U.N. Doc. A/RES/58/140 (Feb. 4, 2004); G.A. Res. 58/136, pmb1, 10, U.N. Doc. A/RES/58/136 (Jan. 26, 2004); G.A. Res. 57/196, ¶ 8, U.N. Doc. A/RES/57/196 (Feb. 25, 2003); G.A. Res. 57/174, Preamble, U.N. Doc. A/RES/57/174 (Jan. 28, 2003); G.A. Res. 57/173, ¶ 4, 6, U.N. Doc. A/RES/57/173 (Jan. 21, 2003); G.A. Res. 56/261, ¶ 22-24, U.N. Doc. A/RES/56/261 (April 15, 2002); G.A. Res. 56/232, ¶ 8, U.N. Doc. A/RES/56/232 (Feb. 26, 2002); G.A. Res. 56/160, pmb1, U.N. Doc. A/RES/56/160 (Feb. 13, 2002).

protocols, to ensure that the *jurisdiction of their courts* enables them to *bring to trial* the perpetrators of terrorist acts.”¹¹⁵ The provisions in Resolution 56/88 relating to terrorism as a crime have continued to be adhered to and reiterated in the subsequent “Measures to Eliminate International Terrorism” Resolutions issued by the General Assembly to the present date.¹¹⁶ It is crystal clear that the General Assembly (majority view of the international community) has, with its series of resolutions, determined that terrorism is a crime, not an act of war, despite the US self-styled declaration of terrorism as an act of war.

Similarly, the Security Council has taken the position that terrorism is a crime rather than an act of war. Immediately after 9/11 the Security Council issued Resolution 1368 in which it condemned the terrorist attacks in New York, and called upon all States to “work together urgently to bring to *justice* the perpetrators, organizers and sponsors of these terrorist attacks and stress[ed] that those responsible for aiding, supporting or harbouring the perpetrators, organizers, and sponsors of these acts will be *held accountable*.”¹¹⁷ Here the Security Council likewise could have defined terrorism as an act of war; however, they carefully crafted their words to define terrorism as a crime for which the perpetrators of such acts must be brought to justice.

Although the Security Council members defined terrorism as a crime immediately after 9/11, its approach did not remain consistent, and a mixed response followed only sixteen days later.¹¹⁸ In Resolution 1373, the Security Council contradicted its earlier statement that terrorism is a crime, when it reaffirmed the right to individual or collective self-defense under the UN Charter, and reaffirmed the “need to combat [terrorist acts] *by all means*” in accordance with the UN Charter.¹¹⁹ Later in the same Resolution, the Security Council required that terrorist acts be established as “serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”¹²⁰ This mixed response was a result of the lack of a clear and acceptable definition of terrorism. Since that time, states have used this mixed response as a justification for waging war against terrorists.¹²¹ Since Resolution 1373, the Security Council has returned to its original definition of terrorism as a crime, rather than an act of war. In further Resolutions issued by the Security Council from 2001 through 2008 the Security Council has continued to maintain

115. G.A. Res. 56/88, *supra* note 114, ¶ 7 (emphasis added).

116. See G.A. Res. 57/27, ¶ 2, 7, U.N. Doc. A/RES/57/27 (Jan. 15, 2003); G.A. Res. 58/81, ¶ 2, 7, U.N. Doc. A/RES/58/81 (Jan. 8, 2004); G.A. Res. 59/46, ¶ 2, 9, U.N. Doc. A/RES/59/46 (Dec. 16, 2004).

117. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).

118. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

119. *Id.* pmbl (emphasis added).

120. *Id.* ¶ 2; see also *id.* ¶ 1-4 (indicating in various ways that terrorism should be implemented as a crime).

121. See Hans Köchler, *The United Nations Organization and Global Power Politics: The Antagonism Between Power and Law and the Future of World Order*, 5 CHINESE J. INT'L L. 323, n.17 (2006).

that terrorism is a crime.¹²²

Over ten years ago, the General Assembly took steps to reach consensus in the international community regarding terrorism. In 1996, the United Nations created an *Ad Hoc* Committee of Terrorism, charged with the mission of creating a comprehensive convention on international terrorism.¹²³ The ultimate goal of the Committee is to establish an international conference for the international community to “formulate a joint organized response. . . to terrorism in all its forms and manifestations.”¹²⁴ Twelve years have passed since that time, yet no international summit has taken place. Thus, there is still a need for a clear, definite and concise definition of terrorism. Hopefully, if such a convention is created, it will set forth a definition of terrorism on which the international community can agree, a definition that expands terrorism to include acts committed by states (whether failed or so-called civilized) and that is not limited to non-state actors.

VII. FROM AN ACT OF CRIME TO AN ACT OF WAR: PRE AND POST 9/11

The General Assembly has soundly endorsed the concept of terrorism as a criminal act rather than an act of war. The Security Council also seems to be convinced of that idea, despite the inconsistency reflected in its September 28, 2001, resolution.¹²⁵ Nevertheless, an acceptable definition of terrorism is still likely to remain a moonshine. It is not a question of unwillingness by a majority of nations to define terrorism, but rather a question of the obstacles to reaching agreement as well as skepticism about using any universal definition for narrow purposes. Why would a powerful country want to become a signatory to any treaty that would limit its power to unilaterally declare war on terrorism? Defining terrorism and instituting an international legal mechanism to address it would pose a limitation to those powerful countries that currently are privileged to exercise power unilaterally. Absence of an accepted definition and an international legal mechanism to address terrorism provides room for powerful countries to act flexibly based upon their political agenda, which are:

122. See e.g., S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001); S.C. Res. 1435, ¶ 4, U.N. Doc. S/RES/1435 (Sept. 24, 2002); S.C. Res. 1438, ¶ 3, U.N. Doc. S/RES/1438 (Oct. 14, 2002); S.C. Res. 1450, ¶ 3, U.N. Doc. S/RES/1450 (Dec. 13, 2002); S.C. Res. 1456, Annex, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1511, ¶ 16, 18, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1530, ¶ 3, U.N. Doc. S/RES/1530 (March 11, 2004); S.C. Res. 1566, ¶ 2, 3, 9, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1611, ¶ 3, U.N. Doc. S/RES/1611 (July 7, 2005); S.C. Res. 1636, pmbl, ¶ 2, 3, 7, 11, 14, U.N. Doc. S/RES/1636 (Oct. 31, 2005); S.C. Res. 1644, pmbl, ¶ 6, 7, U.N. Doc. S/RES/1644 (Dec. 15, 2005); S.C. Res. 1664, pmbl, U.N. Doc. S/RES/1664 (March 29, 2006); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1757, pmbl and Annex, U.N. Doc. S/RES/1757 (May 30, 2007); S.C. Res. 1822, pmbl, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1852, pmbl, U.N. Doc. S/RES/1852 (Dec. 17, 2008).

123. G.A. Res. 51/210, ¶ 9-13, U.N. Doc. A/RES/51/210 (Jan. 16, 1997); G.A. Res. 60/43, ¶ 1, 2, 7, 10, U.N. Doc. A/RES/60/43 (Jan. 6, 2006); G.A. Res. 61/40, ¶ 1, 4, 9, 12, 18, U.N. Doc. A/RES/61/40 (Dec. 18, 2006); G.A. Res. 62/71, ¶ 1, 4, 12, 18, U.N. Doc. A/RES/62/71 (Jan. 8, 2008).

124. G.A. Res. 58/81, *supra* note 116, at pmbl; G.A. Res. 59/46, *supra* note 116, at pmbl; G.A. Res. 60/43, *supra* note 123, at pmbl; G.A. Res. 61/40, *supra* note 123, at pmbl; G.A. Res. 62/71, *supra* note 123, at pmbl; G.A. Res. 51/210, *supra* note 123, at ¶ 9.

125. See S.C. Res. 1373, *supra* note 118, pmbl.

1. The ability to declare terrorism an act of war;¹²⁶
2. Unilateral use of force against non-state/state terrorism with extra-jurisdictional reach;¹²⁷
3. Justification of the unilateral use of force in other countries' territories by claiming self-defense.¹²⁸

The practice of the use of force to suppress terrorist activities in the name of self-defense is not new and not solely the product of 9/11.

For example, in response to the murder of seven Americans in two Libyan-sponsored bombings in Rome and Vienna in December of 1985 and the terrorist bombing of a West German discotheque in April of 1986, the United States justified the lawfulness of its April 1986 air strikes against terrorist training camps and military targets in Libya as an exercise of its right of self-defense as recognized by Article 51 of the Charter.¹²⁹

An attempt by the Security Council to issue a resolution condemning the actions taken by the United States was vetoed by the United Kingdom, France and the United States;¹³⁰ however, the General Assembly subsequently passed a resolution condemning the United States' action of use of force in self-defense.¹³¹ The United States also has relied on Article 51's self-defense provisions in using force based upon an accumulation of terrorist events. For example, the United States, based on "highly reliable evidence" that Osama Bin Laden's network was making

126. See President George W. Bush, *Transcript of Statement by United States President George W. Bush on Wednesday* (Sept. 12, 2001) available at <http://news.bbc.co.uk/2/hi/americas/1540544.stm> (stating that "[t]he deliberate and deadly attacks, which were carried out yesterday against our country, were more than acts of terror. They were acts of war.").

127. See Press Release, Office of the Press Secretary, *President's Remarks at the United Nations General Assembly* (Sept. 12, 2002) available at <http://merln.ndu.edu/MERLN/PFIraq/archive/wh/20020912-1.pdf>.

128. *Id.* See also Lucy Martinez, *September 11th, Iraq And The Doctrine Of Anticipatory Self-Defense*, 72 UMKC L. Rev. 123, 150 (2003) (discussing the unilateral use of force based on anticipatory self-defense in the invasion in Iraq); See also Megan K. Stack & Henry Chu, *Syria Asserts Its Right to Self-Defenses*, L.A. TIMES, Oct. 12, 2003, available at <http://articles.latimes.com/2003/oct/12/world/fg-mideast12> (discussing Syria's right to self-defense and also discussing the Israeli claim to a right of preemption); Ahmad Ali Ghouri, *US Attacks Inside Pakistan Territory: An Insight on International Law and Use of Force*, HG.ORG, available at <http://www.hg.org/article.asp?id=5447> (discussing the doctrine of preemptive self-defense to justify attacks against Pakistan); see also President George W. Bush, *Address to the Nation – Ultimatum to Saddam Hussein*, AMERICAN RHETORIC (March 17, 2003) available at <http://www.americanrhetoric.com/speeches/wariniraq/gwbushiraq31703.htm>.

129. Sharp, Walter Gary Sr., *The Use of Armed Force against Terrorism: American Hegemony or Impotence*, 1 CHI. J. INTL. L. 37, 41 (2000). See also *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya*, THE RONALD REAGAN PRESIDENTIAL LIBRARY (Apr. 16, 1986), available at <http://www.reagan.utexas.edu/archives/speeches/1986/41686d.htm>.

130. See UN Doc. S/PV.2682 (Apr. 21, 1986). See also Sharp, *supra* note 129, at 42.

131. G.A. Res. 41/38, ¶ 1, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

nerve gas in a synthetic chemical plant in Sudan to produce chemical weapons with the assistance of the Sudanese government¹³² and of Afghanistan's assistance to Bin Laden in allowing terrorist training camps on its territory,¹³³ ordered cruise missile attacks against the training facilities in Afghanistan and a pharmaceutical plant in Sudan in 1990.¹³⁴ The United States justified these missile strikes in Afghanistan and Sudan as an exercise of its inherent right of self-defense in response to anticipated attacks—preventive self-defense.¹³⁵ Thus, characterizing terrorism as an act of war is a convenient tool in the propaganda and political arsenal of powerful nations seeking to justify the use of force in the territories of alien-minded nations.

The 9/11 event increases the risk of the establishment of state practices justifying the use of force as self-defense. The 9/11 event differs from previous incidents in that it led so-called civilized nations to focus our legal attention—at least currently—on a narrow concept of globalized terrorism centered on Bin Laden, Al Qaeda and the Taliban, creating the fiction that civilized nations can never be a part of terrorist actions. The subsequent open endorsement and naked pursuit of a “War on Terror” is a convenient and expedient shift from terrorism as a crime to terrorism as an act of war. It is convenient and expedient because the notion of a War on Terror allows a state (generally a powerful state) to use force against another state in self-defense if there is any link or connection with terrorism based on a unilateral or coalitional determination.¹³⁶ At the same time,

132. See John Quigley, *International Law Violations By The United States In The Middle East As A Factor Behind Anti-American Terrorism*, 63 U. Pitt. L. Rev. 815, 825 n.66 (2002) (citing Department of State Fact Sheet, Aug. 21, 1998, Department of State's Coordinator for Counterterrorism, U.S. Strike on Facilities in Afghanistan and Sudan (Aug. 21, 1998), in 9 Foreign Pol'y Bull. 13 (No. 5, 1998) (“The U.S. is confident this Sudanese government-controlled facility is involved in the production of chemical weapons agents.”); Steven Lee Myers, *Dozens of Ship-Launched Cruise Missiles Strike at Same Moment, 2,500 Miles Apart*, N.Y. TIMES, Aug. 21, 1998, at A10; Address by the President to the Nation (Aug. 20, 1998), in 9 Foreign Pol'y Bull. 6-8 (No. 5, 1998) (“Our forces also attacked a factory [that] was involved in the production of materials for chemical weapons.”); Excerpts from Press Briefing by Secretary of State Albright and National Security Advisor Berger (Aug. 20, 1998), in *id.* at 8-12 (claiming Sudanese complex used to develop VX gas).

133. See President William Jefferson Clinton, Address to the Nation by the President (Aug. 20, 1998), available at <http://clinton6.nara.gov/1998/08/1998-08-20-president-address-to-the-nation.html> (President Clinton addressed the nation stating that Afghanistan maintained “one of the most active terrorist bases in the world. It contained key elements of the bin Laden network's infrastructure and has served as a training camp for literally thousands of terrorists from around the globe.”)

134. See *id.* (President Clinton “ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the imminent threat they presented to our national security.”)

135. See President William Jefferson Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan (Aug. 21, 1998), available at <http://clinton6.nara.gov/1998/08/1998-08-21-text-of-a-letter-on-afghanistan-and-sudan-strikes.html> (“These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.”); see also John Yoo, *International Law and the War in Iraq*, 97 Am. J. Int'l L. 563, 573 (2003) (describing the United States strikes against Libya as necessary to prevent future terrorist attacks).

136. Yoo, *supra* note 135, at 573; see also President George W. Bush, *supra* note 126, and

captured individuals can be brought into domestic criminal legal systems and tried in domestic courts or even military tribunals. Investigations by torture, lacking due process, may also be justified without regard to international humanitarian law.¹³⁷ In this way 9/11 has become a convenient justification for treating terrorism either as a crime or as an act of war as suits the purposes of powerful countries, based solely on their determinations of what is appropriate rather than on international law.¹³⁸ There are examples in which civilized states have engaged in terrorist activities and yet remain exempt from the term terrorism and the responsibilities thereof. The 1986 decision in the case of Nicaragua against the United States in the International Court of Justice is an apt example. While the United States was ordered to make reparations for its violation of international law in supporting Contra guerillas, it was not tagged as a terrorist nor was made responsible for its state-sponsored terrorist activities.¹³⁹

The invasion of Afghanistan in 2001 and Iraq in 2003 are direct and clear examples of the use of force in the name of the War on Terror.¹⁴⁰ These further provided incentives to use force in other territories. The United States' attack on terrorist suspects in Syrian territory in October 2008 was justified on the basis that a network of Al-Qaeda-linked foreign fighters was moving through Syria into Iraq.¹⁴¹ Similarly, U.S. forces have attacked a village in Pakistan's south

accompanying text.

137. See Detainee Treatment Act of 2005, 28 U.S.C. §2241(e) (2005) (amended 2008) (held unconstitutional by *Boumediene v. Bush*, 128 S. Ct. 2229, 2230 (2008)); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2810 (2006) (Scalia, J., dissenting) (arguing that once the DTA was adopted, the Court lost the right to render judgment on it "The DTA provides: [N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba. This provision "[t]ook effect on the date of the enactment of this Act," which was December 30, 2005. As of that date, then, *no* court had jurisdiction to "hear or consider" the merits of petitioner's habeas application. This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30. It is also perfectly clear that the phrase "no court, justice, or judge" includes this Court and its Members, and that by exercising our appellate jurisdiction in this case we are "hear[ing] or consider[ing] an application for a writ of habeas corpus.") (internal citations omitted); see Jens David Ohlin & George P. Fletcher, *Special Issue the Law of Cruelty: Torture as an International Crime*, 6 J. INT'L CRIM. JUST. 157, 157 (2008) ("[T]he Bush Administration now maintains the right to use torture in the war against terror, or at the very least to use harsh interrogation measures that fall just short of an elusive definition of torture as a federal or international crime.").

138. See Bush Statement After 9/11, *supra* note 126; see also President's Remarks at the United Nations General Assembly, *supra* note 127 (justifying the 2003 invasion of Iraq); see also Megan K. Stack & Henry Chu, *supra* note 128 (addressing Syria's right to self-defense); Ahmad Ali Ghorri, *supra* note 128 (addressing the U.S. attacks inside Palestinian Territory); President George W. Bush, Address to the Nation – Ultimatum to Saddam Hussein, *supra* note 128.

139. Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 257, (June 27, 1986).

140. See President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), available at <http://www.historyplace.com/speeches/gw-bush-9-11.htm>; President George W. Bush, Address to the Nation – Ultimatum to Saddam Hussein, *supra* note 128; see *infra* notes 160-161 and accompanying text.

141. See Jennifer Griffin et al., *U.S. Official: Unclear If Al Qaeda Coordinator Killed in Syria*

Waziristan.¹⁴² In both attacks, there was no self-defense justification under Article 51 of the UN Charter and no approval from either country.

A new dawn of the War on Terror began when President Bush gave a speech before a joint session of Congress on September 20, 2001.¹⁴³ On October 7, The United States and its allies attacked Afghanistan. People were killed indiscriminately. He declared war with the following statement:

We will direct every resource at our command . . . every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war . . . to the destruction and to the defeat of the global terror network.

. . . We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.¹⁴⁴

In Afghanistan, the United States' use of self-defense was justified by some scholars based on the International Law Commission's draft articles on Responsibility of States for International Wrongful Acts (2001).¹⁴⁵ This document provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."¹⁴⁶ The articles relied on by these scholars include: Article 8 (conduct of a person directed or controlled by the state),¹⁴⁷ Article 9 (conduct carried out in the absence or default of the official authorities),¹⁴⁸ and Article 11 (conduct acknowledged or adopted by the state).¹⁴⁹

Raid, FOXNEWS, Oct. 28, 2008, available at <http://www.foxnews.com/story/0,2933,444199,00.html>; see also *U.S.: Syria Raid Killed Al Qaeda Leader*, CBS NEWS, Oct., 27, 2008, available at <http://www.cbsnews.com/stories/2008/10/27/world/main4547352.shtml>.

142. See *Deadly Missiles Strike Pakistan*, BBC Jan. 23, 2009, available at http://news.bbc.co.uk/2/hi/south_asia/7847423.stm.

143. See President George W. Bush, Address to a Joint Session of Congress, *supra* note 140.

144. *Id.*

145. See Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" In Article 51 Of The U.N. Charter*, 43 HARV. INT'L L.J. 41, 50-51 (2002). See also International Law Commission, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereafter *ILC*].

146. *Id.* at art. 1.

147. "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id.* at art. 8.

148. "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." *Id.* art. 9.

149. "Conduct which is not attributable to a State under the preceding articles shall nevertheless be

The United States' use of self-defense against Afghanistan is arguably justifiable under this document. Some scholars have proffered that:

“[d]epending on the facts, one might find the de facto government responsible because of the omissions of its organs or officials in allowing Al Qaeda to operate from Afghanistan even after its known involvement in terrorist acts prior to the September 11 incidents. . . because the de facto government by default essentially allowed Al Qaeda to exercise governmental functions in projecting force abroad (Article 9), or because after the September 11 incidents the de facto government declined to extradite Al Qaeda operatives and thus, in effect, adopted Al Qaeda's conduct as its own.”¹⁵⁰

Similarly, President Bush justified the use of force in Iraq by declaring that Security Council Resolutions 678 and 687 authorized the United States and allied nations to use force against Iraq to destroy weapons of mass destruction.¹⁵¹ The British and Australian governments issued similar statements.¹⁵² This marked the start of “Operation Iraqi Freedom,” which has now turned into the United State's “Operation Freedom from Iraq.” After the United States' use of the controversial Security Council Resolution 687 (that contained Iraq after the 1991 war)¹⁵³ as a basis to go to war (Operation Iraqi Freedom),¹⁵⁴ the United States and the United Kingdom then proposed Resolution 1441 in 2002 that stated “further material breach of Iraq's obligations. . . authorizes member states to use all necessary means¹⁵⁵ to restore international peace and security. . . .”¹⁵⁶ However, because of

considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.” *Id.* art. 11.

150. Murphy, *supra* note 145, at 50-51 (citing W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 39 (1999); see Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISRAEL Y.B. H.R. 233 (1989); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 182-83 (3d ed. 2001) (“[A]n armed attack is not extenuated by the subterfuge of indirect aggression or by reliance on a surrogate. There is no real difference between the activation of a country's regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the governmental apparatus.”)).

151. See President George W. Bush, Remarks by the President in Address to the United Nations General Assembly, (Sept. 12, 2002), (transcript available at <http://merln.ndu.edu/MERLN/PFIraq/archive/wh/20020912-1.pdf>; <http://www.americanrhetoric.com/speeches/wariniraq/gwbushiraq31703.htm>).

152. See United Kingdom Attorney General Lord Goldsmith, Parliamentary Answer on The Legal Basis for the Use of Force Against Iraq, British House of Commons (Mar. 17, 2003) available at http://news.bbc.co.uk/1/hi/uk_politics/2857347.stm (arguing that U.N. Security Council Resolution 1441 (2002), in conjunction with previous Resolutions 678 (1990) and 687 (1991), authorized Operation Iraqi Freedom); Australia Prime Minister John Howard, Address Made to Australian Parliament, (March 18, 2003) (transcript available at <http://www.aph.gov.au/hansard/reps/dailys/dr180303.pdf>) (shortened transcript available at <http://www.thestar.com/federalelection/article/508755>).

153. S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990).

154. See Remarks by the President, *supra* note 151.

155. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (emphasis added).

156. *Id.*

Chinese, Russian and French threats to veto the resolution declaring “material breach” by Iraq, Resolution 1441 was revised.¹⁵⁷ On September 17, 2002, President Bush first released what has become known as “the Bush Doctrine of preemptive self-defense” in the National Security Strategy.¹⁵⁸ In the case of Iraq, President Bush made clear that the United States could always proceed in the exercise of its inherent right of self-defense recognized in Article 51 of the United Nations Charter.¹⁵⁹ President Bush used the 9/11 attack and the War on Terror to justify the 2003 invasion of Iraq as a preemptive use of self-defense with mixed rationales. Some of the reasons given were that Iraq had weapons of mass destruction,¹⁶⁰ the Iraqi people’s need for freedom, and the establishment of democracy in Iraq as an example for the region.¹⁶¹

VIII. IMPLICATIONS OF THE WAR ON TERROR

More complicated questions have arisen, such as whether an act of terrorism may be channeled through the rules of criminal law, either national or international, as the majority of treaties and resolutions have suggested; whether an act of terrorism constitutes an act of aggression in breach of Article 2(4), justifying an armed response in self-defense within the scope of Article 51 of the UN Charter; or whether an act of terrorism constitutes an act of aggression in breach of international peace and security that justifies a collective security approach by the Security Council under Chapter VII of the UN Charter. Without considering relevant questions with regard to the present and future course of handling terrorism, states have acted based on unilateral security prospects, which is by no means a responsible security policy. It has been suggested that militarily strong

157. See Tim Youngs and Paul Bowers, *Iraq and UN Security Council Resolution 1441*, 11-13, available at <http://www.parliament.uk/commons/lib/research/rp2002/rp02-064.pdf>. Compare, Full Text Draft UN Resolution, available at http://news.bbc.co.uk/2/hi/middle_east/2831607.stm with S.C. Res. 1441, *supra* note 155.

158. “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.” The National Security Strategy Of The United States Of America, 15 (Sept. 17, 2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> [hereinafter *The National Security Strategy*].

159. William H. Taft and Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 557 n.1, (citing Report in Connection with Presidential Determination Under Public Law 107-243, reprinted in 149 CONG. REC. H1957, H1958 (daily ed. Mar. 19, 2003) (on resolution authorizing use of force against Iraq).

160. See President George W. Bush, President Discusses Beginning of Operation Iraqi Freedom, (March 22, 2003) (transcript available at http://www.cfr.org/publication/18137/president_discusses_beginning_of_operation_iraqi_freedom.html?breadcrumb=%2Fbios%2F11324%2Fgeorge_w_bush%3Fgroupby%3D3%26hide%3D1%26id%3D11324%26filter%3D2003).

161. See President George W. Bush, President Discusses the Future of Iraq (Feb. 26, 2003) available at <http://www.mafhoum.com/press4/bush134.htm>; see also President George W. Bush, Address to the Nation – Ultimatum to Saddam Hussein, (March 17, 2003), available at <http://www.americanrhetoric.com/speeches/wariniraq/gwbushiraq31703.htm> (providing transcript and audio recording).

countries such as the United States are power-oriented and have a tendency not to recognize relevant international law or to disregard it, whereas Europe has a tendency to be law-oriented because of its militarily weak position.¹⁶² Because of its power-oriented approach, the United States' War on Terror has raised questions on the future of international law.

There are three primary sections contained in the Charter of the United Nations that govern the use of force against Member States.¹⁶³ First, Article 2(4) of the Charter provides a blanket mandate against the use of force "in any manner inconsistent with the purposes of the United Nations."¹⁶⁴ Specifically, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁶⁵ Second, Article 51 of the UN Charter is the initial legal structure for self-defense.¹⁶⁶ Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁶⁷

Third, Chapter VII of the UN Charter¹⁶⁸ empowers the Security Council to take those actions necessary to maintain international peace and security. In essence, Chapter VII allows the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to authorize the Member Nations to take nonmilitary and military actions to "restore international peace and security."¹⁶⁹

The United States' action in going into Afghanistan in self-defense and the post 9/11 War on Terror have a number of serious implications on international law by amending and expanding Article 2(4) and Article 51 of the UN Charter.

162. *See generally* ROBERT KAGAN, OF POWER AND PARADISE: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003) (providing a realist perspective and author firmly supports Bush's foreign policy).

163. *See* U.N. Charter arts. 2(4), 39-45, 51.

164. *Id.* art. 2(4).

165. *Id.*

166. *Id.* art. 51.

167. *Id.*

168. *See id.* arts. 39-45.

169. *Id.* art. 39.

Previously, Article 2(4) was limited to state actors;¹⁷⁰ however, after 9/11 not only state actors but also non-state actors can violate Article 2(4) by disturbing the territorial integrity and political sovereignty of a country. This means that Article 2(4) has been extended to include any non-state actors who initiate or plan to attack another country. The entire international community rushed to embrace the *de facto* amendment of Article 2(4) by endorsing the use of self-defense as a justification of the United States' actions against Al Qaeda, a non-state actor, in Afghanistan, which in turn eviscerated the thrust of Article 2(4).¹⁷¹

The doctrine of self-defense has been stretched from self-defense under Article 51 of the UN Charter¹⁷² to preemptive self-defense or anticipatory self-defense as described in the Caroline Doctrine,¹⁷³ and now is further stretched to preventive self-defense as utilized by the Bush Administration during its invasion of Iraq.¹⁷⁴ After 9/11, Article 51 has been amended in two ways. First, the post 9/11 War on Terror has amended Article 51, initially a structure for self-defense, to encompass "preemptive" self-defense, which is similar to the preemptive self-defense or anticipatory self-defense under the Caroline Doctrine.¹⁷⁵ This means that a state can now justify the use of preemptive self-defense under Article 51 of the Charter without regard to the words and intent of the Article's provisions. Second, after 9/11, a state or non-state actor does not have to actually attack or violate Article 2(4) of the Charter prior to a self-defense claim being utilized.¹⁷⁶ If any state or non-state actor initiates or plans in a host country to attack another country, the host country is subject to a self-defense attack. This is recognition of the preventive self-defense justification used by the Bush Administration during its invasion of Iraq.¹⁷⁷ Thus, Article 2(4) and Article 51 have been expanded to include not only the inherent right of self-defense after an actual attack occurs but now also are being used to justify preemptive and preventive self-defense in situations where a state or non-state actor is believed to have plans for an attack, based solely on the unilateral prediction of the country using force that an attack will occur in near or remote future – even though that prediction may be wrong.

The War on Terror saga of the Bush Administration, by (ab)using Article 51 of the UN Charter, has caused not only *de facto* amendment of Articles 2(4) and 51 but has also undermined the use of collective security under Chapter VII of the UN Charter.¹⁷⁸ The United States acted unilaterally by not bringing the 9/11 case

170. *See id.* art. 2(4).

171. *See* YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE, 207-08 (4th ed. 2005); *see also* Colonel Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT'L L. 281, 293 n.54 (2005).

172. U.N. Charter, art. 51.

173. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 92 (1938).

174. *See* The National Security Strategy, *supra* note 158, at 15.

175. *See* Jennings, *supra* note 173, at 92.

176. *See* The National Security Strategy, *supra* note 158, at 15.

177. *See* Taft & Buchwald, *supra* note 159, at 557.

178. Chapter VII entitled "Action With Respect To Threats To The Peace, Breaches Of The Peace,

before the Security Council, usurping the UN Security Council's authority under Article 39. In doing so, the United States not only missed the opportunity to adhere to the UN charter and international law but also missed an "opportunity knocking" chance for international leadership. If the Bush Administration was honest in its determination that 9/11 was a threat of or breach of international peace and security, it could have brought the issue before the Security Council rather than unilaterally declaring a global War on Terror and imposing its consequences upon the world. Unfortunately, the Bush Administration did not bring the 9/11 issue before the Security Council. It decided to take the responsibility upon itself, along the way limiting the scope of terrorism to the conduct of Al-Qaeda, Bin Laden and the Taliban. It further embellished this restricted view of terrorism (Al-Qaedaism) by invading Iraq, which in turn led to the invitation of Al-Qaedaists into the country. The international community was forced to fix the humanitarian conditions in Iraq and Afghanistan that were caused by the destruction of a war waged without the authority of international law. This missed opportunity to bring the 9/11 issue before the Security Council has led to a new problem in international law – the prospect of never-ending terror wars. The United States' action in pursuing a global War on Terror has energized the side claimed to be terrorists in terms of their scattered but collective intent to network and has unified scrambled but common anti-US sentiment.

What if the United States had, prior to invading Afghanistan, brought the case before the Security Council under Chapter VII of the UN Charter by arguing that 9/11 was a threat to and breach of international peace and security? Considering the worldwide support of the United States based on the 9/11 event,¹⁷⁹ there is a little or no doubt that the Security Council would have determined that 9/11 was in fact a threat to, and breach of, the peace and security under Article 39 of the UN Charter.¹⁸⁰ This determination would have given the Security Council the ability to enforce Article 42, allowing the United States along with the other Members of the United Nations to "take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security,"¹⁸¹ without applying Article 40 (requesting compliance with provisional measures)¹⁸² or Article 41 (complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relation).¹⁸³ Further, all Member states would have had to undertake actions under

And Acts Of Aggression" of the U.N. Charter sets forth the basis for use of collective security. U.N. Charter ch. VII. *See infra* notes 180-185 and accompanying text (providing a summary of the collective security abilities under Chapter VII).

179. *See* Watkin, *supra* note 171, at 281 n.54.

180. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter, *supra* note 163, art. 39.

181. *Id.* art. 42.

182. *Id.* art. 40.

183. *Id.* art. 41.

Article 43.¹⁸⁴ If the application of Article 43 would have taken too much time, the United States and other countries could have cooperated in providing combined international enforcement action under Article 45 of the Charter.¹⁸⁵ If these actions had been considered, the international community would not have struggled with the meaning of self-defense and the applicability of Chapter VII of the UN Charter

IX. CONCLUSION

The absence of an internationally accepted definition of terrorism has led to international lawlessness and unilateral vigilantism. The post 9/11 War on Terror resulted from the longstanding failure of the international community to agree on a definition of terrorism, which in turn has intensified the war of terrors between the two sides. From the viewpoint of one side, this is a justified (unilaterally, because this side has capability to move and manage military might and resources) War on Terror to protect human rights, freedoms, civilization and the (self-styled) global rule of law. This side has labeled its War on Terror a just war by definition, defocusing a possible response mechanism to address the very real problem of international terrorism. The method of this War on Terror by the coalition of willing nations against insurgents and failed states will lead to likely forfeiture of sovereign equality, hot pursuits of terrorists under the claim of international rule of law without proper application of the UN charter, and so-called justified preventive war and regime change without regard to the interests and human rights of the people of weak or failed states. The result is a fiercely proclaimed or professed new international law and order. On the other side, weak or failed states and stateless actors view terror as a justified response to a history of terrorism (a series of events resulting in victimization by domination, colonization, hegemonization, and the silencing of dissent). This side, then, views terrorism as perhaps the only available tool against the so-called civilized and powerful nations' asserted responsibility to unilaterally guarantee international stability, peace and security, and against horror produced by a good Samaritan global hegemon.

The concept of the War on Terror, particularly after 9/11, has emerged in a form in which only failed states and less powerful and resourceful people engage

184. *Id.* art. 43. Art. 43 of the U.N. Charter provides that "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." *Id.*

185. *Id.* art. 45. "In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee." *Id.*

in the act of terrorism, a form in which (self-styled) civilized nations will never employ terrorism or engage in terrorist activities. But because there is no legal basis to respond to terrorist activities, both sides can now assert an ethical basis for their respective terror wars. This division between nations and societies will create enormous tension between the populace of both sides, leaving open the question of whether terrorism is an effect or a cause of the horror that follows.¹⁸⁶ In order to avoid such a division and debate, the definition of terrorism needs to include the terrorist activities conducted not only by the failed or likely to be failed states and scattered non-state actors, but also should include the terrorist activities engaged in by the powerful states. This inclusive approach in defining terror has the potential to create an international acceptability to the definition of terrorism. At the same time, this approach will provide an objective standard for all state and non-state actors to use in response to the problem of terrorism. Such a clear and inclusive standard might suffer from the lack of traditional enforcement mechanisms in international law; however, it will provide a legal basis for international consensus to criticize and to pressure a country or a group that engages in terrorist activities.

186. Angelica Nuzzo, *Reasons for Conflict: Political Implications of a Definition of Terrorism*, 35 METAPHILOSOPHY 330, 336 (2004).

