

**THE DUAL IMPERATIVE TO ENHANCE NATIONAL  
SECURITY AND FOSTER HUMAN RIGHTS**  
THE UNITED NATIONS AND THE ADOPTION OF RESOLUTION 1373

Master of Arts in Law and Diplomacy Thesis

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## **ABSTRACT**

“There is no trade off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights—the deep respect for the dignity of each person—is among our most powerful weapons against it. To compromise on the protection of human rights would hand terrorists a victory they cannot achieve on their own. The protection and promotion of human rights should therefore be at the centre of anti-terrorism strategies.”<sup>1</sup>

-Secretary-General of the United Nations, Kofi Annan, September 2003

On September 28<sup>th</sup>, 2001, the United Nations (hereafter, the UN) Security Council unanimously adopted Resolution 1373, through which it codified abstract and specific rules pertaining to terrorism which are obligatory and binding on all member states. While mainstream discourse has pointed to the opportunities provided by Resolution 1373 to build a consistent and coherent global anti-terrorism regime, international human rights advocates have raised grave concerns over its sanctioning of human rights violations by state authorities under the guise of countering terrorism.

This dually descriptive and prescriptive paper will investigate the impact of Resolution 1373 on the global human rights regime, its actors, and its institutions by exploring the following three questions: 1) Does the mandate of UN Security Council Resolution 1373 pose a threat to the international human rights regime?; 2) What precedent does the Security Council's legislative act set?; and, 3) Do the implementation and enforcement mechanisms, and obligations contained within Resolution 1373 condone state behavior that is ultimately detrimental to states' citizens?

By examining the philosophical, structural, and functional components, as well as the political factors that led to the establishment of Resolution 1373, the study proposes that the resolution poses a threat to the international human rights regime by providing states with the façade of UN sanction to implement sweeping anti-terrorism measures. Albeit lofty in its objective to build a global standard to assist states in taking practical measures to prevent the scourge of terrorism both domestically and internationally, the Security Council and the institutions of Resolution 1373 lack the current capacity to monitor states' compliance in a manner that recognizes and reinforces global human rights norms.

Through the adoption of Resolution 1373, the Security Council circumvented the traditional use of treaties and conventions to develop broadly-agreed upon international norms under the guise of multilateralism—and essentially provided an avenue for US unilateral assertions. More honest multilateral endeavors provide the only true mechanism to foster a more holistic conception of “security” that seeks to protect citizens from the vastly complex threats to their *human* security—including those posed by the threat of terrorism.

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<sup>1</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 23.

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## **CHAPTER I: Background**

### **Section 1: Overview**

#### **i. Introduction:**

On September 28<sup>th</sup>, 2001, the UN Security Council unanimously adopted Resolution 1373, through which it codified abstract and specific rules pertaining to terrorism which are obligatory and binding on all member states. While mainstream discourse has pointed to the opportunities provided by Resolution 1373 to build a consistent and coherent global anti-terrorism regime, international human rights advocates have raised grave concerns over its sanctioning of human rights violations by state authorities under the guise of countering terrorism.

This dually descriptive and prescriptive paper will investigate the impact of Resolution 1373 on the global human rights regime, its actors, and its institutions by exploring the following three questions: 1) Does the mandate of UN Security Council Resolution 1373 pose a threat to the international human rights regime?; 2) What precedent does the Security Council's legislative act set?; and, 3) Do the implementation and enforcement mechanisms, and obligations contained within Resolution 1373 condone state behavior that is ultimately detrimental to states' citizens?

By examining the philosophical, structural, and functional components, as well as the political factors that led to the establishment of Resolution 1373, the study proposes that the resolution poses a threat to the international human rights regime by providing states with the façade of UN sanction to implement sweeping anti-terrorism measures. Albeit

lofty in its objective to build a global standard to assist states in taking practical measures to prevent the scourge of terrorism both domestically and internationally, the Security Council and the institutions of Resolution 1373 lack the current capacity to monitor states' compliance in a manner that recognizes and reinforces global human rights norms. Through the adoption of Resolution 1373, the Security Council circumvented the traditional use of treaties and conventions to develop broadly-agreed upon international norms under the guise of multilateralism—and essentially provided an avenue for US unilateral assertions. More honest multilateral endeavors provide the only true mechanism to foster a more holistic conception of “security” that seeks to protect citizens from the vastly complex threats to their *human* security— including those posed by the threat of terrorism.

Although premised on the framework postulated by Kofi Annan above—“that there is no tradeoff to be made between human rights and terrorism, and that promoting human rights is not at odds with battling terrorism”—this study recognizes the necessity for all states to strike a balance between upholding human rights principles broadly and ensuring that their citizens are able to live without fear from terrorism.<sup>2</sup> Moreover, it acknowledges that human rights principles and commitments impose limitations on the manner in which states are able to respond to terrorism, but fail to circumscribe the actions of terrorist agents, who are able to operate outside of normative confines.<sup>3</sup>

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<sup>2</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 23.

<sup>3</sup> Joan Fitzpatrick, “Speaking Law to Power: The War Against Terrorism and Human Rights,” *European Journal of International Law*, Vol. 14, No. 2: 243.

However, this study is ultimately rooted in the belief that national and global security, actualized through a variety of international and domestic measures, including Resolution 1373 and its operational agencies—and human rights norms, practices, and institutions—are not mutually exclusive. The compelling notion that 191 independent states within the international community can and should strive to uphold both of these principles of national security and human rights is evident in the values, institutions, and practices that undergird and constitute the UN Charter and system. Policies developed within the system that are detrimental to human rights principles and institutions are reparable through prescriptive remedies that recognize states' desire to work through international organizations such as the UN. In conclusion, the author will therefore provide prescriptions to strengthen harmonization, integration, and cooperation between the global anti-terrorism and human rights regimes through institutional and mandate-specific remedies.

## ii. Context:

The terrorist attacks that occurred in New York, Washington, and Pennsylvania on September 11<sup>th</sup>, 2001 shook the United States at its very core, bringing to glaring light the porous nature of its territorial dominion, the inadequate information that had historically been prioritized and generated in the intelligence community, and the points of structural weakness in the domestic security regime. The complex and multi-dimensional impact of September 11<sup>th</sup> was catastrophic—traversing beyond the realm of physical destruction and death, to “quite possibly shatter the emotional foundation on which Americans' sense

of physical safety had rested.”<sup>4</sup>

The consequences of September 11<sup>th</sup> experienced in the domestic domain represented only one act on the radically transformed global political stage, on which conflicting forces such as unilateralism and multilateralism, and reactive versus preventative diplomacy and militarism would play themselves out. September 11<sup>th</sup> served as a glaring reminder of the inseparable relationship between internal and international security—and resulted in the implementation of immediate and longer-term political, legal, and structural domestic alterations to “enhance” the security environment in the United States, and in nations throughout the world. In addition to the sense of urgency spurred by September 11<sup>th</sup> to implement domestic security measures globally, the international nature of the threat of terrorism, its agents, and its enabling processes became salient. This environment fostered renewed prospects for global cooperation to combat specific categories of crimes and behavior that fell under the conceptually vague rubric of “terrorism” and “terrorist acts.”<sup>5</sup>

The goal to develop collective arrangements to address shared security concerns of a grave nature served as the *raison d'etre* for the earliest international organizations, dating back to the Hague International Peace Conferences of 1899-1907, which sought to establish laws of war, and a machinery for dispute settlement.<sup>6</sup> The centrality of security

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4 W. Michael Reisman, “In Defense of World Public Order,” *The American Journal of International Law*, Vol. 95, No. 4 (Oct., 2001): 833.

5 Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *Leiden Journal of International Law*, 16 (2003): 594.

6 Philippe Sands and Pierre Klein, “General Introduction,” in *Bowett's Law of International Organizations*, eds. Philippe Sands and Pierre Klein (London: Sweet & Maxwell, 2001), 3.

concerns, the endeavor to address these through collective mechanisms, and the imperative for international organizations to serve as arenas for discourse were all reinforced throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, most notably through United States President Woodrow Wilson's landmark post-World War I attempt to establish the world's first collective security regime, the League of Nations.<sup>7</sup>

The UN, which came into being in 1945 in the aftermath of World War II, sought to utilize the lessons-learned from Wilson's inability to garner adequate support for the establishment of the League of Nations, due to a shared belief during the interwar period that collective security was a utopian concept rooted in idealism.<sup>8</sup> The UN would develop a multilateral security system as a component of a more comprehensive global arrangement in which it would be linked to institutions aimed at fostering the social and economic conditions for peace.<sup>9</sup>

The UN was conceived of as an organization that would function as a security institution integrated into a broader system aimed at promoting international peace. The UN Security Council, with its five permanent (P5), and 10 regionally-rotating members, was designed to be responsible for the maintenance of international peace and security, and was granted the authority to adopt resolutions that are binding on all members—mandates which are outlined in Articles 24 and 25 of the UN Charter.<sup>10</sup> Linked through a vast web of institutional arrangements, organizations such as the General Assembly and

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7 Ibid, 10.

8 Ibid, 13.

9 Ibid, 24.

10 United Nations Charter, Articles 24 and 25.



subsidiary organs such as the United Nations Development Program (UNDP) and the United Nations International Children's Emergency Fund (UNICEF) were tasked with countering the political, social, economic, and cultural obstacles to peace, and to individual and collective development.<sup>11</sup>

### iii. Resolution 1373 and the Security Council's Evolving Role:

The policy environment that unfolded in the aftermath of September 11<sup>th</sup> reinforced the traditional tension in international affairs between states' temptation, ability, and willingness to avail themselves of either unilateral or multilateral channels to meet their interests, while upholding a certain “identity” to domestic constituencies and in the global community.<sup>12</sup> Ultimately, the extent to which each of the approaches successfully enabled the US and other states to achieve their objectives, limited their opportunities in the short and long-term, and enabled them to strike a balance between moral idealism and realist concerns—is fiercely debated.

In the aftermath of September 11<sup>th</sup>, debates between the comparative value of unilateralism versus multilateralism, and UN-engagement versus 'do it yourself' realism reigned on the US domestic political stage in regards to a potential invasion of Afghanistan. In a parallel and simultaneous process, more subtle pressures began to be exerted on the UN to strike a balance between its goals as a security organization and as a tool for human rights and social and economic development. The UN's capacity to

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<sup>11</sup>Philippe Sands and Pierre Klein, “Principal Organs,” in *Bowett's Law of International Organizations*, eds. Philippe Sands and Pierre Klein (London: Sweet & Maxwell, 2001), 41.

<sup>12</sup>Janusz Symonides, “New Human Rights Dimensions: Introductory Remarks,” in *Human Rights: New Dimensions and Challenges*, ed. Janusz Symonides (Hants, UK: Ashgate Dartmouth, 1998): 13.

negotiate these dual goals was simultaneously limited and facilitated by its imperative to mediate between the pressures exerted by its most powerful members—the Permanent Five (P5) of the Security Council—and the interests of its broader membership base.<sup>13</sup>

For the United States, as well as for other actors in the international community, most notably the members of the Security Council, September 11<sup>th</sup> fostered a sense of shared urgency to address a common danger, and renewed an interest in the UN. This interest was specifically directed at the legitimizing power of the Security Council, which enables it to engage in enforcement, respond to “particular actions or situations threatening international peace and security;” and adopt binding resolutions in response to terrorism.<sup>14</sup> Whatever the intent of the US's and other states multilateral engagement through UN channels in the aftermath of September 11<sup>th</sup>, it appeared to reflect what Kofi Annan described in the recently released report, *In Larger Freedom: Toward Development, Security, and Human Rights*, “a growing belief in the importance of effective multilateralism.”<sup>15</sup>

In the immediate aftermath of September 11<sup>th</sup>, this renewed strategic interest in the UN on the part of some member states became glaringly evident, as did its own desire as an international organization to raise its collective voice on the dangers of terrorism. On September 12<sup>th</sup>, 2001, the Security Council issued Resolution 1368, through which it

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13 W. Michael Reisman, “In Defense of World Public Order,” *The American Journal of International Law*, Vol. 95, No. 4 (Oct., 2001): 834.

14 Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations,” *Leiden Journal of International Law*, 16 (2003): 600.

15 United Nations Secretary General. *In Larger Freedom: Toward Development, Security, and Human Rights for All* (accessed March 24, 2005; available from <http://www.un.org/largerfreedom/>), 26.

condemned the terrorist attacks and framed them as threats to international peace and security. It recognized the US right to individual and collective self-defense under Article 51 of the UN Charter in response to an “armed attack.” Through Resolution 1368, the Security Council called on states to bear the shared responsibility for addressing terrorism and for bringing the perpetrators, organizers, and sponsors to justice, and expressed its readiness to take all necessary steps to respond to the terrorist attacks of September 11<sup>th</sup>.<sup>16</sup>

As a mechanism to establish more specific controls on the actions of states, and to address the holistic nature of the terrorist threat, the Security Council acted under its Chapter VII mandate on September 28, 2001 to unanimously adopt Resolution 1373, through which it codified abstract and specific rules pertaining to terrorism which are obligatory and binding on all of the UN's 191 member states.<sup>17</sup> Indicative of the gravity of its response to September 11<sup>th</sup>, the Security Council utilized the operative statement that “all states *shall* take certain actions against terrorist activities,” rather than the weaker term '*should*'. Resolution 1373 represented not only a fundamental shift in the function and role of the Security Council, but also codified the conception that addressing terrorism is a collective responsibility.<sup>18</sup>

Terrorism in the post-September 11<sup>th</sup> environment was viewed as posing too grave a

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16 Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 481.

17 David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, “An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism,” *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 3.

18 Paul Szasz, “The Security Council Starts Legislating,” *The American Journal of International Law*, Vol. 96, No. 4 (October, 2002): 902.

threat to be addressed in an ad hoc manner and voluntarily by signatories to international anti-terrorism conventions that were generally already deemed “status quo” states. The Council's prior practice of adopting resolutions on terrorism became viewed as insufficient to address latent terrorist threats, including structural weaknesses within states that could make these matters of international concern. In light of these responses, a consensus emerged among the members of the Security Council that the global endeavor to address terrorism would be more effective, manageable, and accountable if it passed a binding resolution which would make compliance obligatory for all states, and if it established a monitoring and enforcement mechanism to enhance the potential for compliance.<sup>19</sup>

The Security Council has historically exercised significant discretion in interpreting the concept of 'threats to the peace' delineated in Article 39 of the UN Charter, and has responded with flexibility to its enforcement mandate contained in Articles 41 and 42.<sup>20</sup> Prior to its passage of Resolution 1373 in the aftermath of September 11th, the Security Council utilized this flexible interpretation of 'threats to the peace' to compel states compliance with resolutions using a wide range of techniques. These techniques not only included those mentioned in the Charter, such as sanctions and the use of military force, but also the demarcation of international borders, the awarding of compensation, and the establishment of international tribunals.<sup>21</sup>

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19 Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 595.

20 United Nations Charter, Articles 39, 41, and 42.

21 Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 594.

Although Resolution 1373 was consistent with the Security Council's practice of flexibly interpreting its mandate to maintain international peace and security, it heralded a dramatic transition from its more traditional use of Chapter VII to react to specific situations to action intended to address systemic factors regarded as posing persistent threats to international peace and security.<sup>22</sup> The modifications from prior practice evident in the scope of Resolution 1373 are both structural and functional. It has paved the way for an enhanced role for the Security Council in the legislative arena and created a more active and engaged UN anti-terrorism regime. Additionally, Resolution 1373 has had a profound impact on influencing state and non-state actors alike as they respond to new opportunities and limitations fueled by alterations in legal, law-enforcement, and security regimes at the domestic, regional, and the international level.

#### iv. Human Rights in the International System: A Progressive Discourse

Although evidence points to the existence of human rights principles and concepts of natural morality in the philosophical and religious discourse of ancient times, the contemporary international human rights regime took shape and gained its momentum in the aftermath of World War II.<sup>23</sup> The crystallization of human rights principles, and the integration of these norms into institutional frameworks was fueled by the collective conviction in the aftermath of the Holocaust that the extermination of citizens was intolerable on ethical and moral grounds, and posed a threat to international peace and

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22 Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 602.

23 Richard B. Bilder, "An Overview of International Human Rights Law," in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Ardsley, NY: Transnational Publishers, Lc., 2004), 4.

security.<sup>24</sup>

This new notion of the preeminence and inviolability of human rights resulted in an expansion of international concern into the realm of traditionally domestic matters. The post-Westphalian system of international affairs was challenged by this new view that the protection of human rights was beyond the discretion of individual leaders. Supranational actors such as the United Nations increasingly became justified in taking forceful action against states to protect the rights of individual citizens.<sup>25</sup>

Since 1648 the international system had rested on the principle of state sovereignty, with deviations from this notion limited to the provision of diplomatic protection.<sup>26</sup> Increased concerns for the well-being of individual citizens within states struck at the heart of the conventional conception of domestic control and altered the view of national responsibility and obligation. However, by no means did it put to rest the historical tension between sovereignty and universality.

The dual imperatives to uphold universal ethical principles and to address the threat to international peace and security posed by human rights violations within the domestic arena of states has imbued the language and institutional mechanisms of the UN since its establishment in 1945. The centrality of human rights concerns and the imperative of states to foster fundamental freedoms became one of the principal purposes of the UN, and was codified in the UN Charter. In its Preamble, and in Articles 1, 55, and 56, it

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24 Ibid, 5.

25 Ibid, 6.

26 Ibid, 4.

states the goals of the institution and its members to promote and encourage respect for human rights.<sup>27</sup>

UN operations in the human rights arena have historically focused on the use of diplomatic and coercive measures against states to protect citizens from violations by their leaders. They have also assisted states in developing institutional and legal mechanisms for the practical implementation of human rights norms. The UN has used a wide variety of institutional and legal mechanisms to serve as a third-party mediator between populations and their leaders, to engage in constructive dialogue with states, and to take forceful action against countries.

Institutional mechanisms have included diplomatic channels afforded by the 'good offices' function of the Secretary-General; processes for engagement and collaboration with states through the Office of High Commissioner for Human Rights (OHCHR); and human rights treaty-obligation monitoring and follow-up by the Commission on Human Rights (CHR). Additionally, legal measures have been taken through the development, ratification and adoption of international human rights treaties, conventions, protocols, and Security Council resolutions.<sup>28</sup>

These system-wide UN processes have included the use of diplomatic measures to encourage states to promote the universal ratification and implementation of human rights treaties. Through the passage of Security Council resolutions they have obligated the

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<sup>27</sup> United Nations Charter, Preamble, Articles 1, 55, and 56.

<sup>28</sup> Richard B. Bilder, "An Overview of International Human Rights Law," in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Ardsley, NY: Transnational Publishers, Lc. 2004), 12.

cessation of human rights atrocities and responded to humanitarian crises. The UN has additionally encouraged the evolution of customary international human rights norms, which albeit not binding, have shaped domestic laws and influenced national court decisions due to the universality of their moral and political weight.<sup>29</sup>

The institutionalization of the international human rights regime and the global mainstreaming of moral standards have relied on the UN's capacity to serve as a mediator that can exert influence on the actions and behavior of states. The importance of the UN's role in this regard has been noted with regularity by international human rights advocates, including by the participants at the 2003 conference entitled, *Human Rights Defenders on the Frontlines of Freedom*, hosted by the Carter Center, which in their meeting report stated as one of the “three types of international solidarity that can make a difference between real improvements in human rights practices and the status quo—*cooperation and support from intergovernmental organizations such as the UN and regional bodies.*”<sup>30</sup>

#### v. Resolution 1373 and the Unease of the International Human Rights Regime:

Since its passage on September 28<sup>th</sup>, 2001, Resolution 1373 and the broadly defined obligations on states contained therein have been examined by a wide spectrum of political theorists, international lawyers, and security experts. They have highlighted its

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<sup>29</sup> Ibid, 5.

<sup>30</sup> The Carter Center. *Human Rights Defenders on the Frontlines of Freedom* (November, 2003); available from <http://www.cartercenter.org>, 10.



precedent-setting nature and its capacity to exert significant influence on state behavior in addressing what mainstream discourse tends to describe as “a common danger to world public order.”<sup>31</sup> Amidst these mixed but overwhelmingly positive analyses, however, mounting impassioned concerns have been voiced by the UN's human rights institutions, as well as by international human rights advocates and Non-Governmental Organizations (NGOs).

Although widely divergent in their substantive emphases and in the urgency of their claims, in sum human rights advocates have raised concerns that fall into four principle conceptual categories: a) derogations from international legal norms; b) philosophical and values-based arguments; c) relationship-oriented threats; and, d) concerns centered on institutional structures and dynamics. These concerns are delineated in further detail below:

**a. Violations from International Legal Norms:**

Resolution 1373 makes no precise reference to states' obligations to international human rights, humanitarian, and refugee law. To address this shortcoming, the Security Council adopted Resolution 1456 in January 2003, which obligates all states to “ensure that any measure taken to combat terrorism comply with their obligations under international law and that they adopt such measures in compliance with international law, in particular international human rights, refugee and humanitarian law.”<sup>32</sup>

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31 W. Michael Reisman, “In Defense of World Public Order,” *The American Journal of International Law* Vol. 95, No. 4 (Oct. 2001): 834.

32 United Nations Security Council Resolution 1456 (January 20, 2003), S/RES/1456.

Despite the adoption of Resolution 1456, human rights advocates and international lawyers have expressed grave concerns that states are taking measures that are non-compliant with international legal norms in their efforts to address terrorist threats. A number of these concerns are outlined in an October 2004 study conducted by the Office of the High Commission for Human Rights (OHCHR), entitled *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*. Drawn from a series of reports submitted by states on the topic of anti-terrorism and human rights, the study provides an overview of human rights concerns emerging in the context of their implementation of anti-terrorism measures in the areas of judicial reform, law-enforcement, and border control.<sup>33</sup>

Although the study identifies a wide range of concerns, it focuses particular attention on practices that pose direct threats to international human rights, humanitarian, and refugee law. The study identifies a number of violations, the majority of which are delineated as protections in the International Covenant on Civil and Political Rights (ICCPR). These include: crackdowns on freedom of speech (Article 19, ICCPR) and freedom of assembly (Article 21, ICCPR); violations of the right to privacy (Article 17, ICCPR); nefarious detention practices, including holding alleged “terrorists” at undisclosed locations, and conducting inter-state transfers and extradition (Article 9, ICCPR); and the introduction of new procedures for use in the detention of suspected terrorists and the prosecution of terrorism-related cases (Articles 9 and 14, ICCPR).<sup>34</sup>

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33 United Nations, General Assembly Report, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Study of the United Nations High Commissioner for Human Rights*, A/59/428 (October 8, 2004): 13.

34 Ibid, 15.

Perhaps the gravest danger identified by the OHCHR has been the tendency for states to derogate from human rights provisions under the mantle of declared “emergency situations.” Article 4 (1) of the ICCPR permits states to derogate from certain rights when threats to national security lead to states of emergency. However, Article 4 additionally imposes limits on the permissiveness of the suspension of certain rights, declaring Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18, as non-derogable.<sup>35</sup> The UN's human rights machinery has made multiple efforts to clarify the scope of non-derogable rights and provide guidelines to states on elements which are not subject to lawful derogation. Despite these efforts, however, UN human rights bodies have expressed concern that anti-terrorism measures have resulted in significant violations of international humanitarian, human rights, and refugee law.<sup>36</sup>

#### b. Philosophical and Values Based Arguments:

Human rights advocates critiquing the impact of Resolution 1373 through a philosophical and values-based framework hold that states' have overwhelmingly accepted human rights principles, evidenced through their active participation in human rights discourse, commitment to norms codified in international conventions and treaties, and their deliberate domestic and global promotion of a “human rights friendly” identity. However, in the presence of perceived threats to 'national' and 'international' security, these rights seem to be deemed as violable by states.

Values-based critiques additionally point to the potential for Resolution 1373 to

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<sup>35</sup> International Covenant on Civil and Political Rights (ICCPR), Article 4.

<sup>36</sup> United Nations, General Assembly Report, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 18-19.

jeopardize the progress that has been made toward reaching universal consensus on the inherent merits of “First Generation,” civil and political rights.<sup>37</sup> The notion that their promotion contributes to the endeavor to foster international peace and security—another core ideological objective of the human rights regime, is also put at risk. Pointing to both its domestic and international impact, critics additionally highlight that Resolution 1373 has reinforced the notion of the exclusivity of traditional conceptions of 'security' among member states, and chipped away at the progress that was made during the 1990s to broaden the discourse on 'security' to “human security.”<sup>38</sup>

In 1975 at the Conference of Security and Cooperation in Europe, this conception of “human security” was formalized through the Helsinki Final Act, which in its Principle VII and Basket III emphasize “Respect for Human Rights and Fundamental Freedoms,” and “Cooperation in Humanitarian and Other Fields.” By no measure did “human security” displace the focus of traditional conceptions of “security” in the domestic and foreign policy agendas of states. However, greater acceptance of this concept during the 1990s might be evidenced through countries enhanced willingness to endorse humanitarian interventions on human rights grounds.<sup>39</sup>

Critics argue that in the post-September 11<sup>th</sup> heightened security environment, “human

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37 Ramesh Thakur, “Security in the New Millennium,” in *Enhancing Global Governance*, eds. Andrew F. Cooper, John English, and Ramesh Thakur (New York, NY: United Nations University Press, 2002): 285.  
38 Thomas G. Weiss, Margaret E. Crahan, and John Goering, “The Serendipity of War, Human Rights, and Sovereignty: The Case of the United States,” in *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and US Foreign Policy*, eds. Thomas G. Weiss, Margaret E. Crahan, and John Goering (New York: Routledge, 2004), 3.

39 Jack Donnelly, “International Human Rights: Unintended Consequences of the War on Terrorism,” in *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*, eds. Thomas G. Weiss, Margaret E. Crahan, and John Goering (New York: Routledge, 2004), 105-106.

security” has been pushed to the background in light of states' prioritization of traditional notions of national security. An outcome of states tendency to revert to a more rigid view of security has been the development of greater consensus among states that national and human security are mutually exclusive and incompatible.<sup>40</sup>

c. Relationship-Oriented Threats:

Critics of Resolution 1373 are also concerned with its impact on the relationships between states and human rights advocates, alleged victims of human rights violations, and the UN system. They emphasize that it has tarnished the capacity for cooperative and collaborative engagement around human rights matters. In the heightened post September 11<sup>th</sup> security environment, human rights advocates' principal enterprise of 'naming and shaming' states into meeting their treaty obligations by documenting violations and defending alleged victims of violations has increased their vulnerability to government attacks based on allegations of noncompliance with new national security concerns. Decisions as to whether to advocate for human rights that might directly or indirectly be perceived as assaults on governments are significantly influenced by threats of state-instigated reprisals.<sup>41</sup>

The implementation of new security measures in the aftermath of the adoption of Resolution 1373 has tended to target actors perceived as nuisances and threats to the legitimacy of states—including human rights advocates. Although Resolution 1373 has made the potential of these threats more likely, the UN's recognition of the imperative to

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40 Ibid.

41 The Carter Center. *Human Rights Defenders on the Frontlines of Freedom* (November, 2003), 10. Available at <http://www.cartercenter.org>, 4.

protect human rights defenders from harassment and intimidation dates back to 2000, when the Commission on Human Rights (CHR) established the position of Special Representative on the Situation of Human Rights Defenders.<sup>42</sup> Appointed by the Secretary General, the Special Representative, Ms. Hina Jilani is tasked with promoting and protecting the human rights and fundamental freedoms of human rights defenders, including their capacity to engage in human rights work in the absence of coercion and threats of violence.<sup>43</sup>

In the aftermath of the passage of Resolution 1373, states' practice of hindering the capacity of human rights activists and organizations to engage in autonomous advocacy bears the potential to profoundly jeopardize the security and collective endeavors of advocates. This trend will likely impact channels for honest information on human rights violations that feed into the UN system. Primarily circumscribed by the use of diplomatic channels, the lack of information from advocates will limit the capacity of the UN human rights regime to take on the difficult and highly politicized task of holding member states accountable to their human rights obligations.

The impact of human rights violations stemming from the domestic implementation of Resolution 1373 are not only likely to threaten the UN's reporting and information feedback loop—but will probably have a profound impact on the lives of individuals and on the fate of particular communities. In communities around the world, minority groups

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42 Special Procedures of the Commission on Human Rights (accessed March 25, 2005); available from <http://www.ohchr.org/english/bodies/chr/special/themes.htm>.

43 Special Representative of the Secretary General on Human Rights Defenders--Mandate (accessed March 25, 2005); available from <http://www.ohchr.org/english/issues/defenders/mandate.htm>.

held in low esteem by prevailing power structures have been particularly vulnerable to attacks by governments under the guise of new security provisions.<sup>44</sup> These attacks on minority groups allegedly include more severe and repressive crackdowns by Russia, China, and Israel in their dealings in Chechnya, Xinjiang, and the West Bank.<sup>45</sup> Concerns over these types of actions have not only been voiced by NGOs, but also by the UN Secretary-General, Kofi Annan, whom in a press conference in July 2003 stated his concern that “under the guise of terrorism, governments all around the world are using the “T” word—and tagging people with it—to abuse their rights and to lock them up in jail and to deal with political opposition. We are seeing an erosion in respect for human rights, which is of concern to us all.”<sup>46</sup>

#### d. Concerns Centered on Institutional Structures and Dynamics:

Structural and functional concerns of the anti-terror regime established through Resolution 1373 are primarily leveled at two of its features—its conceptual design, and its capacity for coordination with the human rights regime. At the level of design, Resolution 1373's lack of a cogent definition of 'terrorism,' 'international terrorism,' and 'terrorist acts,' broadens the opportunities for states to flexibly interpret the obligations contained therein. The interpretation of international law in a manner that is self-fulfilling for states does not only occur in the “decentralized international legal system where much law is interpreted not by an impartial arbiter but by domestic officials who

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44 The Carter Center. *Human Rights Defenders on the Frontlines of Freedom* (November, 2003), 10. Available at <http://www.cartercenter.org>, 4.

45 Kenneth Roth, “The Fight Against Terrorism: The Bush Administration's Dangerous Neglect of Human Rights,” in *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*, eds. Thomas G. Weiss, Margaret E. Crahan, and John Goering (New York: Routledge, 2004), 124.

46 “Transcript of Press Conference by Secretary-General Kofi Annan at United Nations Headquarters, 30 July 2003,” Press Release SG/SM/8803, p. 7.

are institutionally and politically predisposed to interpretations that favour their government or state.”<sup>47</sup> It also occurs when these same domestic officials are incorporating international law into national judicial and law-enforcement systems.

At the level of cooperation and integration, critics point to the limited will of the implementing agency of Resolution 1373, the Counter-Terrorism Committee (CTC) to monitor alterations in states practices and institutions to ensure that they are compliant with international human rights norms. The deliberate lack of integration between the CTC and human rights institutions was demonstrated by a number of speeches presented to the Security Council by its former Chairman, Sir Jeremy Greenstock.<sup>48</sup>

In these speeches, Greenstock made explicit his view that ensuring compliance with human rights obligations falls outside of the Committee's purview when he stated that “the Counter-Terrorism Committee is mandated to monitor the implementation of Resolution of 1373. Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate.”<sup>49</sup> Although the CTC is not encouraging states to take action that is contradictory to their human rights obligations, it has tended to deflect the responsibility to monitor compliance to other UN agencies and instruments.<sup>50</sup>

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47 Ian Johnstone, “Security Council Deliberations: The Power of the Better Argument,” *European Journal of International Law*, Vol. 14, No. 3 (2003): 443.

48 Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 484.

49 Eric Rosand, “Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism,” *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

50 Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 485.



However, Greenstock additionally expressed the Committees' openness to "other organizations studying states' reports and taking up their content in other forums."<sup>51</sup> Ultimately, this "openness" has resulted in the human rights regime claiming the responsibility of monitoring human rights standards in light of new anti-terror measures. This task has principally fallen on treaty-monitoring bodies, which albeit severely under-resourced and restricted to investigating practices of states that have ratified treaties, have access to information covering a wide range of topics pertaining to civil, political, economic, social, and cultural rights. In July 2004, these efforts were bolstered by the CHR's decision to appoint Professor Robert Goldman (as per Resolution 2004/87) as the independent expert to assist the High Commissioner for Human Rights to fulfill the mandate to protect human rights and fundamental freedoms while countering terrorism.<sup>52</sup>

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## **Section 2: Theoretical and Normative Framework**

### **i. Theoretical Framework:**

A comprehensive analysis of the impact of Security Council Resolution 1373 on the global human rights regime necessitates the utilization of a theoretical framework to shed light on how international organizations shape and alter the behavior of states, enforce obligations, and juggle their simultaneously autonomous and rigidly prescribed roles. Institutionalism, Realism, Liberalism, and Social Constructivism serve as a useful sample of theoretical approaches to describe the nature, purpose, and dynamics of international

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<sup>51</sup> Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 342.

<sup>52</sup> Office of the United Nations High Commissioner for Human Rights. *Special Procedures of the Commission on Human Rights* (accessed March 10, 2005), available from <http://www.ohchr.org/english/bodies/chr/special/themes.htm>

organizations and their affairs with states.<sup>53</sup>

These theories take divergent views on the causal factors that trigger the development and foster the maintenance of international organizations as venues for deliberation by state and non-state actors. They also differ in their interpretation of states behavior within these institutions. Each of the theories rests on a continuum. At one end is the perception that international organizations have no autonomous functions and purposes beyond those granted to them by their most militarily and economically potent members. At the other is the opinion that these institutions possess identities that are wholly autonomous from their constituent parts.<sup>54</sup>

Realist political theorists such as George Kennan attribute the greatest influence to states in shaping the character and content of international organizations. They perceive these institutions as being “epiphenomenal” in that they are unable to exert independent influence on states, or on their behavior. Institutionalists, such as Robert Keohane and Joseph Nye, and Liberals such as Andrew Moravcsik ascribe a more flexible role to international organizations, viewing these institutions as facilitators of self-interested cooperation, and as incubators of transnational coalitions and networks. Social Constructivists such as John Ruggie, attribute the highest degree of autonomous legitimacy to international organizations, perceiving them as platforms for the development and propagation of norms, and as venues where states can redefine their

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53 Anne-Marie Slaughter, “The Technology: Principal Theories of International Relations,” Chapter 1 in *International Law and International Relations* (Ann- Marie Slaughter, Hague Academy of International Law Lectures, 2000): 30-31.

54 Ibid, 31.

interests and reinvent their identities.<sup>55</sup>

The following study will be examined from an Institutionalist framework, primarily on account of the centrality accorded to states' pursuit of interests through international organizations, and the value assigned to cooperation in the global system. Developed in the 1970s principally to ascribe meaning to the emergence of global economic interdependence, Institutionalists argue that although self-interest is the catalyst which propels states to act through international organizations, these institutions serve a critical function in the global community by institutionalizing rules, norms, principles, and decision-making procedures.<sup>56</sup> This process of institutionalization mitigates anarchy and allows states to cooperate toward the pursuit of common ends. International organizations provide a setting through which inherently self-interested states cooperate and obey agreed-upon rules due to the value attached to reciprocity; the imperative to preserve their reputation in the international community; and their long-term interest in upholding the overall integrity of the system.<sup>57</sup>

International organizations such as the UN, which is based upon a virtually global membership, provide avenues for both centralization as well as independence. They simultaneously facilitate collective action and invite opportunities for the most powerful states to dominate the institutional agenda. In the arena of centralization, the UN

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<sup>55</sup> Anne-Marie Slaughter, "The Technology: Principal Theories of International Relations," Chapter 1 in *International Law and International Relations* (Ann-Marie Slaughter, Hague Academy of International Law Lectures, 2000): 30-31.

<sup>56</sup> Robert Keohane, "International Relations and International Law: Two Optics," *Harvard Journal of International Law*, Vol. 38 (2), Spring 1997: 488.

<sup>57</sup> Anne-Marie Slaughter, "The Technology: Principal Theories of International Relations," Chapter 1 in *International Law and International Relations* (Ann- Marie Slaughter, Hague Academy of International Law Lectures, 2000): 30-31.

furnishes a platform for deliberative democracy and for justificatory discourse to take shape, and a neutral, depoliticized forum to manage substantive matters. Although it is shaped and profoundly influenced by the interests of its most powerful members, within defined spheres it is able to act with a degree of independence, both playing the part of community representative and enforcer.<sup>58</sup>

## ii: The United Nations' Norm-Creating Capacity:

UN agencies are not conceived of as legislative bodies, as their institutional objectives are principally carried out through the implementation of recommendations. The UN's norm-creating role has evolved progressively, as actors in the international arena have advocated for the development of new laws and regimes to provide frameworks for action around substantive issues of international concern. Lawmaking within the UN system has historically been conducted through three mechanisms: a) Security Council decisions; b) multilateral treaty making; and, c) the development of 'soft law'.<sup>59</sup>

Described in further detail below, these mechanisms shed light on the evolving process of norm-creation in the UN system. They point to the degrees of legitimacy accorded to different processes and structures in the international system, and provide a historical narrative that elucidates the current nexus between anti-terrorism and human rights.

### a. The Security Council:

As the principal lawmaking institution within the UN system, the Security Council's

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<sup>58</sup> Kenneth Abbot and Duncan Snidal, "Why States Act through Formal Organizations," *Journal of Conflict Resolution*, Vol. 42, No. 1 (February 1998): 9-11.

<sup>59</sup> Oscar Schachter, "The UN Legal Order: An Overview," in *The United Nations and International Law*, ed. Christopher Joyner (Cambridge, UK: Press Syndicate of the University of Cambridge, 1997), 3.

adoption of Resolution 1373 in the aftermath of September 11<sup>th</sup> does not itself portend a deviation in its normative practice. The Security Council draws its mandate to establish legally-binding norms from the authority granted to it in Articles 25 and 48 (1) of the UN Charter, which states that “the decisions of the Security Council are binding on all member states,” and that “the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”<sup>60</sup>

Although Resolution 1373 is unique in that it demonstrates the capacity of the Security Council to legislate for the global community, it has long tested its normative ability by issuing recommendations, passing binding resolutions absent enforcement, and taking enforcement action.<sup>61</sup> Articles 39 and 24 of the UN Charter set limits on the Security Council's authority to pass binding resolutions that threaten international peace and security, and require that it “act in accordance with the purposes and principles of the UN when discharging these duties (laid out in Chapters VI, VII, VIII, and XII).”<sup>62</sup>

Limits to the Security Council's powers are not merely codified in the UN Charter, but are privy to the dynamics of the larger institutional system in which it operates.

Maintaining a degree of legitimacy in its practice of adopting resolutions is essential for the Security Council to encourage states compliance. The centrality of Security Council

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60 United Nations Charter, Chapter VII.

61 Oscar Schachter, “The UN Legal Order: An Overview,” in *The United Nations and International Law*, ed. Christopher Joyner (Cambridge, UK: Press Syndicate of the University of Cambridge, 1997), 15.

62 United Nations Charter, Articles 24 and 39.

legitimacy is particularly salient in the case of Resolution 1373, which relies on the cooperation of states and contains limited opportunities for enforcement. Although by acting outside of the purview of the UN Charter the Security Council could theoretically face judicial review by the International Court of Justice (ICJ), in reality its authority is principally circumscribed by the political imperative to act in complementarity with other UN agencies.<sup>63</sup>

Historically, the Security Council has exercised significant latitude in interpreting the conception of 'threats to the peace, breaches of the peace, and acts of aggression' outlined in Chapter VII of the UN Charter. These have included invoking Chapter VII to adopt binding resolutions to counter less 'obvious' threats to international peace and security through the use of enforcement action and the imposition of sanctions. Security Council action to halt the repression of Kurds in Northern Iraq in 1991 (Security Council Resolution 688); ensure the delivery of humanitarian assistance in Somalia in 1992-1994 (Security Council Resolutions 751, 794, 814, 837, and 886); and engage in restorative democracy-building in Haiti in 1994 (Security Council Resolution 940), were all conducted through the vehicle of Chapter VII.<sup>64</sup>

#### b. Multilateral Treaty-Making:

Traditionally, multilateral treaties have served as the human rights regime's principal mechanism to build consensus on the inviolability of rights, and to induce compliance

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<sup>63</sup> Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 609.

<sup>64</sup> Thomas Weiss, David Forsythe, and Roger Coate, *The United Nations and Changing World Politics* (Boulder: Westview Press, 2001), 168-170.

with states existing international human rights obligations.<sup>65</sup> In the aftermath of the adoption of Resolution 1373, multilateral treaties have provided standards according to which the human rights community can hold states accountable. Moreover, they have provided human rights advocates with the language and institutions to encourage states to adopt a balanced approach to their dual imperative to foster national security and to promote human rights.

The process of multilateral treaty-making is facilitated through UN political bodies that assume quasi-legislative functions. Concerns for the establishment of standards for the protection and promotion of human rights figure prominently in a number of multilateral treaties—including in the UN Charter, ratified in 1945. In its Preamble and Articles 1, 55, and 56 the UN Charter states the goals of the institution and its members to promote and encourage respect for human rights. Additionally, it emphasizes the imperative to encourage the conditions that enable those rights to be actualized—conditions of social, cultural, economic, and political advancement.<sup>66</sup> The UN Charter establishes general human rights obligations, and is widely interpreted as prohibiting gross and systemic government-imposed or endorsed violations of human rights, such as through genocide or apartheid.<sup>67</sup>

Multilateral treaties that establish legally binding obligations on state parties and cover a wide range of substantive matters abound in the international system. Principal among

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65 Hurst Hannum, “Overview of NGO Strategies and Procedures,” in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Ardsley, NY: Transnational Publishers, Lc., 2004), 31.

66 United Nations Charter, Preamble and Articles 1, 55, and 56.

67 Philippe Sands and Pierre Klein, “Principal Organs,” in *Bowett's Law of International Organizations*, eds. Philippe Sands and Pierre Klein (London: Sweet & Maxwell, 2001), 24.

these are the International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social, and Cultural Rights (ICESCR), adopted in 1966. Framed as two distinct human rights mandates, they seek to delineate a series of substantive rights to be protected and/or promoted by state parties to the covenants.<sup>68</sup>

In the aftermath of the adoption of Resolution 1373, the ICCPR has been the principal multilateral treaty invoked by human rights advocates to point to inconsistencies between states international obligations and their domestic practices in the anti-terrorism arena. The ICCPR covers a wide range of substantive “First Generation” human rights issues, and obligates state parties to prohibit certain types of actions and to foster others.<sup>69</sup>

### c. The Development of 'Soft Law':

International declarations, resolutions, and recommendations passed by the General Assembly and in other UN forums frequently have a legal effect and essentially constitute 'soft' law, as they are viewed as authentic interpretations of the Charter and affirmations of recognized customary law. Although General Assembly resolutions are not technically binding in international law, they take on a normative function and a moral authority, and are frequently invoked in connection with human rights issues.<sup>70</sup>

The most important of these, the Universal Declaration of Human Rights (UDHR), was

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<sup>68</sup> Office of the High Commissioner for Human Rights. *International Covenant on Civil and Political Rights (ICCPR)*, (General Assembly resolution 2200A XXI, 16 December 1966), (accessed March 10, 2005); available from [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). Office of the High Commissioner for Human Rights. *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, (General Assembly Resolution 2200A XXI, 16 December 1966), (accessed March 10, 2005), available from [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm).

<sup>69</sup> Ibid.

<sup>70</sup> Richard B. Bilder, “An Overview of International Human Rights Law,” in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Ardsley, NY: Transnational Publishers, Lc., 2004), 11.



adopted without a dissenting vote by the UN General Assembly in 1948. It delineates the UN's general human rights commitment when it states in Articles 25 and 28, “the right to a standard of living sufficient to satisfy basic human needs,” and that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”<sup>71</sup> Albeit not technically legally binding, the universality of the UDHR grants it significant moral weight, and establishes an aspirational standard for states in the international community.<sup>72</sup>

Despite the lack of true bindingness of international law, the limits of enforcement action, and the fact that “hard” law can only be established by states, through the ratification of treaties, or through the development of customary law—the notion of “hardness” of law can also be applied to non-binding obligations.<sup>73</sup> In the international arena, “harder” law has a greater capacity to encourage compliance due to the clarity with which obligations are expressed and the precise nature of the rules. Additionally, “hardness” is determined by the measures to which third parties are incorporated into the process to assist in implementation, monitor compliance, and provide technical assistance for institutional capacity building to meet the requirements of the laws. States do not merely become bound to obligations that are clearly “binding,” but respond to a variety of measures in international law, frequently incorporating globally-recognized but uncodified standards of conduct, such as those delineated in the UDHR, into domestic law.<sup>74</sup>

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71 Universal Declaration of Human Rights, Articles 25 and 28.

72 Richard Falk, “Humane Governance for the World: Reviving the Quest,” *Review of International Political Economy*, 7:2 (Summer 2000), 8.

73 Paul Szasz, “The Security Council Starts Legislating,” *The American Journal of International Law*, Vol. 96, No. 4 (October, 2002): 901.

74 Kenneth Abbott, Robert O. Keohane, Andrew Moravcsik, Anne Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization*, 54, 3 (Summer 2000): 401.

### **Section 3: The UN Human Rights Regime**

#### **i. Emerging Dilemmas in the Post September 11 Environment:**

Over the past half century, the UN human rights regime has been enormously successful at developing internationally recognized standards of civil and political or “First Generation Rights,” establishing a greater global recognition on the 'universality' of these rights, and providing mechanisms to encourage sovereign states to comply with international standards of behavior. Additionally, it has successfully broadened human rights discourse, from a narrow definition of 'rights' as civil and political guarantees (“First Generation Rights”), to one that includes social and economic rights (“Second Generation Rights”), and the “right to development” (“Third Generation Rights”).<sup>75</sup>

Although the UN human rights regime faces numerous challenges, those that have emerged in light of the adoption of Resolution 1373 in the aftermath of September 11<sup>th</sup> diverge significantly from the principal institutional obstacle faced during its historical development—the effort to establish universal acceptance of human rights norms.

The principal dilemma that has emerged with regard to human rights in the post-September 11<sup>th</sup> environment strikes at the very heart of the difficulties of balancing universality with sovereignty. Since the adoption of Resolution 1373, a number of 'status quo' states generally perceived as human rights abiding have cracked down on human rights activists, political opponents, asylum seekers, and minority groups, taking actions that by international human rights lawyers and activists are viewed as violations of commitments to codified global human rights standards as well as customary law. The

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<sup>75</sup> David Forsythe, “Introduction,” in *Human Rights and Comparative Foreign Policy*, ed. David Forsythe (Tokyo: United Nations University Press, 2000): 11.

[human rights] regime's continued efforts to strengthen and uphold human rights standards in this environment will compel a process of rethinking about how to reframe the debate away from one focused on the zero-sum dialectic between national and international security on the one hand—and the promotion of human rights on the other—to one which enables both to be realized.<sup>76</sup>

## ii. Structure and Function of the UN Human Rights Regime:

The UN's human rights regime, composed of a combination of Charter and treaty-based bodies, are engaged in a wide range of operational activities that have placed them at the nexus of human rights and state efforts to implement new anti-terrorism measures in the aftermath of the adoption of Resolution 1373. Although the regime includes a vast range of institutions that seek to foster human rights principles and practices in the international community, the following organizations have been particularly confronted with the new realities posed by Resolution 1373:

### i. The Commission on Human Rights and Its 'Special Procedures':

The Commission on Human Rights (CHR) is a Charter-based body that was established in 1946 in accordance with Article 68 of the UN Charter which states that the Economic and Social Council (ECOSOC) “shall set up a Commission in economic and social affairs and for the promotion of human rights.”<sup>77</sup> Composed of 53 member states, CHR reports to ECOSOC, which in turn reports to the General Assembly. It meets annually in Geneva

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<sup>76</sup> Mary Robinson, “Foreword,” in *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*, eds. Thomas G. Weiss, Margaret E. Crahan, and John Goering (New York: Routledge, 2004): xv.

<sup>77</sup> United Nations Charter, Article 68.

to examine, monitor, and publicly report on the state of human rights in particular countries/territories, or around particular topical themes.<sup>78</sup>

The Commission on Human Rights assigns special rapporteurs, special representatives, independent experts, and working groups to conduct investigations into human rights situations around 37 thematically and country focused topics throughout the year. These individuals and groups are appointed by the Chairperson of the CHR following deliberation with members, but serve in a personal capacity for a maximum term of six years. Through the mechanism of the Special Procedures, two independent experts have been appointed to the CHR whose mandates are particularly pertinent to the intersection between human rights and anti-terrorism measures—the Independent Expert on Human Rights and Counter-Terrorism, and the Special Representative on the Situation of Human Rights Defenders.<sup>79</sup>

On July 9<sup>th</sup>, 2004, in accordance with Resolution 2004/87, the CHR appointed Professor Robert Goldman as the independent expert to assist the High Commissioner for a period of one year in the fulfillment of the mandate to protect human rights and fundamental freedoms while countering terrorism. Although Professor Goldman's specific tasks remain relatively unclear, the mandates of independent experts generally focus on examining, monitoring, advising, and publicly reporting on human rights situations by conducting site visits, providing advice on technical cooperation, and responding to

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<sup>78</sup> Office of the United Nations High Commissioner for Human Rights. *Commission on Human Rights* (accessed March 15, 2005), available from <http://www.ohchr.org/english/bodies/chr/index.htm>

<sup>79</sup> Ibid.

individual complaints.<sup>80</sup>

In 2000, the CHR established the position of Special Representative on the Situation of Human Rights Defenders. Tasked with promoting and protecting the human rights and fundamental freedoms of human rights defenders, Special Representative Ms. Hina Jilani has conducted significant documentation and reporting on the consequences of Resolution 1373 on alterations in national anti-terrorism strategies, and the impact of these on the security of human rights advocates.<sup>81</sup>

Delineated in ECOSOC Resolution 2000/61, Ms. Jilani's mandate is to provide support and protection to human rights defenders in the context of their work.<sup>82</sup> Rather than creating new rights, it draws on existing principles codified in international instruments that are legally binding such as the ICCPR, and applies them to the endeavors undertaken by human rights defenders. These include addressing access to funding by organizations of human rights defenders; gathering and exchanging information on human rights standards and violations; and outlining the specific duties of states in defending the human rights of advocates. Although not technically binding, her mandate bears a degree of legitimacy due to its adoption by consensus by the General Assembly.<sup>83</sup>

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80 Office of the United Nations High Commissioner for Human Rights. Commission on Human Rights Resolution 2004/87, April 21, 2004 (accessed March 15, 2005), available from [http://ap.ohchr.org/documents/dpage\\_e.aspx?s=33](http://ap.ohchr.org/documents/dpage_e.aspx?s=33)

81 Office of the United Nations High Commissioner for Human Rights. Special Procedures of the Commission on Human Rights (accessed March 25, 2005); available from <http://www.ohchr.org/english/bodies/chr/special/themes.htm>.

82 Office of the United Nations High Commissioner for Human Rights. Special Representative of the Secretary General on Human Rights Defenders – Mandate (accessed March 25, 2005); available from <http://www.ohchr.org/english/issues/defenders/mandate.htm>.

83 Office of the United Nations High Commissioner for Human Rights. Special Representative of the Secretary General on Human Rights Defenders - Methods of Work (accessed March 25, 2005); available from <http://www.ohchr.org/english/issues/defenders/methods.htm>

National anti-terrorism measures have been considered by several of the special procedures, indicating that these measures are impacting upon a wide population of 'rights' holders. The Special Rapporteur on the Question of Torture has been particularly outspoken in this regard, expressing repeated concerns over states practice of detaining alleged “terrorists” in incommunicado, and denying them access to legal counsel and to visitations from family members. The Special Rapporteur has indicated that incommunicado detention tends to facilitate torture.<sup>84</sup> These rights are protected in Article 9 of the ICCPR, and Article 9 of the UDHR which both state that “no one shall be subjected to arbitrary arrest, detention, or exile.”<sup>85</sup>

The negative impacts of anti-terrorism measures on human rights have been noted on separate and numerous accounts by several of the special procedures. To counter the dispersed nature of these reports, the special procedures have issued joint statements to advocate for collective human rights missions. On June 27, 2003, 20 special procedures issued a joint public statement in which they expressed “profound concern at the multiplication of policies, legislations, and practices increasingly being adopted by many countries in the name of the fight against terrorism, which negatively affect the enjoyment of virtually all human rights—civil, cultural, economic, political, and social.” In June 2004, four (4) Special Rapporteurs called for a fact-finding mission to Afghanistan, Iraq, and Guantánamo Bay to examine whether alleged “terrorists” are

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84 United Nations General Assembly. *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Study of the United Nations High Commissioner for Human Rights*. United Nations General Assembly Document A/59/428 (October 8, 2004), 9.

85 International Covenant on Civil and Political Rights (ICCPR), Article 9, and Universal Declaration of Human Rights (UDHR), Article 9.

being protected by international human rights standards.<sup>86</sup> On April 21, 2005 at the recent meeting of the CHR in Geneva, these requests were rejected.<sup>87</sup>

Special rapporteurs, special representatives, independent experts, and working groups have been actively involved in the process of identifying and reporting on the intersection between anti-terrorism measures and human rights, and are increasingly engaging in joint endeavors such as the one described above. Despite these efforts, special procedures are generally only able to address national counter-terrorism measures within their respective mandates, each of which is typically focused on a specific set of rights or rights holders, or a particular country. Additionally, special procedures must address a range of concerns that fall within her/his topical or country-specific mandate, limiting their capacity to conduct careful analysis of anti-terrorism measures.<sup>88</sup>

ii. Treaty-Based Bodies:

Seven Treaty-Monitoring Bodies supervise two international covenants on civil and political rights, and economic, social, and cultural rights; two anti-discrimination conventions on racial discrimination and discrimination against women; a convention against torture; a convention on the rights of migrant workers and their families; and a convention on the rights of the child.<sup>89</sup> Treaty Bodies are composed of committees of

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<sup>86</sup> Ibid.

<sup>87</sup> United Nations Press Release. *Commission Establishes New Mandates for Experts on Minority Issues, Human Rights, and Countering Terrorism and the Sudan* (accessed April 24, 2005); available from <http://www.unhchr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>.

<sup>88</sup> United Nations General Assembly. *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Study of the United Nations High Commissioner for Human Rights*. United Nations General Assembly Document A/59/428 (October 8, 2004), 11.

<sup>89</sup> The International Covenant on Economic, Social, and Cultural Rights (1976), the International Covenant on Civil and Political Rights (1976), the International Convention on the Elimination of All Forms of Racial

independent experts that monitor states' implementation of human rights provisions contained in the treaties, as well as review periodic reports.<sup>90</sup>

The seven treaty-monitoring bodies have played a critical role in analyzing domestic anti-terrorism measures through their review of the approximately 100 reports received each year from states. The Human Rights Committee (HRC) has been the most active of these treaty-monitoring bodies on matters regarding human rights and anti-terrorism, regularly considering states' party obligations under ICCPR while reviewing reports. The HRC has issued comments in the concluding remarks in 18 of the 45 reports that it has reviewed since September 11th, 2001. These comments have addressed a wide range of rights delineated in the ICCPR, including the rights to life, freedom from torture, and free and fair trial.<sup>91</sup>

Albeit extremely active in commenting on human rights violations that appear to be linked to anti-terrorism measures, the capacity of treaty bodies to serve as the principal mechanism for monitoring compliance with international human rights commitments is severely limited. Treaty bodies are confined in two principal regards—in terms of resource and staffing, and in the limitations imposed by their mandate. Seven treaty-monitoring bodies review an average of more than 100 reports per year, which leaves them with a limited capacity to examine the linkage between national anti-terrorism and

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Discrimination (1969), the Convention on the Elimination of All Forms of Discrimination Against Women (1981), the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (1987), and the Convention on the Rights of the Child (1990).

<sup>90</sup> Office of the High Commissioner for Human Rights. Treaty Bodies (Brochure) (accessed March 6<sup>th</sup>, 2004); available from <http://www.unhchr.ch>.

<sup>91</sup>United Nations General Assembly. *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Study of the United Nations High Commissioner for Human Rights*. United Nations General Assembly Document A/59/428 (October 8, 2004), 12.



human rights. Moreover, treaty bodies are only able to address the practices of states that have ratified respective treaties.<sup>92</sup>

iii. Office of the High Commissioner for Human Rights:

The UN's Charter and treaty-based human rights bodies receive support from, and are overseen by the Office of the High Commissioner for Human Rights (OHCHR), which functions as the focal point for human rights activity within the UN system, and as the Secretariat to the CHR and the Sub-Commission.<sup>93</sup> Headquartered in Geneva, and with a satellite office in New York, the post of High Commissioner for Human Rights was established in 1993 at the second World Conference on Human Rights in Vienna. It derives its mission and operating principles from Articles 1, 13, and 55 of the UN Charter, the Vienna Declaration and Programme of Action, and General Assembly resolution 48/141, and acts in accordance with priorities established by the General Assembly.<sup>94</sup>

The OHCHR and individual High Commissioners have taken a prominent leadership role in coordinating and encouraging the work of relevant UN bodies and organs on matters related to terrorism and human rights. At the time of the adoption of Resolution 1373, the late High Commissioner Sergio Vieira de Mello, and his predecessor, Mary Robinson, both raised their concerns that the implementation of the resolution would be used as an

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<sup>92</sup> United Nations General Assembly. *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Study of the United Nations High Commissioner for Human Rights*. United Nations General Assembly Document A/59/428 (October 8, 2004), 9.

<sup>93</sup> Office of the United Nations High Commissioner for Human Rights. Human Rights, Human Rights Bodies (accessed March 21, 2005); available from <http://www.ohchr.org/english/bodies/>.

<sup>94</sup> Office of the United Nations High Commissioner for Human Rights. The High Commissioner (accessed March 8, 2005) available from <http://www.ohchr.org/english/about/hc/index.htm>

excuse to infringe on human rights. In order to address this concern, de Mello and Robinson recommended that the CTC appoint an expert on human rights that would be responsible for monitoring states' compliance with human rights norms in the area of anti-terrorism. Although the OHCHR offered to provide the CTC with such an expert, the Committee declined, arguing that the task of monitoring human rights obligations in the fight against terrorism falls outside of the purview of its mandate.<sup>95</sup>

In the immediate aftermath of the adoption of Resolution 1373, former High Commissioner for Human Rights, Mary Robinson expressed grave concerns over its potential impact on human rights, and prepared a guide to prevent states' violation of human rights through their application of the Resolution. Released in July 2003, the *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism* includes a wide range of references to decisions of international and regional human rights bodies on issues relating to human rights and terrorism such as non-derogability, non-discrimination, and the right to seek asylum and non-refoulement.<sup>96</sup>

The report additionally provides a synthesis of general topics of concern that have emerged from an initial review of states' reports submitted in accordance with obligations under Resolution 1373. The concerns described in the report focused on three principal topical areas—on the types of information being highlighted by states in their reports; on

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<sup>95</sup> Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

<sup>96</sup> Office of the High Commissioner for Human Rights. *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (accessed March 11, 2005); available from <http://www.unhchr.ch/terrorism/>.

problematic law enforcement measures; and on the absence of equitable legal representation. In reviewing reports, the OHCHR noted the tendency of states to prioritize the development of new laws, rather than on describing how these measures are being practically implemented.<sup>97</sup>

States have taken measures to strengthen their law enforcement capacities, and in so doing have increased the provision of search, arrest, and detention powers, often without adequately distinguishing between minors and adults. The OHCHR additionally pointed to states limited provision of legal representation.<sup>98</sup> The OHCHR had hoped that the report would become an official CTC document that would be circulated to all member states. However, although the guide was posted on the CTC's website, it declined to circulate it to member states.<sup>99</sup>

Current High Commissioner, Louise Arbour, has conducted investigations and made numerous recommendations on safeguarding human rights in combatting terrorism, frequently at the request of the General Assembly. In its Resolution 58/187 (2003), for instance, the General Assembly requested the High Commissioner to submit a study on the extent to which the human rights special procedures and treaty monitoring bodies are able to address the compatibility of national counter-terrorism measures with international human rights obligations in their work. The findings of this examination were synthesized in an interim report to the General Assembly at its 59<sup>th</sup> session, and to

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<sup>97</sup> Office of the High Commissioner for Human Rights. *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (accessed March 11, 2005); available from <http://www.unhchr.ch/terrorism/>, 6.

<sup>98</sup> *Ibid*, 6.

<sup>99</sup> Human Rights Watch. *'Hear No Evil, See No Evil'* (accessed March 20, 2005); available from <http://www.hrw.org/backgrounder/un/2004/un0804/2.htm>.

the Commission on Human Rights at its 60<sup>th</sup> session.<sup>100</sup>

The OHCHR's action on the issue of human rights and terrorism is additionally guided by the CHR's human rights resolution 2003/68, entitled *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, which calls on the OHCHR to examine the question of the protection of human rights and fundamental freedoms while countering terrorism; make general recommendations concerning the obligation of states to promote and protect human rights while taking anti-terrorism measures; and provide assistance to states in their efforts to abide by human rights principles while addressing terrorism.<sup>101</sup>

Since the establishment of the CTC in 2001, the OHCHR has briefed the Committee on anti-terrorism measures and human rights on three occasions. In September 2002, the High Commissioner submitted a *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures*, in which general principles of law were set out to help guide states in protecting human rights in the context of their efforts to eradicate terrorism.<sup>102</sup>

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Office of the High Commissioner for Human Rights. *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (accessed March 11, 2005); available from <http://www.unhchr.ch/terrorism/>.

## **Section 4: Non-UN Human Rights Institutions and Instruments**

Non-state actors such as Non-Governmental Organizations (NGOs) have during the past twenty years emerged as prominent players in the human rights arena. NGOs' capacity for adaptation and responsiveness to the concerns of local constituencies and their ability to act independently of the government have enabled them to serve as vocal advocates for a wide range of social concerns, including human rights. This steady distribution of power away from national governments to NGOs has been characterized as an era of “new internationalism,” in which non-state actors are able to build constituencies of their own, and work through multiple channels to address the needs of our time.<sup>103</sup>

Despite the centrality of the relationship between the UN and state parties, the non-coercive nature of the vast majority of the machinery in human rights law has facilitated the democratization of the human rights regime. The deepened discourse of human rights, the broadened strategies undertaken, and the expanded range of actors involved, are all evidence of this process. NGOs in particular play a central coordination and implementation role in the human rights regime. They have taken on a wide variety of functions, including monitoring treaty obligations, submitting 'shadow reports' to treaty monitoring bodies, and holding governments accountable to their citizenry and to their international obligations through processes of 'naming and shaming'.<sup>104</sup>

The relationship between NGOs and the UN has been mutually reinforcing. NGOs ensure

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103 Jessica T. Matthews, “Power Shift,” *Foreign Affairs*, Vo. 76, No. 1 (Jan/Feb, 1997): 55.

104 Ramesh Thakur, “Security in the New Millennium,” in *Enhancing Global Governance*, eds. Andrew F. Cooper, John English, and Ramesh Thakur (New York, NY: United Nations University Press, 2002): 278.

that UN treaty monitoring bodies have access to accurate and appropriate information documenting governments' human rights standards, and they are willing to take vocal positions on controversial human rights issues. In turn, the UN legitimizes their advocacy efforts through global conferences and the passage of human rights resolutions. The critical function of NGOs in the UN human rights regime is delineated in General Assembly Resolution 48/141, which states: "Convinced that the World Conference on Human Rights made an important contribution to the cause of human rights and that its recommendations should be implemented through effective action by all States, the competent organs of the UN and the specialized agencies; in *cooperation with non-governmental organizations*."<sup>105</sup>

Since 1948, ECOSOC has accredited over 1,350 NGOs to monitor and contribute to UN activities in a diverse range of fields. This process of greater NGO inclusion in UN mechanisms has been facilitated through the practical implementation of Article 71 of the Charter, which states that "the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."<sup>106</sup>

NGOs' consultative status enables them to play an influential role in a wide variety of the UN's operational human rights activities, in particular those of the CHR and the Sub-

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105 United Nations General Assembly Resolution A/RES/48/141 (December 20, 1993) (accessed March 2, 2005); available from <http://www.un.org/Depts/dhl/res/resa48.htm>.

106 United Nations Charter, Article 71.

Commission, to which they provide information for country-specific and thematically-oriented human rights investigations, and in turn receive reports by experts which they can use to advocate for human rights concerns in their local communities. Additionally, NGOs in the human rights arena play a critical role in drafting new international normative instruments, assist in identifying priority-areas for the UN's human rights regime, and provide information on non-compliance with existing legal frameworks.

## **CHAPTER II: Anti-Terrorism and Human Rights**

### **Section 1: Terrorism As A Violation of Human Rights -- Human Rights Violations and Anti-Terrorism Measures: An Inherent Irony**

#### i. Terrorism As a Violation of Human Rights:

The threat posed by terrorism to the human rights of civilians and the imperative of states to provide an environment in which citizens can live without the fear of terrorist-induced violence has figured prominently in the discourse on what constitutes 'rights', and was recognized in the [Vienna] Declaration and Programme for Action developed at the 1993 World Conference on Human Rights in Vienna. Paragraph 17 of the Vienna Declaration makes the link between human rights and terrorism explicit by stating that the “acts, methods, and practices of terrorism in all its forms and manifestations as well as the linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms, and democracy.”<sup>107</sup>

Supporters of the imposition of more stringent anti-terror measures to defend human rights invoke the UDHR, which despite its lack of specific reference to 'terrorism', recognizes the right to “life, liberty, and security of persons” in Article 3, and states in Article 5 that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>108</sup> Article 6 of the ICCPR which states that “every human being has the inherent right to life,” and “that this right shall be protected by the law,” is

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107 Office of the United Nations High Commissioner for Human Rights. Vienna Declaration and Programme for Action (accessed February 20, 2005); available from <http://www.ohchr.org/english/law/vienna.htm>

108 Universal Declaration of Human Rights (UDHR), Articles 3 and 5.



similarly referenced as a basis for linking terrorism to human rights concerns.<sup>109</sup>

In December 1972, at the General Assembly's 27<sup>th</sup> session, the topic of terrorism emerged on the UN's global agenda through the establishment of an Ad Hoc Committee tasked with developing a report on key recommendations for “possible cooperation for the speedy elimination of the problem.”<sup>110</sup> During its 34<sup>th</sup> session in 1979, the General Assembly examined the report of this Committee and in Resolution 34/145 condemned all acts of international terrorism in all its forms and manifestations, which endangered or took human lives, or jeopardized fundamental freedoms. In the aftermath of the General Assembly's passage of Resolution 34/145, it has adopted numerous resolutions categorically criminalizing terrorist acts, methods, and practices.<sup>111</sup>

In February 1994, the General Assembly passed its first resolution, Resolution 48/122, addressing the intersection between anti-terror measures and human rights through which it expressed grave concern at the gross violation of human rights perpetrated by terrorist groups. The same concern has been articulated in a series of resolutions adopted by the CHR and the Sub-Commission since that time. At its 48<sup>th</sup> session in 1996, the Sub-Commission requested Professor Kalliopi Koufa (Greece) to prepare a working paper on the question of terrorism and human rights, and the following year it appointed her to serve as Special Rapporteur to conduct a comprehensive study on the issue. Since that time, Professor Koufa has submitted six papers plus annexes, addressing many of the

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109 International Covenant on Civil and Political Rights (ICCPR), Article 6.

<sup>110</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 8.

<sup>111</sup> Ibid.

issues related to terrorism and human rights such as the legal definition of terrorism, and the application of the term.<sup>112</sup>

The papers makes explicit the dual impact of terrorism on human rights—both recognizing it as an act of abuse to victims, and acknowledging that it opens the door for violations of human rights and fundamental freedoms by governments. In 2004, in response to Professor Koufa's report, the Sub-Commission decided that in 2005 it would establish a sessional working group to elaborate detailed principles and guidelines with a relevant commentary concerning the promotion and protection of human rights.<sup>113</sup>

#### ii. Human Rights Violations and Anti-Terrorism Measures:

A resolution specifically focusing on the need to protect human rights and fundamental freedoms while countering terrorism was adopted for the first time by the General Assembly on December 18, 2002. It affirmed the notion that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee, and humanitarian law.<sup>114</sup>

The resolution requests the High Commissioner to take a number of actions, including examining the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources.

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<sup>112</sup> United Nations, General Assembly Report, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Study of the United Nations High Commissioner for Human Rights*, A/59/428 (October 8, 2004): 13.

<sup>113</sup> Ibid, 13.

<sup>114</sup> United Nations, General Assembly Resolution A/RES/57/219 (accessed February 21, 2005); available from <http://www.un.org/Depts/dhl/resguide/r57.htm>

Additionally, it calls on the High Commissioner to make recommendations concerning the obligation of states to promote and protect human rights while countering terrorism, and to provide technical assistance to assist them in this regard. On April 25, 2003, at the CHR's 59<sup>th</sup> session, Resolution 2003/68 was adopted with a mandate which similarly links human rights and anti-terrorism measures.<sup>115</sup>

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## **Section 2: UN Efforts to Combat Terrorism**

### **i. Anti-Terrorism Measures Enacted by the General Assembly:**

Although a long-term topic of concern in the field of international relations, efforts to combat terrorism through cooperative measures only emerged in the 19<sup>th</sup> and 20<sup>th</sup> centuries. In 1937, the League of Nations took early action on terrorism by adopting a special convention aimed at the punishment and prevention of acts of this nature.

Although the convention was not enacted, it played a significant role in characterizing terrorism as a grave crime of international scope.<sup>116</sup>

Although UN responses to terrorism perpetrated by specific states and regarded as “threats to international peace and security” prior to September 11<sup>th</sup>, 2001 were under the purview of Security Council sanction, international terrorism more broadly interpreted was considered by the Sixth Legal Committee of the General Assembly. The Sixth Legal Committee developed a number of counter-terrorism conventions to address specific crimes committed by terrorists, including the handling of nuclear material, plastic

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<sup>115</sup> Office of the High Commissioner for Human Rights. *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (accessed March 11, 2005); available from <http://www.unhchr.ch/terrorism/>.

<sup>116</sup> Janusz Symonides, “New Human Rights Dimensions: Introductory Remarks,” in *Human Rights: New Dimensions and Challenges*, ed. Janusz Symonides (Halts, UK: Ashgate Dartmouth, 1998): 13.

explosives, aviation, maritime navigation, terrorist bombings, and financing. Although the vast majority of these conventions deliberately omitted the term “terrorism” and failed to criminalize terrorism itself, they did seek to condemn terrorist activities.<sup>117</sup>

In 1996, the General Assembly established an ad hoc committee to elaborate an international convention for the suppression of terrorist bombings. The committee was subsequently charged with developing new international conventions on the suppression of acts of nuclear terrorism and a comprehensive legal framework for addressing international terrorism. Each year the General Assembly has renewed the committee's mandate. Although delegates have been able to agree on the criminality of certain activities, they have been unable to come to a consensus on a definition of 'terrorism'.<sup>118</sup>

The need to develop an agreed upon definition of 'terrorism', and to establish a comprehensive convention on international terrorism have remained priorities for the UN since the 1990s, and resurfaced in Secretary-General Kofi Annan's report *In Larger Freedom: Towards Development, Security, and Human Rights for All*, in which he states that “we must ensure that catastrophic terrorism never becomes a reality. This will require a new global strategy, which begins with Member states agreeing on a definition of terrorism and including it in a comprehensive convention.”<sup>119</sup>

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<sup>117</sup> Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 479.

<sup>118</sup> Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 481.

<sup>119</sup> United Nations Secretary General. *In Larger Freedom: Toward Development, Security, and Human Rights for All* (accessed March 24, 2005; available from <http://www.un.org/largerfreedom/>), 26.

## ii. The Security Council and Anti-Terrorism Measures:

The Security Council's concern over the dangers posed by terrorism in the global community emerged in January 1992, when heads of state met to develop a roadmap for the Council's post-Cold War agenda, and articulated the imperative to take effective action to counter terrorist threats. Two months later, the Security Council translated this vocalized commitment into direct action by imposing economic sanctions on Libya on the basis of their alleged participation in the 1988 and 1989 bombings of UTA flight 772 and Pan Am Flight 103. The Security Council has subsequently utilized its Chapter VII mandate to address terrorism by imposing mandatory sanctions against Sudan in 1996, against the Taliban regime in 1999, and again in the aftermath of the events of September 11<sup>th</sup>, 2001.<sup>120</sup>

During the 1990s, new features of international terrorist attacks raised concerns amongst both the US intelligence community as well as the Security Council. In 1998, as terrorist attacks against US embassies in Tanzania and in Kenya brought to light the international reach of the Al-Qaeda network, US intelligence also began to estimate its fighting force at approximately 4,000 to 5,000, starkly contrasted to the 200 to 300 estimated members of the synonymous Irish Republican Army (IRA). Additionally, concerns around the potential use of chemical, biological, and nuclear weapons in terrorist attacks became salient when Aum Shinrikyo released nerve gas on a crowded Tokyo subway in 1995.<sup>121</sup>

Throughout the 1990s, economic sanctions and extradition were utilized as policy

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120 Chantal de Jonge Oudraat, "UN Counterterrorism Sanctions in the 1990s," *Washington Quarterly* (Autumn 2003): 164.

121 Ibid, 164.

instruments to address terrorism, and were intended as uses of international judicial mechanisms to seek justice for victims, and to send a clear message on the potential consequences of states' sponsorship of terrorism. The Council's emphasis on extradition and sanctions as its principal counter-terrorism strategy during the 1990s is regarded as remedially successful as it increased the costs of states to support terrorist activities and altered public attitudes toward terrorist agents. Critics of these policy instruments, however, point to their failure to halt global terrorist activities, and their tendency to enhance the sophistication of terrorist organizations by forcing them underground.<sup>122</sup> The UN's anti-terrorism strategy during the 1990s served to stigmatize terrorism in the international community and made evident the imperative to address the threat of terrorism through collective international mechanisms. By utilizing its Chapter VII mandate to designate terrorist activities as “threats to international peace and security,” and penalizing these through the imposition of sanctions, the Security Council laid the foundations for more aggressive anti-terrorism measures in the aftermath of September 11<sup>th</sup>.<sup>123</sup>

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### **Section 3: Legality and the Use of Force in Response to Terrorism**

Anti-terror measures and obligations pertaining to “terrorist activities” have been codified in the form of conventions and treaties. Despite this process of norm creation, use of force in response to terrorism prior to the passage of Resolution 1368 in the immediate aftermath of September 11<sup>th</sup> generally provoked significant condemnation in the General

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122 Ibid, 165.

123 Ibid, 167.

Assembly, as well as among legal scholars.<sup>124</sup> Critiques have primarily been leveled at the Security Council's invocation of states right to individual or collective self-defense outlined in Article 51 of the UN Charter, and its explicit legitimization of the unilateral use of force against terrorist attacks. The passage of Resolution 1368, critics held, would pose a threat to the general prohibition on the use of force, outlined in the UN Charter's Article 2 (4).<sup>125</sup>

Prior to the events of September 11<sup>th</sup>, the US was conscious of the weak legal basis for the use of retaliatory force against alleged terrorist attacks. In recognition of this reality, it had used military force sparingly, taking retaliatory action against Libya in 1986 in response to its alleged involvement in the bombing of a nightclub frequented by US service members in Berlin; to Iraq's attempt to assassinate former US President George Bush and the emir of Kuwait in 1993; and against Afghanistan and Sudan in 1998 following the bombings of US embassies in Kenya and in Tanzania.<sup>126</sup>

The Security Council's sanctioning of retaliatory action through its passage of Resolution 1368 served as a blank check for the US's invasion of Afghanistan. Moreover, it broadened the conception of 'self defense' in the absence of adequate Security Council knowledge as to who was responsible for launching the attacks. Indicative of this wider interpretation of 'self defense', the US hinted at the potential for preemptive military attacks against wider targets in a letter to the Security Council, informing it of US action

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124 Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

125 Richard Falk, "Humane Governance for the World: Reviving the Quest," *Review of International Political Economy*, 7:2 (Summer 2000), 5.

126 Chantal de Jonge Oudraat, "UN Counterterrorism Sanctions in the 1990s," *Washington Quarterly* (Autumn 2003): 168.

against Al Qaeda and the Taliban in Afghanistan. In its letter it stated that “our inquiry is its early stages. We may find that our self-defense requires further actions with respect to other organizations and other states.”<sup>127</sup>

Although the Security Council sanctioned military action in the immediate aftermath of September 11<sup>th</sup> with its passage of Resolution 1368, Secretary-General Kofi Annan, UN diplomats, and legal scholars became deeply concerned over the US view, principally due to the absence of a recognized definition of 'terrorism' and the potential that it presented for states' flexible interpretations of 'self defense'. China and Russia's immediate endorsement of the US position were viewed as salient indications of the threats to human rights posed by the exercise of significant interpretive leeway.<sup>128</sup>

China's vocal support is attributed to its perception that it would legitimize its suppression of opposition groups in Xinjiang province. Russia similarly viewed Resolution 1368 as a useful precedent-setting tool which it would be able to employ in its campaign against Chechen rebels. In October 2002, the Security Council adopted Resolution 1440, condemning the hostage-taking in Moscow. Resolution 1440 contained language that explicitly referred to the obligation of states to act in accordance with Resolution 1373. In effect, Resolution 1440 provided the means for Russian authorities to invoke Security Council support to justify military attacks against Chechen rebels operating in Georgia.<sup>129</sup>

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127 Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 481.

128 Chantal de Jonge Oudraat, “UN Counterterrorism Sanctions in the 1990s,” *Washington Quarterly* (Autumn 2003): 168.

129 Ibid.



In essence, Resolution 1368 laid the groundwork for the adoption of Resolution 1373, and heralded the Security Council's process of legislating for the global community, with the interests of its most powerful member—the United States—at its pith. This action on the part of the US and the Security Council has inevitably raised questions on the imperative to balance individual states interests with the good of the global community, a dichotomy captured by former US President Harry Truman in 1945. In a speech delivered at the founding conference of the United Nations Organization he stated with great poignancy that “we all have to recognize—no matter how great our strength—that we must deny ourselves the license to do always as we please.”<sup>130</sup>

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<sup>130</sup> United Nations Secretary General. *A More Secure World: Our Shared Responsibility* (Report of the Secretary General’s High Level Panel on Threats, Challenges, and Change) (accessed April 10, 2005); available from <http://www.un.org/secureworld/>, 13.

## **CHAPTER III: Resolution 1373**

### **Section 1: September 11<sup>th</sup> and the Development of Resolution 1373**

#### i. Background:

On September 28<sup>th</sup>, 2001, the UN Security Council unanimously adopted Resolution 1373 which imposes broad legal obligations on all 191 UN member states and establishes a framework for the launch of a global campaign of cooperative law enforcement measures to address the threat of international terrorism. Resolution 1373 focuses on three principal objectives: to criminalize terrorist acts and prevent states from harboring terrorists, prohibit the financing of terrorists, and foster cooperation on these measures between states. To actualize these objectives, the Resolution calls on states to modify and renew domestic legislation, tighten its border controls, and strengthen its law-enforcement mechanisms.<sup>131</sup>

The passage of Security Council Resolution 1373 in the aftermath of September 11<sup>th</sup> raises the question of states' conceived imperative to engage in collective action on terrorism through the instruments and mechanisms of international organizations, rather than through unilateral action. The passage of Resolution 1373 points to the Security Council's endorsement of the notion that “today's threats recognize no national boundaries, are connected, and must be addressed at the global and the regional as well as national level.” These realities were described as “three basic pillars” in the recently released report of the *High Level Panel on Threats, Challenges, and Change*, which

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<sup>131</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 3.

reflects on progress that has been achieved since the Millennium Summit, and develops a framework for collective security for the new century.<sup>132</sup>

Additionally, the justification to defend the need for the establishment of new binding rules of conduct in the field of anti-terrorism likely points to the Security Council's collective assertion that member states take widely divergent measures to address domestic terrorism, and terrorist threats which are currently national, but have the potential of spilling across borders. Resolution 1373 in essence seeks to counter attitudinal divergence and the prospect of “recalcitrant states,” and spread the costs of protective anti-terrorism measures across all member states. It rests on the principle that despite the likelihood that the vast majority of member states have not directly experienced the consequences of terrorism, addressing it is a responsibility to the international community, and one which ultimately reaps benefits that far outweigh the costs to individual nations.<sup>133</sup>

## ii: Organizational Design:

### a. Structure and Objectives:

Resolution 1373's application, monitoring, and implementation measures are conducted through a Counter-Terrorism Committee (CTC). The CTC was established in accordance with Section six (6) of the Resolution, which states that it “decides to establish, in accordance with Rule 28 of its provisional rules of procedure, a Committee of the

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<sup>132</sup> United Nations Secretary General. A More Secure World: Our Shared Responsibility (Report of the Secretary General's High Level Panel on Threats, Challenges, and Change) (accessed April 10, 2005); available from <http://www.un.org/secureworld/>, 13.

<sup>133</sup> Ibid.

Security Council, consisting of all members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise.”<sup>134</sup> It is composed of three subcommittees which consist of eight permanent staff charged with reviewing and analyzing reports submitted by member states, and two responsible for coordinating the Committee's technical assistance program. Independent Expert Advisors provide technical advice on matters relating to legislative drafting; policing and law enforcement; illegal arms trafficking; and financial, customary, immigration, and extradition law.<sup>135</sup>

The objectives of Resolution 1373 are to enhance the minimum level of action taken by all 191 member states in the anti-terrorism arena by focusing on four principal programmatic areas—a) criminalizing terrorist acts and preventing states from harboring terrorists; b) prohibiting the financing of terrorists; c) fostering cooperation on these measures between states through bilateral and multilateral agreements; and, d) encouraging states to become parties to existing international conventions and protocols relating to terrorism.<sup>136</sup>

a) **Criminalizing terrorist acts** and prohibiting **states' support** to terrorists includes the suppression of terrorist recruitment processes, denying safe haven and movement across borders, and ensuring that domestic laws and law enforcement are adequately stringent to punish perpetrators (Paragraph 2).

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<sup>134</sup> United Nations Security Council. Resolution 1373 (S/RES/1373, September 28, 2001) accessed January 10, 2005; available from <http://www.un.org/terrorism/sc.htm>.

<sup>135</sup> UN Action Against Terrorism. Counter-Terrorism Committee (accessed March 20, 2005); available from <http://www.un.org/Docs/sc/committees/1373/work.html>.

<sup>136</sup> Eric Rosand, “Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism,” *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 334.

b) Prohibiting the **financing** of terrorists and terrorist activities includes criminalizing the provision or collection of funds, and freezing and preventing financial assets from being available in support of terrorism (Paragraph 1).

c) Developing mechanisms for formal and regular **exchanges of intelligence** between states, including the sharing of evidence for criminal prosecution through international protocols and bilateral agreements (Paragraph 3).

d) Encouraging states to **become parties to existing international conventions and protocols** relating to terrorism (Paragraph 3).<sup>137</sup>

## b. Functions:

### i. Operational Stages:

The CTC's functional tasks are divided into three operational stages—A, B, and C, which reflect both a timeline for states' to meet their obligations, and a process for the CTC to enhance its own institutional capacity for cooperation and coordination with member states.

*Stage A:* States are obligated to have legislation in place to cover all aspects of the Resolution and begin the process of becoming party to the 12 international anti-terrorism conventions and protocols. Specific attention is given to addressing terrorist financing.

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<sup>137</sup> David Schenker, "UNSC 1373 and the War Against Terror: An Important if Untested Tool," *the Washington Institute for Near East Policy* (Policy Watch #582), November 6, 2001: 2.

*Stage B:* Member states will have in place legislation covering all aspects of Resolution 1373; an effective government-wide coordination mechanism for counterterrorism activity; and mechanisms for cooperating at the bilateral, international, and regional level. Specific attention will be given to preventing recruitment to terrorist organizations, and prohibiting the establishment of safe havens.

*Stage C:* The goal will be to fill existing gaps from Stages A and B, described above. The CTC will determine whether states are utilizing their new machinery to take practical action against 'terrorists', 'terrorist organizations', and 'terrorist acts'.<sup>138</sup>

ii. States Submission of Reports:

During its first stage the CTC ordered all states to submit reports within 90 days of the adoption of Resolution 1373 (December 27, 2001), delineating existing legislative and executive measures to combat terrorism, and describing steps taken to implement the resolution at the domestic level. Specific information requested by the CTC included relevant legislation and executive action currently in place or being contemplated, and cross and multi-sectoral endeavors undertaken to implement the resolution.<sup>139</sup>

Since the adoption of Resolution 1373, all 191 member states have submitted first-round reports to the CTC on their efforts to comply with the delineated obligations. In order to generate substantive responses from states, the CTC's Chairman issued a set of guidelines

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138 Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

139 David Schenker, "UNSC 1373 and the War Against Terror: An Important if Untested Tool," *The Washington Institute for Near East Policy*, Policy Watch #582 (November 6, 2001): 1.

for the submission of reports, in which he disaggregated specific questions into three sections to correspond to each of the resolution's operative paragraphs. Questions that seek to elucidate states current and expected action to prevent and suppress the **financing** of terrorist acts, outlined in Resolution 1373's first paragraph include the following:

- What measures if any have been taken to prevent and suppress the financing of terrorist acts in addition to those listed in your responses to questions on 1(b) to (d)?
- What are the offences and penalties in your country with respect to the activities listed in this sub-paragraph?
- What legislation and procedures exist for freezing accounts and assets at banks and financial institutions?<sup>140</sup>

Although the receipt of submissions from all 191 member states reflects a high response rate, a preliminary analysis of these reports has pointed to a number of institutional challenges. These difficulties stem primarily from divergent interpretations of the resolution's key terms and provisions. For instance, states have tended to equate the “financing of terrorist acts” with money laundering and other illegal measures, and have dealt with it only in that context. Critics of this approach, however, argue that the finances used to support terrorist activities are frequently acquired through legal means, and must be addressed through more holistic mechanisms.<sup>141</sup>

Reports have additionally pointed to a series of challenges that stem from states' lack of resources to implement the provisions of the Resolution. For instance, in many countries border controls are weak, and states lack the capacity to effectively police territories

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<sup>140</sup> Counter Terrorism Committee. Information Note on Submissions to the CTC Directory (accessed April 15, 2005); available from [http://www.un.org/Docs/sc/committees/1373/information\\_note.html](http://www.un.org/Docs/sc/committees/1373/information_note.html)  
<sup>141</sup>Chantal de Jonge Oudraat, “UN Counterterrorism Sanctions in the 1990s,” *Washington Quarterly* (Autumn 2003): 170.

under their jurisdiction. Additionally, the financial and safe-haven provisions of the Resolution require monitoring and enforcement capabilities that most states lack the financial capacity to acquire.<sup>142</sup>

Although the CTC has used written reports to assess the fulfilment of Stage A priorities, this method of evaluation will likely be inadequate when it moves to Stages B and C, and from monitoring the existence of legislation to assessing the presence and quality of the executive machinery through which states implement their anti-terrorism policies. In late 2003, this phase of reviewing reports was viewed as complete, and a general consensus emerged that the next period would focus on the needs of states and on enhancing coordination among and between regional, subregional, and international organizations. Taking on a more engaged approach to monitoring will likely include conducting site visits, a policy which the CTC has thus far shied away from for obvious political reasons.<sup>143</sup>

### iii. Institutional Philosophy:

The CTC's philosophy is to take a non-confrontational approach in order to promote an open environment in which states are honest about technical and financial needs necessary for them to be able to comply with Resolution 1373. For instance, upon receiving and reviewing reports, one of three subcommittees conducts follow up to generate more elucidated responses from states. Since the adoption of Resolution 1373,

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<sup>142</sup> Ibid, 170.

<sup>143</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 4.



the CTC has conducted follow-up with approximately 161 countries. In light of their limited budgetary and staffing capacity, the Committee has devoted significantly more time to those states in need of assistance, and less resources to members that have in place “adequate” legislation covering components of Resolution 1373.”<sup>144</sup>

Despite issuing uniform requirements across states, the CTC has utilized a progressive approach to assisting nations in meeting the obligations contained in Resolution 1373 in recognition of their varying resource and institutional constraints. Rather than issuing blame, the CTC utilizes a “nonthreatening” approach, aimed at building states technical capacity. Although this non-confrontational approach has facilitated wide support for the work of the CTC from member states, particularly those that are willing but unable to implement the obligations of the resolution—it is likely to have a limited impact on altering the behavior and institutions of less willing states.<sup>145</sup>

#### iv. Technical Assistance, Monitoring and Evaluation, Financing, and Support:

In March 2004, the Security Council adopted Resolution 1535 to establish a framework for the transition from the CTC's principal function of reviewing states reports to a phase of assessing their needs for implementing Resolution 1373 on the ground, and developing mechanisms for coordination, evaluation, and the provision of technical assistance.<sup>146</sup> The resolution called for the establishment of a Counter-Terrorism Executive Directorate (CTED) tasked with reinforcing the CTC's endeavors to build effective international

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144 Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Volume 97, No. 2 (2003): 336.

145 Ibid, 337.

146 David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 4.

cooperation and enhance capacity at the country-level.<sup>147</sup>

The goal is for the CTED to coordinate the capacity of international, regional, and subregional organizations and to facilitate the provision of assistance to states to enable them to meet their obligations under Resolution 1373. The CTED's principal task will be to move beyond country reporting to develop formal criteria for evaluating states' specific measures of compliance and capacity.<sup>148</sup> In July 2004, Spain's Ambassador to the United States, Javier Ruperez was appointed to serve as CTED's first Executive Director.<sup>149</sup>

The establishment of the CTED, and its focus on addressing discrepancies in capacity stem from a study conducted by the *Fourth Freedom Forum* and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame. In its report, *An Action Agenda for Enhancing the United Nations Program On Counter-Terrorism*, it found that approximately 70 member states were willing but unable to mount effective counter-terrorism efforts due to poverty and social hardship, a preoccupation with civil conflict, and the need for technical assistance to build adequate legal and administrative systems. The report additionally noted the necessity to foster collaboration among Member states, regional, and international organizations to develop standards for compliance with 1373, and to match technical assistance with country needs.<sup>150</sup>

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147 Ibid.

148 David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 4.

149 Counter-Terrorism Committee. Counter Terrorism Executive Directorate.  
<http://www.un.org/Docs/sc/committees/1373/cted.html>

150 David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 4.

On November 12, 2001, the Security Council adopted Resolution 1377 to strengthen the CTC's coordination role in the area of counter-terrorism assistance by seeking to identify the specific needs of countries and matching their needs with donors capable of providing assistance. In essence, the CTC would operate as a coordinating body to manage the relationship between assistance providers, and those states in need of technical support in the area of counter-terrorism. Thus far, more than 50 states have expressed an interest in receiving technical assistance to facilitate their implementation of Resolution 1373.<sup>151</sup>

Despite the Security Council's active and ambitious measures to strengthen the CTC's capacity to conduct monitoring and evaluation and to provide technical assistance, its means remain grossly inadequate. Currently, formal standards have not been developed to evaluate the capacity of states to comply with Resolution 1373. The development of assessment criteria is critical for the CTC to enhance its regional coordination efforts, and to facilitate the provision of technical assistance.<sup>152</sup>

Additionally, the provision of financial resources to facilitate this process are severely limited. During its first two years of operations, the CTC's operational budget of \$11 million was provided by the General Assembly. Although the General Assembly has over the past few years met the budgetary needs of the CTC, the Assembly's continued receptiveness may be hindered by two political factors.<sup>153</sup> Firstly, the General Assembly

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<sup>151</sup> Counter-Terrorism Committee. Counter Terrorism Executive Directorate.

<http://www.un.org/Docs/sc/committees/1373/cted.html>

<sup>152</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 7-9.

<sup>153</sup> Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 338.

may lose interest in supporting the development of a Security Council-instigated anti-terrorism regime, instead seeking to address alternative issues that emerge in the international community. Additionally, the CTC may continue to be affected by the General Assembly's early lukewarm response to Resolution 1373, which became glaringly evident when its Sixth Legal Committee excluded all provisions of Resolution 1373 into its draft Comprehensive Convention on International Terrorism.<sup>154</sup>

However, with a staff of 12 and no independent budget, the CTC is forced to rely on funds for technical assistance through bilateral channels, which tend to be ad hoc and selective. Although proposals have been made to establish an Assistance Fund, the US has been vocally opposed to this approach, preferring to provide selective financial assistance through bilateral mechanisms. In addition to its reliance on bilateral measures for financial support, the CTC and the Council's Sanctions Committee, tasked with consolidating a list of 'alleged terrorists' that are to be sanctioned—lack the capacity to conduct criminal investigations, and is forced to rely on information from national authorities such as the US government. This reliance on the resources of the US and its allies has severely weakened the CTC's status as impartial and apolitical.<sup>155</sup>

### c. Conceptual Features:

#### i. Time Window:

The Security Council has historically taken action against states through the passage of

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154 Paul C. Szasz, "The Security Council Starts Legislating," *The American Journal of International Law*, Volume 96, No. 4 (2002): 903.

155 José E. Alvarez, "The UN's 'War' on Terrorism," *International Journal of Legal Information*, Volume 31:2 (2003): 249.

binding resolutions. These resolutions define clearly the nature of the threat to which they are responding and what measures are required on the part of the targeted states to prevent additional pressures from being exerted. As such, the resolutions are perceived as expiring when state actions no longer pose a threat to international peace and security. In contrast, Resolution 1373 provides no end date for the obligations which it imposes on states, and does not prescribe the issuance of certificates of compliance.<sup>156</sup>

The absence of an end date potentially enables states to take anti-terrorism measures over an indefinite period of time. The CTC's funding, however, is not independent, and is privy to the whims of the General Assembly, whose budget allocations are determined on an annual basis. This contradiction has the potential of posing significant challenges for the CTC when it begins to emphasize the provision of technical assistance, and more actively evaluate states' implementation of the Resolution.<sup>157</sup>

ii. Definitional Ambiguity:

a. What Constitutes Terrorist Acts?

Resolution 1373 is notable for its absence of a cogent definition of “terrorism,” “terrorists,” and “terrorist acts.” The deliberate nature of this conceptual ambiguity was exhibited by Sir Jeremy Greenstock, the first Chairman of the CTC, when he stated in a press conference that it was not in his committee's purview to try to define “terrorism” but rather to “establish the highest common denominator of action against terrorism in every

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<sup>156</sup> Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 598.

<sup>157</sup> Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

territory of members of the United Nations.”<sup>158</sup> Its willingness to enable each state to define terrorism under its domestic system rather than relying on one, potentially highly divisive term has likely been a critical contributing factor to member states' broad support of the CTC's enterprises.<sup>159</sup>

*Historical Definitional Ambiguity:*

Conceptual confusion around the definitions of “terrorism,” “terrorists,” and “terrorist acts” is not new to the adoption of Resolution 1373, but has persisted in the UN system since its inception. Despite the difficulties that surround an arrival at a precise definition of the term itself, experts share the belief that terrorism is a tool utilized by a wide range of social and political movements. However, the historically persistent lack of consensus on the illegality of terrorism, based on the inability to generate a consensual definition, has tended to result in disagreement over the UN's role in combating terrorism.<sup>160</sup>

Rather than developing an all-encompassing definition of “terrorism,” the UN has sought to broadly define offenses that constitute acts of terrorism through the development of 12 counter-terrorism conventions.<sup>161</sup> These conventions focus on actions such as hijacking, bombing, hostage-taking, and financing—rather than on the specific individuals or organizations responsible for these acts. Although these 12 conventions constitute a relatively comprehensive interpretation of the conditions which describe “terrorist”

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158 David Schenker, “UNSC 1373 and the War Against Terror: An Important if Untested Tool,” *The Washington Institute for Near East Policy*, Policy Watch #582 (November 6, 2001): 2.

159 Eric Rosand, “Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism,” *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

160 Nicholas Rostow, “Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>,” *Cornell International Law Journal*, Vol. 35 (2002): 475.

161 James A. R. Nafziger, “The Grave New World of Terrorism: A Lawyer’s View.” *Denver Journal of International Law and Policy*, Volume 31 (2002): 8.

activity, assumptions of consensus on this basis are moot in light of the limited number of states which are parties to the conventions.<sup>162</sup>

Historically, the Security Council has left the discussion of a single definition to the General Assembly, in particular the (Sixth) Legal Committee. Since 1996, the Sixth Legal committee has been engaged in negotiations on a Comprehensive Convention on International Terrorism, which have stalled repeatedly as a result of challenges of reaching consensus on a definition of 'terrorism'.<sup>163</sup> Although many states have been concerned that the development of a comprehensive convention would limit opportunities for independent domestic interpretation, Middle Eastern states have been particularly vocal in this regard.<sup>164</sup>

Concerned that anti-terrorism measures might circumscribe the Palestinian resistance movement against Israeli occupation, countries in the Middle East have been extremely reluctant to ratify anti-terrorism conventions, and to actively comply with Resolution 1373. For instance, the *Kuala Lumpur Declaration* developed at the 2003 Islamic Conference, makes the distinction between 'terrorism' and 'legitimate struggles against foreign aggression and by those under colonial domination or foreign occupation'. It includes in this latter category the Palestinian peoples.<sup>165</sup>

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<sup>162</sup> Ibid.

<sup>163</sup> Eric Rosand, "Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 339.

<sup>164</sup> David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 17.

<sup>165</sup> José E. Alvarez, "The UN's 'War' on Terrorism," *International Journal of Legal Information*, Volume 31:2 (2003): 239.

*Textual Ambiguity in Resolution 1373:*

A critical element to the broad support of the CTC has been its strategic focus on procedural issues and generic counter-terrorism capabilities, rather than on developing conceptual consensus. The CTC is willing to enable each state to define terrorism under its domestic system, rather than relying on the use of one, potentially highly divisive term.<sup>166</sup> One result of this has been states' use of unclear and exaggerated definitions of “terrorism” and related offenses in national legislation, which the HRC has noted on a number of occasions. The HRC has categorically held that the opportunity for states to flexibly interpret the concept of “terrorism” enables them to misuse the law to suppress lawful activities, which may ultimately violate the non-derogable principle of legality contained in Article 15 of the ICCPR.<sup>167</sup>

Evidence of the limitations of dependence on customary interpretations at the international level, and the complexity of considerations that have gone into formulating domestic definitions around the term are evident in the provisions of India's 2002 Prevention of Terrorism Act (POTA). POTA refers to specific instruments of terrorism, membership in specific associations, and the crime of conspiracy which is less prevalent in the common law tradition. The complexity of the Indian definition, moreover, is evident in the fact that it runs to one and a half pages single-spaced.<sup>168</sup>

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166 Eric Rosand, “Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism,” *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 340.

167 United Nations, General Assembly Report, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 18-19.

168 James A.R. Nafziger, “The Grave New World of Terrorism: A Lawyer’s View.” *Denver Journal of International Law and Policy*, Volume 31 (2002): 22-45. *Policy*, v31 i1 p1 (September 29, 2002): 6.



## b. Who Are Terrorist Agents?

In addition to its lack of definitional specificity for the term “terrorism,” the absence of clarity in attribution to individual terrorists and terrorist agents similarly reflects the political and procedural advantages of adopting open-ended mandates, and the inherent limitations of excessive specificity. Rather than focusing on specific actors such as Osama bin Laden and the Al Qaeda Network, Resolution 1373 describes terrorists as those individuals and groups that engage in particular actions. Its lack of attribution of specific actions to named individuals and organizations is politically savvy, minimizing opportunities for disagreement on parties to be included on the list. However, it has also provided states with a free reign to label individuals and sectors of their populations as 'terrorists' and 'terrorist groups'.<sup>169</sup>

The tendency for divergent interpretations is both reflected in the case of individual states versus the UN, as well as in the types of individuals and groups that are classified as “terrorists” within and across states. For instance, the US government has cited seven countries as “state-sponsors of terrorism,” and 28 groups as “foreign terrorist organizations.” In sharp contrast, the UN merely recognizes Afghanistan, Al Qaeda, and Osama bin Laden as guilty of these allegations. Although they were until recently included under these categories, Libya and Sudan were both removed after suspects were handed over to British authorities due to their alleged participation in the Lockerbie bombing, and in the aftermath of the governments' issuance of conciliatory remarks in the

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<sup>169</sup> David Schenker, “UNSC 1373 and the War Against Terror: An Important if Untested Tool,” *The Washington Institute for Near East Policy*, Policy Watch #582 (November 6, 2001): 1.

aftermath of September 11<sup>th</sup>, respectively.<sup>170</sup>

c. Measures for Addressing Non-Compliance:

Adopted under Chapter VII of the UN Charter, compliance with the obligations contained in Resolution 1373 are mandatory on member-states and give the Security Council significant latitude in seeking enforcement. In accordance with Article 41 of the UN Charter which authorizes “complete or partial interruption of economic relations and/or diplomatic relations,” and 42 authorizing “action by air, sea, or land forces,” the Security Council can impose punitive measures ranging from non-military options to military operations in response to non-compliance.<sup>171</sup> The recently released report of the *High Level Panel on Threats, Challenges, and Change*, recommends that the Security Council develops a plan for imposing sanctions on states that are capable of meeting their obligations under Resolution 1373, but are nonetheless non-compliant.<sup>172</sup>

Despite the Panel's strong recommendation for the Security Council's use of sanctions to induce compliance, the CTC's institutional mandate rests on the principle of transparency and cooperation.<sup>173</sup> The CTC has emphasized this spirit of open collaboration since its establishment, likely reflecting on the challenges of promoting ratification of anti-terror treaties and conventions due to concerns about infringement on sovereignty by treaty monitoring procedures. Given that the CTC does not operate as a sanctions committee or

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170 David Schenker, “UNSC 1373 and the War Against Terror: An Important if Untested Tool,” *The Washington Institute for Near East Policy*, Policy Watch #582 (November 6, 2001): 1.

171 Ibid.

172 Countering Terrorism: Progress and Challenges. Published by the United Nations Department of Public Information. DPI/2375 (January 2005).

173 Eric Rosand, “Security Council Resolution 1373, the Counter Terrorism Committee, and the Fight Against Terrorism,” *The American Journal of International Law*, Vol. 97, No. 2 (April, 2003): 335.

report to the Security Council on those states that it deems are falling behind on the obligations of the Resolution, the Council's decision to take measures against non-compliant states are likely to be perceived by the international community as being politically motivated.<sup>174</sup>

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174 Ibid, 336.

## **CHAPTER IV: Impact on the Human Rights Regime: Two Frames of Analysis**

### **Section 1: International Level**

Resolution 1373 and its institutional mechanisms established to address international terrorism in the aftermath of September 11<sup>th</sup>, 2001, have profoundly impacted state and non-state actors alike as they have responded to new opportunities and limitations fueled by subtle and more dramatic alterations in the domestic and international system. Human rights advocates operating independently as well as within the UN system have highlighted Resolution 1373's capacity to alter the mechanisms through which international law is conceived of, developed, and utilized by the UN and by member states. The impacts of Resolution 1373 on the instruments of international law are likely to be felt primarily within the treaty regime, and with regard to assertions of US hegemony in the practices of the Security Council. Additionally, Resolution 1373 has provided a vehicle through which states can advocate for a broader interpretation of the right to 'self defense' under Article 51 of the UN Charter.

#### **i. The Treaty Regime:**

As is indicated above, Resolution 1373 represented a dramatic shift from the Security Council's prior practice of primarily adopting resolutions to address specific situations threatening international peace and security. In passing a resolution that is universally legally binding and is backed by the potential of enforcement action, the Security Council legislated for the entire global community.<sup>175</sup> Although distinct in this regard,

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<sup>175</sup> José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International*

the substantive obligations contained in Resolution 1373 diverge very slightly from those already included in the 12 existing anti-terrorism conventions, which were adopted between 1963 and 1999.<sup>176</sup>

Prior to the passage of Resolution 1373, the 12 UN anti-terrorism conventions had received a lukewarm response from member states. States unwillingness to become signatories to these conventions was primarily due to concerns that they would open the door to UN interference in domestic matters. Additionally, states' ratification of these conventions was frequently stalled by staunch disagreements on the definition of 'terrorism'.

Resolution 1373 made binding many of the measures contained in the 1997 Convention for the Suppression of Terrorist Bombings, and the 1999 Convention for the Suppression of the Financing of Terrorism, which entered into force in 2000 and in 2002, respectively.<sup>177</sup> The provisions of Resolution 1373 bear a particularly striking resemblance to those contained in the recently concluded International Convention on the Financing of Terrorism. These provisions include the requirement that state parties take steps to prevent and counteract the financing of terrorists; identify, freeze, and seize

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*Law*, Vol. 97, No. 2 (October, 2004): 875.

176 These 12 international conventions cover the following subjects: Offences and Certain Other Acts Committed On Board Aircraft (1963); Unlawful Seizure of Aircraft (1970); Unlawful Acts Against the Safety of Civil Aviation (1971); Prevention and Punishment of Crimes Against Internationally Protected Persons (1973); Taking of Hostages (1979); Physical Protection of Nuclear Material (1980); Unlawful Acts of Violence at Airports (1988); Unlawful Acts Against the Safety of Maritime Navigation (1988); Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Marking of Plastic Explosives for the Purpose of Detection (1991); Terrorist Bombing (1997); and Financing of Terrorism (1999). (accessed April 20, 2005); available from <http://untreaty.un.org/English/Terrorism.asp>.

177 Paul Szasz, "The Security Council Starts Legislating," *The American Journal of International Law*, Vol. 96, No. 4 (October, 2002): 903.

funds targeted at terrorist activities; and share information on terrorist financing with other states.<sup>178</sup> Albeit covering a wider range of activities, Resolution 1373 similarly prioritizes states prohibition of terrorist financing through the freeze of assets, cooperation on intelligence with other states, and the use of law enforcement to more effectively bring those engaged in terrorist financing to justice.<sup>179</sup>

Although these provisions are similar to those delineated in the Convention on the Financing of Terrorism, the Convention contains various other substantive requirements which the Security Council refrained from incorporating into Resolution 1373. These include the imperative to defer to other requirements of international humanitarian law, and references to the rights due to persons charged with terrorism-related offenses, including the provision of judicial dispute settlement.<sup>180</sup> In constructing a framework for Resolution 1373, the Security Council had the option to make participation in the Convention mandatory, or to bind all member states to the provisions of the Convention.<sup>181</sup>

The Security Council's decision to instead adopt Resolution 1373 points to the likely influence of US resistance to bind itself to the Convention on the Financing of Terrorism. Although an active proponent and early signatory of the Convention, the US only became a party on June 26, 2002. The US act of delaying the process of becoming a signatory to

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178 United Nations Office on Drugs and Crime. Conventions Against Terrorism (accessed April 25, 2005); available from [http://www.unodc.org/unodc/terrorism\\_conventions.html](http://www.unodc.org/unodc/terrorism_conventions.html).

179 United Nations Security Council. Resolution 1373 (S/RES/1373, September 28, 2001) (accessed January 10, 2005); available from <http://www.un.org/terrorism/sc.htm>.

180 José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 875.

181 Paul Szasz, "The Security Council Starts Legislating," *The American Journal of International Law*, Vol. 96, No. 4 (October, 2002): 902.

the Convention is consistent with its typical ambivalence toward international law and the treaty regime. US tendency has generally been to assert broad competence for international law when it is in the majority, is of a dominant opinion, possesses a veto, and is not likely to become a target of authoritative international action. In deciding to engage in multilateral channels, the US has generally preferred to seek its foreign-policy objectives through the Security Council, likely due to its position of primacy, the presence of strong allies, and its capacity to use its Chapter VII authority.<sup>182</sup>

The US has taken the same selective approach in its engagement in international human rights endeavors, where its more legitimate efforts have been undermined by refusals to be bound by standards which are widely accepted in the international community. This rejection of normative human rights frameworks have included its unwillingness to apply the Geneva Convention to Afghan prisoners of war, and its refusal to ratify the ICESCR, the Convention on the Rights of the Child (CCR), and the Convention on the Elimination of Discrimination Against Women (CEDAW). Moreover, it has refused to sign the Statute of the International Criminal Court (ICC), and has developed bilateral agreements with signatories based on the claims that it will assert jurisdiction over US personnel on the basis of alleged engagement in genocide, war crimes, and crimes against humanity.<sup>183</sup>

In its passage of Resolution 1373, the Security Council adopted one resolution that

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182 Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations," *Leiden Journal of International Law*, 16 (2003): 594.

183 Kenneth Roth, "The Fight Against Terrorism: The Bush Administration's Dangerous Neglect of Human Rights," in *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*, eds. Thomas G. Weiss, Margaret E. Crahan, and John Goering (New York: Routledge, 2004), 124.

promptly achieved what several decades of efforts in the anti-terrorism treaty-regime had been unable to accomplish. In so doing, however, it significantly undermined the principal mechanism through which international organizations have historically advocated for global, widespread support and consensus around a wide range of thematic topics—including human rights and security measures. Significant advantages emerge from this process of deliberation, including the capacity to utilize the considerable time that it takes to negotiate, adopt, and bring into force international treaties to build global consensus on the need to address pressing issues. Although states vary significantly in their willingness to bind themselves to international treaties and conventions, in the seriousness with which they take their international obligations, and the extent to which they attach conditions to their acceptance—this process of deliberation between states on treaty texts generally brings a degree of legitimacy to ratified and adopted treaties.<sup>184</sup>

The adoption of Resolution 1373 by the Security Council—under the critical influence of the United States, is likely to impact the philosophical underpinnings, structures, and functions of multilateralism as a channel for global engagement on pressing international concerns. Although the Statute of the ICC entered into force in July 2002, the US unwillingness to become a signatory, and its use of bilateral agreements for non-rendition has limited the opportunity to develop an international framework that can function as an effective multilateral mechanism to bring perpetrators of terrorist acts to justice through more transparent legal measures.<sup>185</sup>

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184 David Forsythe, “Introduction,” in *Human Rights and Comparative Foreign Policy*, ed. David Forsythe (Tokyo: United Nations University Press, 2000): 9.

185 Joan Fitzpatrick, “Speaking Law to Power: The War Against Terrorism and Human Rights,” *European Journal of International Law*, Vol. 14, No. 2: 243.



## ii. US Assertions of Hegemony and the Security Council:

The adoption of Resolution 1373 signals the US' more assertive role in utilizing the Security Council to meet its foreign policy objectives through the process of universal law-making. Although the United States has frequently used the multilateral channel afforded by the UN to achieve unilateral objectives, the adoption of Resolution 1373 heralds its use of a new and nuanced approach to lawmaking, and to fashioning the development of a global anti-terrorism system according to its own designs. The US government's ideological objective was demonstrated when, in the aftermath of the establishment of the CTC, it publicly announced that Resolution 1373 was aimed at exporting its anti-terrorism legislation, in particular its Patriot Act, around the world.<sup>186</sup>

The US has not only been critical in shaping the ideological conceptions that undergird the institutions of Resolution 1373, but has also exerted significant influence in the process of developing its structure and functions. For instance, the manner in which the Security Council and the CTC have responded to constraints against their legal power glaringly resembles the US view that international human rights norms and humanitarian law impose unreasonable constraints on the war against terrorism. The Security Council and the CTC have been reluctant to recognize that its anti-terrorism endeavors may be constrained by treaty or customary law, as well as by international human rights and humanitarian law.<sup>187</sup>

The adoption of Resolution 1373 has enabled the Security Council to take a wide range of

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<sup>186</sup> José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 873.

<sup>187</sup> *Ibid*, 878.

measures against alleged 'terrorists', including imposing sanctions against individuals in the absence of due process. The US reliance on the Security Council to develop universally binding international law enabled it to avoid declaring a less-legitimate case of a national emergency under Article 4 of the ICCPR, which in its Articles 6, 7, 8, 11, 15, and 16 limits the permissiveness of the suspension of certain rights.<sup>188</sup> Although state leaders around the world have welcomed the adoption of Resolution 1373—the US tendency to assert its primacy on the Security Council has not only negatively impacted the international human rights regime, but over time is likely to tarnish the Council's global legitimacy.

### iii. Declarations of Self-Defense:

Since the adoption of Resolution 1373, critics have raised grave concerns that it legitimizes the unilateral use of military force in response to terrorist attacks by broadening the conditions of acceptable 'self defense'.<sup>189</sup> Article 51 of the UN Charter provides states with the right to individual or collective self-defense if an armed attack occurs.<sup>190</sup> Concerns that Resolution 1373 will expand the conditions under which 'self defense' is deemed acceptable are primarily leveled at two factors—the discourse in the Security Council surrounding the adoption of Resolution 1373, and the tendency for Council action to be interpreted as having a broader normative effect.<sup>191</sup>

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188 Ibid.

189 José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 879.

190 United Nations Charter, Article 51.

191 José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 879.

In its process of adopting Resolution 1373, the Security Council failed to clearly identify the party responsible for determining states non-compliance, and for prescribing punitive responses. Security Council members have been split in their opinion on the matter—with the US and Russia vehemently arguing that the Council does not possess the exclusive right to determine policy on measures to be taken against non-compliance. They hold that a unilateral determination of non-compliance would allow them to exercise their right to individual or collective self-defense in response to an “armed attack,” outlined in Article 51 of the UN Charter. US officials have additionally argued that terrorist threats, including state sponsors, need to be countered by preemptive and possibly covert military actions. Critics hold that unilateral responses to non-compliance in the absence of a commonly accepted definition of “terrorism” can set dangerous precedents and provide avenues for significant abuses of power.<sup>192</sup>

It remains to be seen precisely what impact Resolution 1373 will have on legitimizing the unilateral use of military force in response to terrorist attacks. However, critics argue that the greatest influence is likely to be felt as an outcome of the tendency for Council action to be interpreted as having a broad normative effect. Resolution 1373, they hold, will essentially result in the fomentation of new rules on 'self defense' that will emerge to respond specifically to states desire to address terrorism on their own terms.<sup>193</sup>

These new 'rules' will provide avenues for states to categorize terrorist violence as an “armed attack,” and grant them the sanction to respond with individual or collective self-

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<sup>192</sup> Ibid.

<sup>193</sup> José E. Alvarez, “Hegemonic International Law Revisited,” *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 879.

defense. They may additionally constitute the harboring of potential terrorists, and the inability to control these individuals as breaches of states' duty to refrain from interfering in the political independence of other states [outlined in Article 2:4 of the UN Charter], and thereby permit states to respond with an armed military attack. Finally, due to the ambiguous nature of terrorist threats, these new rules may prevent the establishment of limits on the use of military force that are consistent with permissible retaliation, legal anticipatory self-defense, and rules of proportionality.<sup>194</sup>

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## **Section 2: Balancing Human Rights and Anti-Terrorism at the State Level**

The adoption of Resolution 1373 and the seemingly enhanced threats of terrorism that have emerged in the aftermath of September 11<sup>th</sup> have compelled nations to make policy choices that paint human rights and national security as mutually exclusive objectives. Acting in a manner that endorses this false dichotomization, however, fails to recognize that states that are bound by human rights obligations and by those bodies charged with their supervision, are not limited to balancing one claim against another. States principal objective is to find ways of reconciling other rights and interests with an appropriate respect for broader human rights, which may only be interfered with to the degree that is necessary and proportionate.<sup>195</sup> The three examples highlighted below describe states' efforts to reconcile the interests of national security and human rights in light of new pressures and dynamics that have emerged in the aftermath of the events of September 11<sup>th</sup> and the adoption of Resolution 1373.

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<sup>194</sup> Ibid.

<sup>195</sup> Colin Warbrick, "Terrorism and Human Rights," in *Human Rights: New Dimensions and Challenges*, ed. Janusz Symonides (Hants, UK: Ashgate Dartmouth, 1998): 236.

### i. The Practical Implementation of Resolution 1373:

The adoption of Resolution 1373 has posed a number of dilemmas at the state level, where concerns have been raised that no structures and processes exist for conducting impartial judicial review of individuals prior to their being deemed as 'terrorists' by the Security Council and the CTC. Legal scholars in Europe have been particularly critical in this regard, focusing on the prevalence of practices which are non-compliant with international human rights norms codified in the ICCPR and the European Convention on Human Rights (ECHR), including lack of due process, and access to fair, independent, and impartial tribunals.<sup>196</sup>

Although states vary in the degree to which they place the burden of guilt or innocence on individuals, detained alleged 'terrorists' face difficulties in proving their 'non-involvement'. Dossiers on those subject to financial sanctions and other 'terrorist' acts are not made public, on the basis of claims to protect "national security," and the identities of both informants and those being held in custody. European lawyers have expressed grave concerns over individuals who have been branded as 'terrorists' and whose financial assets have been frozen without being able to counter these allegations before a judicial body. Europe-wide courts in Luxembourg and Strasbourg, as well as national courts across the continent are facing a number of challenges from individuals who proclaim their innocence, and yet are denied a day in court to either challenge their inability to access funds held in bank accounts, or to clear their names.<sup>197</sup>

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196 José E. Alvarez, "The UN's 'War' on Terrorism," *International Journal of Legal Information*, Volume 31:2 (2003): 248.

197 José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 877.

In early 2002, a case of this nature was heard in a Swedish national court. Three Swedish nationals of Somali origin were accused of engaging in terrorist financing by the Security Council's sanctions committee, and found their assets frozen. The three men proclaimed their innocence, but nonetheless faced a complete inability to pay their rent or purchase food. Swedish courts were unable to provide them with remedy, as their hands were ostensibly tied by binding Security Council action. When the Swedish government representative assigned to the three men sought to investigate the allegations, he found that the Committee's procedures require an appeal to be made to the state that initially listed the individual—in this instance the United States and its Office of Foreign Assets Control. Additionally, the first listing state can demand any relevant information on the case, and block de-listing attempts.<sup>198</sup>

In August 2002, in response to mounting concerns that persons and organizations were suffering severe consequences from this process, the CTC adopted a de-listing mechanism for those who are able to prove their innocence. The mechanism is based on a model of diplomatic protection, through which states of origin submit a request for de-listing to the state where the alleged terrorists are currently being listed. The CTC serves as the initial arbiter in the matter, while the Security Council issues the final decision in cases of states' refusal to de-list.<sup>199</sup>

Although the CTC's willingness to modify its previously ineffective mechanism is a promising development, the inaccessibility of the listing and de-listing process opens the

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<sup>198</sup> Ibid.

<sup>199</sup> Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights," *European Journal of International Law*, Vol. 14, No. 2: 260

door for governments' potential repression of dissidents. Moreover, the Security Council has refused to accept that those facing terrorist allegations ought to be privy to impartial judicial review prior to their becoming targets of sanctions. In essence, Resolution 1373 imposes criminal sanctions on individuals, but fails to include measures for the provision of legal protections.<sup>200</sup>

## ii. Conflicting Legal Commitments in the Aftermath of Resolution 1373:

Although international conventions and treaties on anti-terrorism measures and human rights establish an important standard for state conduct, the domestic arena ultimately serves as the stage on which these dual goals are sought and are actualized. The adoption of Resolution 1373 has brought to light the dual imperative of states to balance their interests to ensure national security writ large, and to safeguard and promote the individual human and civil rights of their domestic citizenry.

Resolution 1373 appears to have reinforced the notion of the exclusivity of traditional conceptions of 'security' among member states at the cost of a broader discourse of "human security." However, the development of a human rights regime during the past 50 odd years has heralded the emergence of a wealth of civil society actors and advocates. As is demonstrated in the case below, these actors and advocates have sought to 'name and shame' their governments into balancing their dual imperatives to promote national security without compromising on human rights.<sup>201</sup>

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200 José E. Alvarez, "Hegemonic International Law Revisited," *The American Journal of International Law*, Vol. 97, No. 2 (October, 2004): 877-878.

201 David Forsythe, "Introduction," in *Human Rights and Comparative Foreign Policy*, ed. David Forsythe (Tokyo: United Nations University Press, 2000): 3.

In 2003, these dilemmas came to glaring light in Kenya, when the country began to debate the adoption of a new Government bill on anti-terrorism, entitled the Suppression of Terrorism Bill. It is impossible to establish unquestionable causality between the adoption of Resolution 1373 and the debate surrounding the passage of a new anti-terrorism bill in Kenya. Nonetheless, the events of September 11<sup>th</sup>, the US launch of a global 'War on Terror', and the UN's more active engagement in anti-terrorism endeavors resulted in a normative shift which facilitated states' attempts to adopt new and questionable measures to address terrorism within their borders.<sup>202</sup>

In seeking the adoption of a new bill, Kenyan leaders were more likely directly responding to the reality that the country had been targeted by numerous terrorist attacks during the past 30 years. The August 1998 bombing of the US Embassy in Nairobi had raised significant international attention and enhanced the pressure on the Kenyan government to take a more active stance on terrorism. Kenyan efforts to develop more stringent mechanisms to address terrorism were bolstered by international factors such as the US 'War on Terrorism', pressures being exerted by the US in the aftermath of the Embassy bombing, and the UN's adoption of Resolution 1373.<sup>203</sup>

The debate on the adoption of the Bill unfolded in the context of Kenya's constitutional conference to negotiate a draft constitution, which was slated to include a Bill of

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202 Kenya Human Rights Commission. Are Human Rights Movements the Next Victims of the War on Terrorism? (accessed March 28, 2005); available from <http://www.khrc.or/ke/news.asp?ID=9>.

203 Kenya Human Rights Commission. Are Human Rights Movements the Next Victims of the War on Terrorism? (accessed March 28, 2005); available from <http://www.khrc.or/ke/news.asp?ID=9>.



Rights.<sup>204</sup> Kenya had staged a landmark election in December 2002, at which 39-years of authoritarian leadership by Daniel Arap Moi had come to an end. The election of President Mwai Kibaki symbolized for many Kenyans the dawn of a new era of government accountability and transparency.<sup>205</sup>

Responding to the prevailing social and political context, human rights advocates and civil society more broadly were primarily concerned that if was enacted into law, the Bill would be unconstitutional. It would enable the suspension of certain safeguards that protect the rights of those prosecuted or detained under the Bill, and therefore violate fundamental rights protected under the Kenyan Constitution. The proposed legislation, they held, should have taken into consideration the on-going debates around enhancing the Bill of Rights in the constitutional review process.<sup>206</sup>

Human rights advocates critiquing the Suppression of Terrorism Bill raised specific concerns that it contained the potential of creating a two-tier justice system to provide a legal framework for arbitrary arrests, illegal detentions, random searches, and flawed judicial processes. The creation of a distinct system of arrests, detention and prosecution to cover terrorism-related crimes would ultimately violate the right of all people to be equal before the courts. In a manner that resembled Resolution 1373, the Bill provided a vague and broad definition of “terrorism” and “terrorist acts.” The Bill additionally

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204 The Carter Center. *Human Rights Defenders on the Frontlines of Freedom* (November, 2003); available from <http://www.cartercenter.org>, 10.

205 BBC World. Profile: Kenya's New Leader (accessed April 18, 2005) available from <http://news.bbc.co.uk/1/hi/world/africa/2612893.stm>.

206 Amnesty International. Memorandum to the Kenyan Government on the Suppression of Terrorism Bill (accessed April 20, 2005); available from <http://web.amnesty.org/library/Index/ENGAFR320032004?open&of=ENG-2F4>

granted extensive powers to law enforcement to search and seize, arrest, and detain alleged “terrorists” incommunicado without a right to legal representation during interrogations.<sup>207</sup>

Regarded by many critics as a shoddy replica of the US Patriot Act (2001), human rights advocates additionally argued that the legislation was incompatible with international human rights standards, particularly the ICCPR and the African Charter on Human and Peoples' Rights, both to which Kenya is a party.<sup>208</sup> Following widely expressed concerns and strong criticisms that the Bill contained measures that would impact negatively on human rights, it was shelved pending the presentation of a revised version to the Parliament.<sup>209</sup>

### iii. Domestic Political Ideology and the Global Language of Anti-Terrorism:

In the aftermath of the events of September 11<sup>th</sup> and the Security Council's adoption of Resolution 1373, states have sought to use the language of 'anti-terrorism' to repress minority groups, political dissidents, and human rights advocates. Efforts to directly link states' use of repression in the name of 'anti-terrorism' to the adoption of Resolution 1373 is an impossible task. More importantly, however, to ignore the impact of states use of the language of anti-terrorism to commit human right violations hinders the development

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207 Ibid.

208 Kenya Human Rights Commission. Are Human Rights Movements the Next Victims of the War on Terrorism? (accessed March 28, 2005); available from <http://www.khrc.or/ke/news.asp?ID=9>.

209 Amnesty International. Memorandum to the Kenyan Government on the Suppression of Terrorism Bill (accessed April 20, 2005); available from <http://web.amnesty.org/library/Index/ENGAFR320032004?open&of=ENG-2F4>

of a holistic picture of the linkages between September 11<sup>th</sup>, the US 'War on Terrorism', and the Security Council's adoption of Resolution 1373—and the direct impact that these shifts have had on local communities.

In 2002, state leaders' willingness to adopt new and more stringent anti-terror measures at the cost of human rights was illustrated when the Indian government enacted the Prevention of Terrorism Act (POTA). POTA created a broad definition of “terrorism,” and sought to expand the states investigative and procedural powers. The legislation allowed for widespread abuse, including holding suspects for up to 180 days without filing charges; dispensing of the presumption of innocence by placing the burden of proof on suspects; the compulsory denial of bail; and the admissibility of confessions despite law enforcements' use of torture and coercion.<sup>210</sup>

In 2003, the Indian government used the newly enacted POTA to detain 131 Muslims for allegedly attacking the *Sabarmati* Express train in Godhra, Gujarat. The train was transporting Hindu pilgrims who were returning from the site of the demolished *Babri Mosque* in Ayodhya, where they had been volunteering in the construction of a temple in honor of Lord Ram.<sup>211</sup> Accounts of the attack indicate that a tussle ensued between the pilgrims and a Muslim vendors at the train station, which eventually culminated with a compartment being set on fire, and 58 people perishing in the blaze.<sup>212</sup>

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210 Human Rights Watch. India: POTA Repeal a Step Forward for Human Rights, September 22, 2004. [http://www.hrw.org/english/docs/2004/09/22/India9370\\_txt.htm](http://www.hrw.org/english/docs/2004/09/22/India9370_txt.htm). Accessed December 17, 2004.

211 Siddharth Varadarajan, “Introduction” in *Gujarat: The Making of a Tragedy*, ed. Siddharth Varadarajan (New Delhi: Penguin Books India (P) Ltd.: 2002): 15.

212 Fact Finding By a Women’s Panel. How Has the Gujarat Massacre Affected Minority Women? The Survivors Speak (accessed March 1, 2004); available from <http://www.infochangeindia.org/bookandreportsst13.jsp>.

The arrest of the 131 Muslims sparked tremendous public outrage due to the context in which these allegations were made. Despite the accounts of numerous witnesses that described the spontaneous nature of the attack, Chief Minister Narendra Modi and the institutions of the Gujarati Hindu-nationalist BJP state government, as well as members of the central government in New Delhi immediately proclaimed that suspicion pointed to Pakistani “terrorists.” On March 1<sup>st</sup>, 2002, for instance, Home Minister LK Advani stated that “..one feels that only local residents of Godhra were not involved in the horrendous act. The needle of suspicion points to those elements which attacked Parliament on 13 December, 2001.”<sup>213</sup>

Pinning the onus of guilt on Pakistani “terrorists” served the multiple purposes of creating a public belief that the attack had been organized and pre-planned and played on generalized communitarian perceptions by shifting blame from a disorganized, anonymous mob to the Muslim community as a whole. Additionally, it raised the red flag of “terrorism” in a global atmosphere colored by the events of September 11<sup>th</sup>, that had seemingly redefined the parameters of 'national' security.<sup>214</sup>

Kindled by the combination of premeditated mobilization by the Hindu right, the active complicity of state institutions, and the play of sweeping communitarian-based generalizations that pinned the blame of Godhra on all Muslims—vicious attacks against Muslims erupted in villages and towns across Gujarat. More than 2,000 Muslims throughout the state were killed, while scores of Muslim women and girls were gang

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213 Siddharth Varadarajan, “Introduction” in *Gujarat: The Making of a Tragedy*, ed. Siddharth Varadarajan (New Delhi: Penguin Books India (P) Ltd.: 2002): 6.

214 Ibid, 8.

raped before being mutilated and killed. 215

Concerns raised by human rights advocates centered not only on the draconian nature of POTA, but also on the Hindu nationalist party's selective use of the law to arrest alleged Muslim 'terrorists'. The Hindu nationalist BJP that headed the state government at the time has not charged any Hindus under POTA for crimes against Muslims, despite detailed descriptions of individuals who allegedly carried out the attacks. On September 17, 2004, the new Indian government of Prime Minister Manmohan Singh announced that it would keep its election pledge to repeal POTA and amend existing laws to target terrorist activity.<sup>216</sup>

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215 International Institute of Justice. *Threatened Existence: A Feminist Analysis of the Genocide in Gujarat* (accessed March 4, 2004); available from [www.onlinevolunteers.org/gujarat/reports/ijg/2003/ch11\\_recommendations.pdf](http://www.onlinevolunteers.org/gujarat/reports/ijg/2003/ch11_recommendations.pdf)

216 Human Rights Watch. *POTA: Repeal a Step Forward for Human Rights* (accessed March 3, 2005); available from <http://hrw.org/english/docs/2004/09/22/india9370.htm>.

## **Chapter V: Prescriptions**

### **Section 1: Shifting the Ideological Framework from National to Human Security**

The events of September 11<sup>th</sup> and the adoption of Resolution 1373 have highlighted the imperative, yet seemingly difficult task of balancing national security and human rights. At a superficial level, the potential challenges that states face in balancing these two principles appears self-evident, given that the primary responsibility vested in national leaders is to ensure the protection of the state from internal and external aggression—without which it could potentially cease to exist. However, the traditional, narrow concept of security leaves out the primary concerns of ordinary peoples regarding security in their daily lives—concerns such as chronic poverty, conflict, and crime.<sup>217</sup>

Since the birth of the United Nations in 1945, the security as well as human rights mechanisms of the organization have both evolved in recognition of the shifting priorities of the global community. From this process has emerged a broader consensus on the necessity to address “human security” to maintain both internal stability within states, as well as to foster a more secure international environment. Although this broadened notion of security is not explicitly utilized by the military establishments of most states, civil society actors, international organizations, and citizens have served as a powerful voice to both subtly and vocally press for states to recognize and respond to this more holistic view of 'security'.<sup>218</sup>

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217 Ramesh Thakur, “Security in the New Millennium,” in *Enhancing Global Governance*, eds. Andrew F. Cooper, John English, and Ramesh Thakur (New York, NY: United Nations University Press, 2002): 273.  
218 Ibid.

In adopting Resolution 1373, the UN Security Council provided a vehicle through which its most powerful member—the United States—could seek to achieve its short-term national security objectives. In so doing, the Security Council failed to acknowledge one of the central components of human security—the notion that the threat posed to citizens is not merely a consequence of external aggression, but also of a wide range of factors within a state, including its governance and security apparatus.

The mandate of Resolution 1373 and its related organs seek a simple remedy to complex societal ills—including the need to strengthen the rule of law; foster governance accountability and transparency; and enhance criminal investigative capacities among states. Albeit not branded as 'anti-terrorist' endeavors, these are efforts that other instruments of the UN have been attempting to remedy for several years through a “human security” and human rights framework.

As the following study suggests, the real threats posed by terrorism compel states to pay greater heed to human rights standards. A core component of this imperative, however, is recognizing that ensuring security is a global right and responsibility—that extends beyond territorial security, to security through human development, including the provision of food, employment, and lack freedom from conflict. The need for states and the UN to reinforce this conception of 'human security' provides an ideological framework for addressing the threat of terrorism, and violations of human rights in response to perceived security threats. More concrete recommendations, rooted in the dual framework approach described in Section IV, above, seek to provide concrete

recommendations to balance the multiple, and salient dilemmas that have emerged in the following study—those between international and domestic commitments, national security and human rights, and unilateralism and multilateralism.

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## **Section 2: Prescriptions**

### **i. International Level:**

#### **a. The Office of the High Commissioner for Human Rights:**

Institutionalist political theorists hold that at the international level, global organizations such as the UN and its vast web of affiliated entities serve as both a mechanism through which states can maximize their self-interest, as well as cooperate toward the pursuit of common ends. These dual features were demonstrated in the adoption of Resolution 1373 in September 2001. The US' assertions of power and self-interest on the Security Council are evident in the structural, functional, and historical features of Resolution 1373.<sup>219</sup>

International organizations such as the UN, however, additionally provide avenues for cooperative engagement between states. As such, prescriptive remedies to strengthen human rights and foster human security are sought through the existing institutions of the UN system—specifically the Office of the High Commissioner for Human Rights and the treaty regime. Although concerns have been raised over the CTC's lack of willingness to become involved in efforts to protect and promote human rights while addressing terrorism—this decision is suitable in light of the realities of the framework of transparency which underlies the work of the organization. The work of the CTC has

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219 Anne-Marie Slaughter, “The Technology: Principal Theories of International Relations,” Chapter 1 in *International Law and International Relations* (Ann-Marie Slaughter, Hague Academy of International Law Lectures, 2000): 30-31.



been welcomed by member states as a direct result of its non-confrontational approach, which would be severely jeopardized if the organization began to act as a human rights monitoring agency.<sup>220</sup>

As such, the human rights instruments of the UN must be provided with the resources and staffing capacity to effectively integrate its work into the endeavors of the CTC. The goal to 'mainstream' human rights into the broader UN system is not a new objective, but was outlined in Secretary-General Kofi Annan's 1997 report, entitled *Renewing the United Nations: A Program for Reform*, in which he identified human rights as a cross-cutting issue.<sup>221</sup> In his report, he emphasized the imperative to integrate human rights into the areas of peace and security, humanitarian assistance, sustainable development, and social and economic development. In response to this mandate, the OHCHR began to work in closer cooperation with UN organs such as the United Nations Development Program (UNDP), the United Nations High Commissioner for Refugees (UNHCR), the Department of Political Affairs (DPA), and the Department of Peacekeeping Operations (DPKO).

In light of the emerging concerns that have been raised over the violations of human rights under the guise of countering terrorism, it is critical for the OHCHR to become more engaged with anti-terrorism endeavors. Since the adoption of Resolution 1373, the Security Council has welcomed the High Commissioner to its meetings on a number of occasions to brief the Council on specific human rights incidences. In order to move

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220 Eric Rosand. "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," *The American Journal of International Law*, Volume 97, No. 2 (2003): 336.

221 Secretary-General Kofi Annan. *Renewing the United Nations: A Program for Reform* (1997).

beyond the level of debate, however, the High Commissioner must play a more active role in the deliberations of the Security Council, and engage in regular coordination with the CTC. Historically, the integration of human rights into the activities of a wide range of UN programs and organs has enabled the OHCHR to more effectively utilize its limited resources, and encouraged the ‘streamlining’ of the human rights machinery.<sup>222</sup>

However, the notion of ‘mainstreaming’ remains controversial, as some developing countries see it as a polite word for ‘conditionality,’ implying that the OHCHR would have a role in reviewing aid conditionality linked to human rights, and that it could have an impact on the work of UN organs and specialized agencies. Additionally, some critics hold that ‘mainstreaming’ threatens to potentially dilute the works of the OHCHR due to the excessive decentralization of its programs, monitoring, and enforcement mechanisms, and could place an excessive burden on the work of other UN agencies and projects. In light of these realities, the OHCHR needs to be provided with the mandate and resources to work more closely with the institutions of Resolution 1373.<sup>223</sup>

#### b. Treaty Monitoring Bodies:

As the principal mechanism through which the UN reviews states progress on meeting their international human rights obligations, treaty bodies have served an instrumental role in documenting and reporting on human rights violations that have emerged in the aftermath of the adoption of Resolution 1373. Since the adoption of Resolution 1373, the Human Rights Commission has urged bodies whose reports have come under review to

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222 Alston, Philip “Neither Fish Nor Fowl: The Quest to Define the Role of the UN High Commissioner for Human Rights,” *European Journal of International Law*, No.2, Volume 8 (1997): 10.

223 Ibid.

conform anti-terrorism policies to their human rights obligations. However, the submission of reports to the treaty bodies and the schedule according to which these are reviewed are unrelated to the severity of human rights violations. Treaty-bodies lack the capacity to engage in the timely review of reports, and have no procedures for addressing derogations from international commitments that are conveyed in these reports.<sup>224</sup>

In order to address this discrepancy, the UN needs to reexamine existing derogation standards. Key practices undertaken by states that need further investigation include the use of military courts to try terror suspects in the absence of judicial review; whether the conditions under which terror suspects are being are consistent with the element of proportionality; whether states are derogating from their commitments under the ICCPR through the use of severe interrogation techniques and incommunicado detention; and the unequal application of anti-terror measures against non-citizens.<sup>225</sup>

#### c. The Provision of Financial Resources:

Currently, the CTC is forced to rely on funds for technical assistance through bilateral channels, which tend to be ad hoc, selective, and allocated on the basis of domestic political interests among donor countries. Although proposals have been made to establish an Assistance Fund, the US has been vocally opposed to this approach, preferring to provide selective financial assistance through bilateral mechanisms.

In 2002, Secretary-General Kofi Annan recommended the establishment of a Trust Fund, to ensure the financial resources necessary to provide states with technical assistance.

Further recommendations were made in 2003 for the UNDP or the World Bank to

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224 Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights," *European Journal of International Law*, Vol. 14, No. 2: 263.

225 Ibid, 252.

manage an assistance fund.<sup>226</sup> Although additional financial assistance is critical to ensuring that countries seeking to implement new anti-terror measures mandated through Resolution 1373 are able to do so in a manner that is consistent with a larger objective to strengthen the rule of law and foster human security, linking this fund to affiliated organizations might raise suspicions of potential conditionality.

## ii. State Level:

At the state level, UN agencies and NGOs must work in closer collaboration to strengthen monitoring capacities. The OHCHR can play a central role in this regard, convening consultations for international, regional, and sub-regional organizations and non-governmental organizations on the protection of human rights in the struggle against terrorism. Additionally, regional meetings will be critical to reaching a wide range of organizations on the ground.

The Office of the High Commissioner should also make maximum use of its field presences and its regional experts, as well as the findings of the human rights treaty bodies and special rapporteurs. Strengthening and enhancing field presence should be regarded as a key mechanism to reconfigure the UN presence on the ground. Integrating concepts of human security into field presences will be critical in this regard, particularly during times of crisis when they can provide prompt information to the UN, and attract attention to pressing cases of grave violations of human rights.<sup>227</sup>

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226 David Cortright, Alistair Millar, Linda Gerber, and George A. Lopez, "An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism," *The Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame* (April 2004): 17.

227 United Nations Secretary General Kofi Annan. *In Larger Freedom: Toward Development, Security,*

Since the establishment of the OHCHR, the organization has come to increasingly rely on field presences to ensure that international human rights standards are implemented into law and practice at the national level—where information and education programs; and linkages among and between international, regional and national systems for human rights and civil society can advance human rights. Additionally, the use of field operations has enabled the OHCHR to gain more accurate and timely information on events occurring on the ground, to facilitate a proactive rather than reactive approach to prevent human rights violations from occurring.<sup>228</sup>

The OHCHR's enhanced commitment to concentrating resources at the national level has facilitated the expansion of its local capacity from small field presences in the Former Republic of Yugoslavia and in Cambodia in the 1990s, to a current level of more than 200 national and international personnel based in 40 countries and territories worldwide. The growth in the establishment of field missions inside countries represents a dramatic accomplishment in the international human rights arena, given their ability to act on matters that had once been considered solely within the purview of domestic affairs.<sup>229</sup>

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*and Human Rights for All* (accessed March 24, 2005; available from <http://www.un.org/largerfreedom/>, 37.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

## **Conclusion**

Since the adoption of Resolution 1373 on September 28, 2001, we have witnessed both a normative and a structural shift, as states have reacted to new pressures to adopt more stringent anti-terror measures. As this study indicates, the dilemma posed to the UN and to member states to balance security and human rights is not an easy one. The imperative of states to protect human rights at all costs, however, stems not only from a moral or ideological view, but is codified in the principles of the UN Charter.

Around the world, countries have attempted to take advantage of the global war on terror to intensify their own crackdowns on political opponents, separatists, and religious groups, or to suggest they should be immune from criticism of their human rights. Additionally, new laws and measures have been implemented by governments that fail to discriminate between the guilty and the innocent, and regressive anti-terrorist measures have been implemented that expand governmental powers of detention and surveillance in ways that threaten basic rights. Albeit implemented on the premise that they are intended to enhance our security, the more real and daily security concerns of the vast majority of the world's population—are being widely ignored.

The causes of terrorist violence have been widely debated, yet are unable to uncover a precise formula. Although it is undeniably difficult and a potentially meaningless task to engage in such discourse on the one hand, simplifying the causes of terrorism into politically expedient terminology on the other hand fails to provide an avenue for addressing root causes. In this environment, it is imperative for the human rights

movement to demonstrate that the promotion of human rights internationally is not just of ethical and moral value, but also an essential tool in the fight against terrorism. The human rights community must make the link that where there are social, political, and economic opportunities and avenues for participation and civic engagement-terrorism is unlikely to gain popular support.

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