

# Time to Stand Up and Be Counted: The Need for the United Nations to Control International Terrorism

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*Terrorism is a global menace. It calls for a united, global response. To defeat it, all nations must take counsel together, and act in unison. That is why we have the United Nations.*<sup>1</sup>

## I. Introduction

Since September 11, the United States and many other nations have been engaged in the Global War on Terrorism.<sup>2</sup> The U.S. military has approximately 200,000 Soldiers, Sailors, Airmen, and Marines serving in Iraq and Afghanistan.<sup>3</sup> Each service's Judge Advocate General's Corps supports the Global War on Terrorism by providing "professional legal support at all echelons of command throughout the range of military operations"<sup>4</sup> and within other government agencies such as the Department of State.<sup>5</sup> In the Army, this legal support includes advice and services in international law, one of the core legal disciplines.<sup>6</sup> Although international law advice generally focuses on conduct in a full spectrum of missions and ensuring adherence to international treaty law and customary international law,<sup>7</sup> judge advocates may gain a greater understanding of daily activities in deployed areas by understanding the historical evolution of justifying war and the existing anti-terrorism treaties.<sup>8</sup>

Since the beginning of civilization, great philosophers and scholars have struggled with the morality of war. In particular, these philosophers formulated guidelines in an effort to ensure a just cause for going to war. Despite these guidelines, the world faced The Great War—thought to be the "war to end all wars."<sup>9</sup> Close to twenty years later, World War II proved that perception to be wrong.<sup>10</sup> At the end of World War II, many nations joined together to prevent another global armed conflict. In 1945, fifty-one countries formed the United Nations (UN) as an organization for cooperation between

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<sup>1</sup> Press Release, Secretary General, True Faith is Respectful, Compassionate, Devoid of Hatred, Says Secretary-General at Temple Emanu-El in New York, U.N. Doc. SG/SM/7962/Rev. 1 (Sept. 18, 2001), available at <http://www.un.org/News/Press/docs/2001/sgsm7962R1.doc.htm>.

<sup>2</sup> THE WHITE HOUSE, PROGRESS REPORT ON THE GLOBAL WAR ON TERRORISM 1 (Sept. 2003), available at [http://www.whitehouse.gov/homeland/progress/progress\\_report\\_0903.pdf](http://www.whitehouse.gov/homeland/progress/progress_report_0903.pdf).

<sup>3</sup> Rick Maze, *CBO: Iraq Surge Could Actually Total 50,000*, ARMY TIMES, Feb. 2, 2007, available at <http://www.armytimes.com/news/2007/TNScbosurge070201>; Mike Mount, *U.S. Sending More Troops to Thwart Taliban Offensive*, CNN, Feb. 14, 2007, <http://www.cnn.com/2007/World/asiapcf/02/14/Afghanistan.troops/index.html>.

<sup>4</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 1-1 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>5</sup> Interview with Lieutenant Colonel Michael Lacey, Director, Center for Law and Military Operations, TJAGLCS, in Charlottesville, Virginia (Feb. 27, 2007) [hereinafter Lieutenant Colonel Lacey Interview].

<sup>6</sup> FM 27-100, *supra* note 4, at 1-4.

<sup>7</sup> *See id.* at 1-7.

<sup>8</sup> Lieutenant Colonel Lacey Interview, *supra* note 5.

<sup>9</sup> *The Great War: 80 Years On*, BBC NEWS, Nov. 2, 1998, available at [http://news.bbc.co.uk/2/hi/special\\_report/1998/10/98/world\\_war\\_i/197437.stm](http://news.bbc.co.uk/2/hi/special_report/1998/10/98/world_war_i/197437.stm); *The War to End All Wars*, BBC NEWS, Nov. 10, 1998, available at [http://news.bbc.co.uk/2/hi/special\\_report/1998/10/98/world\\_war\\_i/198172.stm](http://news.bbc.co.uk/2/hi/special_report/1998/10/98/world_war_i/198172.stm).

<sup>10</sup> *See generally* Statistics of World War II, The History Place, available at <http://www.historyplace.com/worldwar2/timeline/statistics.htm> (last visited Sept. 25, 2007) (discussing how World War II involved twenty-five nations and resulted in over fifty-two million military and civilian deaths).

States, naturally focusing on the most recent war.<sup>11</sup> The UN Charter limited the justifications for war<sup>12</sup> and sought to prevent future wars between States, thereby achieving global peace.<sup>13</sup>

Since its creation, membership in the UN has expanded<sup>14</sup> and armed conflicts between nations have decreased. Formal declarations of war have become almost nonexistent since the end of World War II, and most States seek to bring their use of military force within the UN Charter framework.<sup>15</sup> The syllogism that the UN has created world peace is appealing, but the reality of the twenty-first century is that this is merely a *post hoc ergo propter hoc* fallacy.<sup>16</sup>

Today, nebulous organizations that operate internationally have filled the void created by the absence of warfare between States. “[T]he combination of religious ideology and interests that use religious factors in violence are becoming an increasingly potent force in Africa, Asia, the Middle East, and even the Americas.”<sup>17</sup> Terrorism is a word frequently used to characterize these acts of violence that increasingly fall within the category of armed conflict. Despite the escalating level of violence, the few anti-terrorism treaties are based in criminal law, not laws of armed conflict. To effectively punish and limit violent terrorism, the UN must abandon the treaties prohibiting the crimes of terrorism and craft a new body of law premised on the law of armed conflict.

Creation of a viable solution for terrorism requires an understanding of the rationale and justification of armed attacks, to include violent terrorist attacks. In Part II, this article discusses three distinct just war systems and conflicts among these systems. The first system, based on Islam but best known as *jihad*, formed with little or no influence from the non-Islamic world. This article discusses *jihad* without Western bias and relies heavily on Muslim scholars as the basis of research. The second system, traditional *jus ad bellum*, commonly known as the law of resorting to war,<sup>18</sup> is a Western framework that some States (including the United States) argue includes a customary international law concept based on the *Caroline* incident of 1837.<sup>19</sup> The third system, the framework of the UN Charter, provides limited justification for armed conflict among its members. An understanding of these systems reveals the shortcomings of the existing counterterrorism treaty law and the necessity for classification of violent terrorism as warfare.

Because existing treaties for the prevention of terrorism rely on a criminal framework, Part III of this article examines the crime of terrorism and existing counterterrorism treaties. This examination begins with UN actions to fight terrorism and continues with the quagmire of inaction surrounding the drafting of a UN Comprehensive Anti-Terrorism Treaty. Next, this article further illuminates the existing polarity throughout the world by discussing several regional counterterrorism conventions. Lastly, Part IV of this article proposes essential elements for defining and controlling the war crime of international terrorism by non-State actors.

## II. Authority for War

*Historical and anthropological evidence suggests that every human culture has generated some analogue of just war tradition: a consensus of beliefs, attitudes, and behavior that defines the terms of justification for resorting to violence and the limits, if any, to be set on the use of violence by members of that culture.*<sup>20</sup>

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<sup>11</sup> History of the United Nations, <http://www.un.org/aboutun/unhistory> (last visited Sept. 25, 2007) [hereinafter History of the United Nations].

<sup>12</sup> U.N. Charter art. 2, para. 4, available at <http://www.un.org/aboutun/unhistory> (last visited Sept. 25, 2007).

<sup>13</sup> Peter Howard, *United Nations*, in MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA, [http://encarta.msn.com/encyclopedia\\_761564986/United\\_Nations.html](http://encarta.msn.com/encyclopedia_761564986/United_Nations.html) (last visited Sept. 25, 2007).

<sup>14</sup> Growth in UN Membership, <http://www.un.org/Overview/growth.htm> (last visited Sept. 25, 2007).

<sup>15</sup> Flashback: Invasion of Kuwait, BBC NEWS, Aug. 1, 2000, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/856009.stm](http://news.bbc.co.uk/1/hi/world/middle_east/856009.stm) [hereinafter Flashback: Invasion of Kuwait].

<sup>16</sup> Post Hoc, <http://www.fallacyfiles.org/posthocf.html> (last visited Oct. 4, 2007) (providing the translation “after this, therefore because of this”).

<sup>17</sup> Pauletta Otis, *Religious Warfare on the Global Battlefield*, in THE JUST WAR AND JIHAD 169, 170 (R. Joseph Hoffman ed., 2006).

<sup>18</sup> MICHAEL WALZER, JUST AND UNJUST WARS 21 (4th ed. 2006).

<sup>19</sup> MICHAEL BYERS, WAR LAW 53-54 (2005).

<sup>20</sup> James Turner Johnson, *Historical Roots and Sources of the Just War Tradition in Western Culture*, in JUST WAR AND JIHAD 3, 3 (John Kelsay & James Turner Johnson eds., 1991).

## A. Jihad

*Jihad*<sup>21</sup> most commonly translates to the English meaning “to strive/make effort in the way of ALLAH”<sup>22</sup> or “an exertion of one’s power in Allah’s path.”<sup>23</sup> In Western societies, though, many people mistakenly believe *jihad* means “holy war.”<sup>24</sup> Although some Muslims seek to avoid the connection of *jihad* and warfare,<sup>25</sup> not all Muslims shun that apparent connection.<sup>26</sup> The most accurate explanation of *jihad* is a “continuum . . . [ranging] from totally nonviolent to violent actions.”<sup>27</sup> Regardless of its form, *jihad* is an integral facet of the Islamic religion and law and has existed since the life of Muhammad. Passages in the *Qur’an*<sup>28</sup> from Muhammad’s time in Medina extol the need to follow Muhammad in spreading Islam through battle.<sup>29</sup> English translations of several verses from the *Qur’an* concerning *jihad* are contained in Appendix A.

Since the basis of Islam is the *Qur’an* and the *Sunnah* (i.e., the Prophet Muhammad’s actions implementing the *Qur’an*),<sup>30</sup> a study of *jihad* requires a brief historical view of Muhammad’s actions with respect to warfare.<sup>31</sup> Approximately two years after Muhammad’s migration from Mecca to Medina,<sup>32</sup> he revealed the first *Qur’anic* verse concerning war.<sup>33</sup> Revelation of this verse marks the beginning of Muhammad’s military leadership and the most famous *jihad* contained within the *Sunnah*—the battle of Badr.<sup>34</sup> Based on the actions of the Muslims at the battle of Badr, many Muslims believe “death [is] a trifle on the way to martyrdom”<sup>35</sup> that can be achieved by “persecuting others for their faith [and] obey[ing] the [*Qur’anic*] Injunction to carry out *jihad*.”<sup>36</sup>

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<sup>21</sup> JUST WAR IN COMPARATIVE PERSPECTIVE 80 (Paul Robinson ed., 2003) (“In the Qur’an, it is always joined with the phrase *fi sabil allah*, which means ‘in the path of God.’”); see also Abdullah Saeed, *Jihad and Violence: Changing Understandings of Jihad Among Muslims*, in TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 72, 73 (C.A.J. Coody & Michael P. O’Keefe eds., 2002).

<sup>22</sup> AAMER LIAQUAT HUSSAIN, ISLAM AND TERRORISM: AN HISTORICAL AND THEOLOGICAL ENQUIRY 16 (2002) (capitalization in the original text).

<sup>23</sup> Johnson, *supra* note 20, at 9.

<sup>24</sup> Karima Bennouna, *As-Salumu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT’L L. 605, 615 (Winter 1994); see also Daniel Pipes, *What Is Jihad*, Dec. 31, 2002, <http://www.danielpipes.org/pf.php?id=990>.

<sup>25</sup> M. AMIR ALI, THE INSTITUTE OF ISLAMIC INFORMATION & EDUCATION, BROCHURE NO. 18 JIHAD EXPLAINED, available at <http://www.iiie.net/node/33> (stating that the translation of *jihad* as “holy war” is the product of “influences of centuries-old Western propaganda,” and the literal translation of holy war from English to Arabic is completely different than the word *jihad*).

<sup>26</sup> AYATULLAH MORTEZA MUTAHHARI, JIHAD: THE HOLY WAR OF ISLAM AND ITS LEGITIMACY IN THE QURAN (Mohammad Salman Tawhidi trans., 1985), available at <http://www.al-islam.org/short/jihad> (asserting that “religion must have a law of war, a law of *jihad*”); see also BERNARD LEWIS, THE CRISIS OF ISLAM 31 (2003) (stating that war against infidels and apostates is *jihad*).

<sup>27</sup> Saeed, *supra* note 21, at 74.

<sup>28</sup> The Noble Qur’an, <http://www.usc.edu/dept/MSA/quran> (last visited Sept. 25, 2007) [hereinafter The Noble Qur’an] (explaining that *Qur’an*, which means word of God, is a written account of the verses from God to Mohammad who became known as a prophet for the Arab people. Muslims strongly believe that the Qur’an is “letter for letter fixed by no one but Allah.”). See generally Richard Martin, *The Religious Foundations of War, Peace, and Statecraft in Islam*, in JUST WAR AND JIHAD 91, 101-02 (John Kelsay & James Turner Johnson eds., 1991) (explaining the significance of the *Qur’an* and *Sunnah*).

<sup>29</sup> Johnson, *supra* note 20, at 9.

<sup>30</sup> MD. MONIRUZZAMAN, THE ISLAMIC THEORY OF JIHAD AND THE INTERNATIONAL SYSTEM 141 (1989) (defining *Sunnah* as “[t]he sayings, acts or approvals of the Prophet Muhammad; Traditions of Muhammad, the second ultimate source for Islamic law after the Qur’an”); see also The Noble Qur’an, *supra* note 28 (“*Sunnah* was inspired by Allah but the wording and actions are the Prophet’s.”). See generally Martin, *supra* note 28, at 101-02 (explaining the significance of the *Qur’an* and *Sunnah*).

<sup>31</sup> See Daniel Pipes, *Why Don’t Scholars Admit That Holy War Means War?*, TIMES HIGHER EDUC. SUPPLEMENT (Oct. 3, 2003), available at <http://www.thes.blogspot.com> (“Jihad was no abstract obligation through the centuries but a key aspect of Muslim life. According to one calculation, Muhammad himself engaged in 78 battles, of which just one (the Battle of the Ditch) was defensive.”).

<sup>32</sup> MONIRUZZAMAN, *supra* note 30, at 17 (explaining that Muhammad met some people from Yathrib, later known as Medina, in 620 C.E. when they traveled to Mecca for the annual pilgrimage. The people of Yathrib showed support for Muhammad and his preaching. After this initial meeting, four successive meetings with people from Yathrib prompted them to invite Muhammad to Yathrib to flee the persecution in Mecca.).

<sup>33</sup> MUTAHHARI, *supra* note 26.

<sup>34</sup> The Battle of Badr, Muhammad.net, <http://www.muhammad.net/bio/badr.htm> (last visited Sept. 25, 2007); see also M.J. AKBAR, THE SHADE OF THE SWORDS 32-34 (2002) (describing the Battle of Badr as a David versus Goliath type of battle with the Muslims as David and the Arab Quraysh tribe being Goliath).

<sup>35</sup> AKBAR, *supra* note 34, at 36.

*Jihad* in its military form also can be considered either offensive or defensive. Offensive *jihad* involves the affirmative use of force to remove anything or anyone that impedes the spreading of Islam.<sup>37</sup> Conversely, defensive *jihad* exists for “the purpose of preserving the Islamic Message, the Islamic State and the Muslims.”<sup>38</sup> The question then arises as to what constitutes a war by non-Muslims that would prompt defensive *jihad*—armed attack, threatening speech, offensive words, or one nation’s perceived non-compliance with international law? Presently, the answer to every one of these possibilities may be “yes.” One must consider that the Islamic belief of *jihad* also means that any “wars waged against Muslims by infidels are by definition unjust.”<sup>39</sup>

Under the rubric of *jihad* as foreign policy, actions must comply with *adl*, which translates to “fairness, rule of law and justice in relation with others.”<sup>40</sup> In many instances, much of the world perceives a double standard to exist because strong nations disobey international laws that are against their national interest while weak nations are held to those same laws regardless of national interest.<sup>41</sup> “Islamic *jihad* is a violent and radical response to that [perceived] double standard, unfairness, and injustice.”<sup>42</sup>

The doctrine of *jihad* is based in verses of the *Qur’an*; however, study of *jihad* must consider “how far the doctrine was molded by pressure of immediate circumstance.”<sup>43</sup> This study can divide the *jihad* verses into three stages: stage one has an apologetic tone and “insistence on the necessity of war,”<sup>44</sup> stage two is “mostly concerned with the sanctification of plunder,”<sup>45</sup> and stage three contains the “ban on idolatry in Arabia.”<sup>46</sup> These stages “prove with transcendent clarity (if indeed any proof was needed) that *jihad* was never contemplated as a permanent dispensation . . . and was never anything but an ad hoc dispensation.”<sup>47</sup> As such, the need for *jihad* may be renounced and “the lineaments of a peaceful *Islam* be conjured up and given shape by people who know better and see further.”<sup>48</sup> Essentially, renouncement of *jihad* would declare an end to the need for acts of *jihad*, the acts would be banned, and peaceful *Islam* would exist.

## B. *Jus Ad Bellum*

Although the “Western Just War Theory” does not appear to be as specifically tied to religion as *jihad*, Western just war theory was “shaped by religious and nonreligious forms within [the] culture.”<sup>49</sup> Sources of influence include Saint Augustine, the twelfth century monk Gratian, Saint Thomas Aquinas, Francisco de Vitoria, and Grotius.<sup>50</sup>

Through the ages, with the contributions of these individuals and many others, Western Just War Theory evolved into a cohesive “doctrine of just war tradition . . . [functioning] as a broad cultural consensus within western European culture on

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<sup>36</sup> Johnson, *supra* note 20, at 10.

<sup>37</sup> Muhammad the Messenger of God, Prophet’s Military Policy, [http://home.swipnet.se/islam/A\\_Personality/The\\_Apostle/12military.htm](http://home.swipnet.se/islam/A_Personality/The_Apostle/12military.htm) (last visited Oct. 4, 2007) (follow “*Prophet’s Military Policy*” hyperlink).

<sup>38</sup> MONIRUZZAMAN, *supra* note 30, at 104.

<sup>39</sup> Johnson, *supra* note 20, at 9.

<sup>40</sup> MONIRUZZAMAN, *supra* note 30, at 104.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 105.

<sup>43</sup> SUHAS MAJUMDAR, *JIHAD: THE ISLAMIC DOCTRINE OF PERMANENT WAR* 89 (1994).

<sup>44</sup> *Id.* at 90.

<sup>45</sup> *Id.* at 91.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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

<sup>49</sup> Johnson, *supra* note 20, at 3.

<sup>50</sup> See generally *id.* at 3-26 (providing a historical account of the Western Just War Tradition).

the justification and limitation of war”<sup>51</sup> with a set of core principles: “just cause, legitimate authority, last resort, proportionality between offence and response, reasonable chance of success and right intention.”<sup>52</sup> The first principle, just cause, seems to have been limited to defense of the innocent and self-defense.<sup>53</sup> Legitimate authority concerns States’ sovereignty, and the sovereign’s authority to declare war.<sup>54</sup> Next, for a war to be just, diplomacy and negotiations must be unavailable, leaving war as the only option.<sup>55</sup> The principles of proportionality and reasonable chance of success closely relate to the conduct of war and are closely tied to an assessment of the anticipated action during war.<sup>56</sup> The last principle, right intention, may be closely tied to just cause, but focuses more on the end sought by the war rather than on the reason to initiate the war.<sup>57</sup> Peace as the end result of war may be the only just intention acceptable under just war theory.<sup>58</sup>

*Jus ad bellum* also considers self-defense as a just cause for war. Although the term “self-defense”<sup>59</sup> may sound relatively straightforward, the world has seen self-defense utilized as justification for a vast spectrum of actions. The current discussion of self-defense will focus on events pre-1945 (i.e., before the UN Charter). Part II.C. of this text discusses self-defense since the creation of the UN.

In the arena of international law, the concept of anticipatory self-defense arguably has risen to the level of customary international law resulting from a dispute over the steamboat *Caroline*.<sup>60</sup> In 1837, after the *Caroline* aided rebels against the British in Canada, the British conducted a raid across the Niagara River into the state of New York, killed at least two of the *Caroline*’s crewmembers, “set the boat on fire and sent it over Niagara Falls.”<sup>61</sup> It was not until five years after the incident that new Secretary of State Daniel Webster sent the now-famous letter to Lord Ashburton wherein he declared that a government must “show a necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment of deliberation.”<sup>62</sup> Webster also articulated that nothing unreasonable or excessive could be done in self-defense.<sup>63</sup> Governments accepted Webster’s necessity and proportionality requirements, and self-defense, distinct from a justification for war, was authorized if these requirements were met and the “act defended against was not an act of war.”<sup>64</sup> Thus, the customary international law recognition of anticipatory self-defense was born.<sup>65</sup> The twentieth century, though, marked an era of written international law in addition to customary international law.<sup>66</sup>

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<sup>51</sup> *Id.* at 16.

<sup>52</sup> Robert Skidelsky, *Essay: The Just War Tradition*, 105 PROSPECT (Dec. 2004), available at <http://skidelsky.com/index.php?id=2,11,0,0,1,0>.

<sup>53</sup> *Id.*

<sup>54</sup> Alexander Moseley, *Just War Theory*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/j/justwar.htm> (last visited Oct. 4, 2007).

<sup>55</sup> Skidelsky, *supra* note 52.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Bertrand Lemennicier, *Classical Just War Theory: A Critical View*, Address before Libertarian International Spring Convention (Mar. 22-23, 2003), available at <http://lemennicier.bwm-mediasoft.com/article.php?ID=86&limba=en>.

<sup>59</sup> David M. Ackerman, *CRS Report for Congress—International Law and the Preemptive Use of Force Against Iraq 1-2* (Apr. 11, 2003), available at <http://www.dean.usma.edu/departments/law/lawandterr/Preemptive%20Use%20of%20Force%20in%20Iraq.pdf> (citing CHARLES CHENEY HYDE, 3 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1686 (1945) (“An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack.”)).

<sup>60</sup> BYERS, *supra* note 19, at 53-54.

<sup>61</sup> *Id.* at 53.

<sup>62</sup> *Id.* at 54; see also FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW 49 (1989) (citing letter from Daniel Webster to Henry Fox (Apr. 24, 1841), in 6 THE WORKS OF DANIEL WEBSTER 250, 261 (1851) (stating that Daniel Webster, “hoping to put the British on the defensive in negotiations over the Maine boundary, argued that the British attack was wholly unjustified.”)).

<sup>63</sup> BYERS, *supra* note 19, at 54.

<sup>64</sup> *Id.*

<sup>65</sup> Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT’L & COMP. L. REV. 293, 296 (2000).

<sup>66</sup> See generally ASIL Guide to Electronic Resources for International Law, <http://www.asil.org/resource/treaty1.htm> (last visited Sept. 25, 2007) (stating that the history of treaties stretches for thousands of years but that they have been increasing codified since the beginning of the 20th century).

### C. Authority for War Within the UN Charter

*The structure of world peace cannot be the work of one man, or one party, or one nation. . . . It must be a peace which rests on the cooperative effort of the whole world. . . . Peace can endure only so long as humanity really insists upon it, and is willing to work for and sacrifice for it.*<sup>67</sup>

In 1945, delegates from fifty countries worked in San Francisco to complete the UN Charter, culminating on 24 October 1945 with a UN comprised of fifty-one member countries.<sup>68</sup> The purpose of the UN, similar to the League of Nations before it, was to foster international cooperation and to promote international peace and security.<sup>69</sup> Whether considered an extension of *jus ad bellum* or a separate and distinct body of law,<sup>70</sup> the UN Charter and customary international law set extreme limits on UN Member States' ability to go to war.<sup>71</sup> "Governments that use force have almost always sought to justify their actions in legal terms, however tenuously."<sup>72</sup> That justification is almost invariably couched in terms of self-defense.

Under the UN Charter, Articles 2(4) and 51 are the two primary sources of both the limitations on, and justifications for, war by member nations. The use of force by one member State against another member State is prohibited under Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>73</sup> Article 51, however, recognizes a nation's inherent right of self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>74</sup> However, the meaning of Article 51's terms and the definition of the right of self-defense are at the center of ever-increasing debates.<sup>75</sup>

Two of the significant debates concerning self-defense primarily focus on: (1) the perceived right of anticipatory self-defense and its limits, and (2) the ability to use force in self-defense outside a nation's own territory. The case for anticipatory self-defense originates from the *Caroline* incident previously discussed.<sup>76</sup> Due to the modern reality of weapons of mass destruction and the unpredictability of non-State actors, some nations, including the United States and Israel, have asserted a right to preemptive self-defense that expands the concept of anticipatory self defense.<sup>77</sup> The second debate focuses on attacks occurring outside the territorial integrity of the attacking nation.

Two examples that illustrate the debate in both of these areas are the 1981 Israeli bombing of the nuclear reactor at Osirak, Iraq,<sup>78</sup> and the 1998 U.S. bombings of al Qaeda training camps in Afghanistan and a chemical weapons production

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<sup>67</sup> Franklin Delano Roosevelt, President of the United States, Address to the United States Congress (Mar. 1, 1945), available at <http://teachingamericanhistory.org/library/index.asp?documentprint=658> (providing a transcript of the speech made by President Roosevelt to the U.S. Congress as a report of progress made when the United States, United Kingdom, Soviet Union, and China held the Yalta Conference and agreed upon the need for a new international organization of nations).

<sup>68</sup> *Id.*; Howard, *supra* note 13.

<sup>69</sup> U.N. Charter art. 1; History of the United Nations, *supra* note 11; League of Nations Photo Archive Introduction, <http://www.indiana.edu/~league/intro.htm> (last visited Sept. 25, 2007).

<sup>70</sup> See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 691-92 (Dec. 2004).

<sup>71</sup> BYERS, *supra* note 19, at 2.

<sup>72</sup> *Id.* at 3.

<sup>73</sup> U.N. Charter art. 2, para. 4.

<sup>74</sup> *Id.* art. 51.

<sup>75</sup> Ackerman, *supra* note 59, at 3.

<sup>76</sup> See *supra* Part II.B.

<sup>77</sup> BYERS, *supra* note 19, at 8. See generally John Norton Moore, *The Need for an International Convention*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM 437, 441 (M. Cherif Bassiouni ed., 1988).

<sup>78</sup> See generally BYERS, *supra* note 19, at 72 (On 7 June 1981, the Israeli Air Force flew 600 miles into Iraqi territory to the outskirts of Baghdad and bombed a nuclear reactor under construction. The attack severely damaged Iraq's nuclear program; the Israeli pilots were national heroes.).

facility in Sudan.<sup>79</sup> In both instances, the attacking nations asserted the right of self-defense within the meaning of Article 51 as justification for these attacks.<sup>80</sup> Also, in both instances, many nations and international law commentators disagreed with the actions of the attacking State and condemned these acts as being outside the meaning of self-defense and therefore, improper uses of force under the UN Charter.<sup>81</sup> Despite these condemnations, the UN has little ability to punish nations for actions that are outside the accepted use of force,<sup>82</sup> particularly when one of the States holds a permanent seat on the UN Security Council with the concomitant “veto.”<sup>83</sup>

In keeping with the UN’s purposes, the international body also pursues international peace and security from threats other than war between nations.<sup>84</sup> Terrorism is one such threat. In the aftermath of September 11, the United States and United Kingdom complied with the provisions of the UN Charter and “notified the Security Council that they were conducting operations against the Taliban and al Qaeda pursuant to their right of individual and collective self-defense.”<sup>85</sup> The “international reaction to the affair was almost universally one of outrage over the terrorist acts and support for the United States,”<sup>86</sup> and the UN Security Council made “no effort . . . to condemn the forceful response once launched.”<sup>87</sup> In this instance, nations followed the law of armed conflict to respond to violent terrorist acts, and the international community supported such a response, but the response departed from the existing international laws to counterterrorism.

### III. The Crime of Terrorism

#### A. What is the Crime of Terrorism?

At first glance terrorism seems to be a word without ambiguity. One literal definition of terrorism is “the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons.”<sup>88</sup> However, international organizations, nations, and individuals utilize definitions of terrorism that may conform with or vary greatly from this

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<sup>79</sup> See generally Todd R. Phinney, *Airpower versus Terrorism: Three Case Studies* 26-33 (June 2003) (unpublished thesis, The School of Advanced Air and Space Studies), available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA425884&Location=U2&doc=GetTRDoc.pdf> (In August 1998, after several years of violent acts, al Qaeda conducted terrorist bombings of the U.S. embassies in Kenya and Tanzania. Within one week of the embassy bombings, evidence showed al Qaeda perpetrated these acts and planned future attacks. Based on this evidence, the United States bombed a chemical plant in Sudan and an al Qaeda training camp in Afghanistan.)

<sup>80</sup> BYERS, *supra* note 19, at 72; David Johnston & Todd S. Purdum, *Missed Chances in a Long Hunt for bin Laden*, N.Y. TIMES, Mar. 25, 2004, at A1; see also Lacey, *supra* note 65, at 294-96 (discussing the United States’ explanation of the lawfulness of the missile strikes in Afghanistan and Sudan); Ackerman, *supra* note 59, at 5-6 (describing Israel’s claim of self defense).

<sup>81</sup> Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89; see also Lacey, *supra* note 65, at 299.

<sup>82</sup> See U.N. Charter arts. 33-50 (providing the Security Council with the authority to determine the pacific settlement of disputes or to take action with respect to threats to the peace, breaches of the peace, and acts of aggression).

<sup>83</sup> *Id.* art. 27(3) (requiring “the concurring vote of the permanent members” for any substantive decisions by the UN Security Council, effectively giving a veto to the five permanent members: the United States, Russia, China, United Kingdom, and France); see, e.g., Afghanistan/Pakistan—UNGOMAP—Background, [http://www.un.org/Depts/dpko/dpko/co\\_mission/ungomap/background.html](http://www.un.org/Depts/dpko/dpko/co_mission/ungomap/background.html) (last visited Sept. 25, 2007) (explaining that the Security Council debate concerning the Soviet forces’ entrance into Afghanistan in December 1979 was deadlocked due to the Soviet Union’s veto power, and to circumvent this situation, the matter was referred to the General Assembly under the “A Uniting for Peace” procedure).

<sup>84</sup> See Basic Facts About the UN, <http://www.un.org/aboutun/basicfacts/peacesec.htm> (last visited Sept. 25, 2007).

<sup>85</sup> Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, in INTERNATIONAL LAW AND THE WAR ON TERROR 7, 25 (Fred L. Borch & Paul S. Wilson eds., 2003).

<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Id.* at 16.

<sup>88</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/26/T0122600.html> (last visited Sept. 25, 2007).

definition resulting in “well over one hundred different definitions of terrorism in the scholarly literature.”<sup>89</sup> Definitions of terrorism focus on many different areas: the act itself, the reason, the actor, or the status of the victim.<sup>90</sup>

One common point of contention concerning the definition of “terrorist” is whether it should “distinguish between the criminal terrorist and the violent but heroic freedom fighter.”<sup>91</sup> In several former colonies, the weaker minority or indigenous people utilized acts of violence to challenge the authority of the ruling nation.<sup>92</sup> Does this constitute terrorism? Understandably, a nation that won its freedom after employing these tactics probably would not classify its actions as terrorism,<sup>93</sup> but, to the contrary, others may consider this an act of terrorism.<sup>94</sup>

Conversely, some consider “actions done on behalf of the state in pursuit of legitimate state aims”<sup>95</sup> to constitute terrorism. These actions could be tactics utilized by the regime in power to quell an internal resistance of its people or the tactics of one nation against the leadership or people of another. Many countries that won independence through the efforts of freedom fighters consider that “‘state terrorism’ [is] actually the most harmful and deadly form of terrorism.”<sup>96</sup> Several periods of Soviet Union history are known for terrorism by the government,<sup>97</sup> and many opponents of the United States consider its current foreign policy to exemplify State terrorism.<sup>98</sup>

Regardless of which definition of terrorism one might use, most would agree that terrorist acts are a “deliberate and cold-blooded exaltation of violence over all forms of political activity. The modern terrorist does not employ violence as a

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<sup>89</sup> C.A.J. (Tony) Coady, *Terrorism, Just War and Supreme Emergency*, in *TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD* 8, 8 (C.A.J. (Tony) Coady & Michael P. O’Keefe eds., 2002) (citing WALTER LAQUEUR, *THE AGE OF TERRORISM* 143 (1987)); see also BEN SAUL, *Reasons for Defining and Criminalizing Terrorism*, in *DEFINING TERRORISM IN INTERNATIONAL LAW* 10, 57 (2006) (citing A. SCHMID & A. JONGMAN, *POLITICAL TERRORISM* 119-52 (1983) (stating over 109 academic or official definitions of terrorism existed as early as 1983)).

<sup>90</sup> Coady, *supra* note 89, at 8-10.

<sup>91</sup> Harry H. Almond, Jr., *Terrorism—Legal Control Under the Law of War*, in *TERRORISM AND POLITICAL VIOLENCE* 355, 361-62 (Henry H. Han ed., 1993); Ninian Stephen, *Toward a Definition of Terrorism*, in *TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD* 1, 2 (C.A.J. (Tony) Coady & Michael P. O’Keefe eds., 2002); Jörg Friedrichs, *Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism*, 19 *LEIDEN J. OF INT’L L.* 69, 71 (2006).

<sup>92</sup> See generally *Algerian War of Independence 1954-1962*, <http://www.onwar.com/aced/data/alpha/algeria1954.htm> (last visited Sept. 25, 2007) (providing details of the war by Algeria against French colonial rule); *World War II Europe The Resistance Movement Other Countries*, [http://intellit.muskingum.edu/wwii\\_folder/wwiieurope\\_folder/wwiieurresother.html](http://intellit.muskingum.edu/wwii_folder/wwiieurope_folder/wwiieurresother.html) (last visited Sept. 25, 2007) (providing a bibliography of sources detailing the resistance fighting in Austria, Belgium, Czechoslovakia, and Denmark).

<sup>93</sup> See Friedrichs, *supra* note 91, at 72. In 1972 when the United States submitted a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, many countries which were the “offspring of national liberation movements, suspected that the US draft was intended to outlaw their brethren fighting against colonialism and oppression.” *Id.*

<sup>94</sup> Trusteeship Council, <http://www.un.org/Depts/dpi/decolonization/council.htm> (last visited Sept. 25, 2007). Chapter XII of the UN Charter authorized the establishment of the Trusteeship Council to oversee the transformation from colonial rule to independence for eleven specified territories. In 1994, however, the Trusteeship Council suspended action since the last of the eleven territories gained self-governance, and the Trusteeship Council will only resume meetings when the occasion may require. Based on the suspension of the Trusteeship Council, it must be concluded that the UN does not recognize the existence of any territories still requiring freedom fighters.

<sup>95</sup> Igor Primoratz, *State Terrorism*, in *TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD* 31, 31 (C.A.J. (Tony) Coady & Michael P. O’Keefe eds., 2002).

<sup>96</sup> Friedrichs, *supra* note 91, at 72.

<sup>97</sup> Primoratz, *supra* note 95, at 31; Ihor Kamenetsky, *Terrorism as an Instrument of the State in Case of the U.S.S.R., from Lenin to Gorbachev*, in *TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL* 145, 145-66 (Henry H. Han ed., 1993).

<sup>98</sup> See BYERS, *supra* note 19, at 76-77; MONIRUZZAMAN, *supra* note 30, at 104; Simon Chesterman, *Introduction: The United Nations and the Law of War: Power and Sensibility in International Law*, 28 *FORDHAM INT’L L.J.* 531, 532 (Feb. 2005); Friedrichs, *supra* note 91, at 70 (“It is precisely the absence of a legal definition of terrorism that makes it possible for the hegemonic power (read ‘United States’) and its followers to determine international public enemy on a case-by-case basis. A legal definition would serve as a limitation to this discretionary power.”); John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729, 797 (Summer 2004).

necessary evil but as a desirable form of action.”<sup>99</sup> Despite the lack of a single comprehensive definition of terrorism,<sup>100</sup> international counterterrorism treaties have existed for over forty years.<sup>101</sup>

## B. Status of International Treaties on Terrorism

### 1. United Nations—Criminal Law Treaties

*Action in the absence of an agreed-upon definition exposes the United Nations to the charge of double standards, thus undermining the very legitimacy and universality that are among its most precious assets.*<sup>102</sup>

Since 1963, the UN has created thirteen conventions or protocols relating to terrorism.<sup>103</sup> A list of the thirteen UN counterterrorism agreements and a summary of the provisions of each is located at Appendix B. The body of law created by these thirteen counterterrorism treaties is an ineffective patchwork of instruments.<sup>104</sup> Three conventions focus on “inherently dangerous substances”<sup>105</sup> rather than the actual commission of a violent act. Many of the other documents are a reactionary attempt to prevent a specific form of violence,<sup>106</sup> and several also establish jurisdiction over the offenses within that instrument. Frequently this jurisdiction follows the “principle of *aut dedere aut judicare*, which states that a country that does not extradite an alleged offender shall assume jurisdiction to judge that person according to its own laws.”<sup>107</sup> Extradition, however, has “worked poorly in practice.”<sup>108</sup> Of course, to prosecute an individual according to domestic laws, a nation must have domestic laws against such an act of terrorism. In many instances, the counterterrorism treaties require the establishment of domestic legislation to “provide elements [not contained in the treaties that are] necessary for implementation.”<sup>109</sup>

The many languages of the Member Nations and the variety of legal systems create several approaches for interpreting and implementing these international counterterrorism documents.<sup>110</sup> To assist in the process, the Commonwealth Secretariat<sup>111</sup> provides model domestic laws for any nation that considers ratifying the UN counterterrorism conventions and

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<sup>99</sup> Paul Jones, *The Seven Deadly Sins of Terrorism*, in *TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL* 189, 191 (Henry H. Han ed., 1993); see also *id.* at 193 (“To terrorists, violence is not a political weapon, to be used *in extremis*: It is a substitute for the entire political process.”).

<sup>100</sup> See Stephen, *supra* note 91, at 1-2.

<sup>101</sup> U.N. OFC. ON DRUGS AND CRIME, LEGISLATIVE GUIDE TO THE UNIVERSAL ANTI-TERRORISM CONVENTIONS AND PROTOCOLS para. 11, U.N. Sales No. E.04.V.7 (2004) [hereinafter LEGISLATIVE GUIDE].

<sup>102</sup> Jane Boulden & Thomas G. Weiss, *Whither Terrorism and the United Nations?*, in *TERRORISM AND THE UN* 1, 4 (Jane Boulden & Thomas G. Weiss eds., 2004).

<sup>103</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 4.

<sup>104</sup> Edward Marks, *Diplomacy and Terrorism: Conflicting Systems*, in *TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROLS* 41, 55 (Henry H. Han ed., 1993); see also John Murphy, *International Law and the War on Terrorism*, in *INTERNATIONAL LAW AND THE WAR ON TERROR* 391, 397 (Fred L. Borch & Paul S. Wilson eds., 2003) (“This so called ‘piecemeal’ approach has resolved the problem of defining terrorism by avoiding it.”).

<sup>105</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 31.

<sup>106</sup> See generally Monica Serrano, *The Political Economy of Terrorism*, in *TERRORISM AND THE UN* 198, 198 (Jan Boulden & Thomas G. Weiss eds., 2004) (stating that the existing conventions identify forms of terrorist acts and no definition of terrorism).

<sup>107</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 57. See generally Harry H. Almond, Jr., *The Legal Regulation of International Terrorism*, in *TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROLS* 199, 199-211 (Henry H. Han ed., 1993); Murphy, *supra* note 104, at 399.

<sup>108</sup> Captain Morris L. Sinor, *Confronting Nomadic Terrorism*, 52 *NAVAL L. REV.* 98, 104 (1964).

<sup>109</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 8.

<sup>110</sup> *Id.* para. 12.

<sup>111</sup> *Assistance Provided by the Commonwealth Secretariat in the Field of Counter-Terrorism*, [http://www.un.org/Docs/sc/committees/13731373/terrorism\\_summary.doc](http://www.un.org/Docs/sc/committees/13731373/terrorism_summary.doc) (last visited Feb. 26, 2007) (The Commonwealth Secretariat created an “Implementation Kit [that] consists of a Model Law and Commentary on each of the Counter-Terrorism Instruments.”). See generally Commonwealth Secretariat, <http://www.thecommonwealth.org/subhomepage/151087/> (last visited Sept. 25, 2007) (The Commonwealth is an organization of nations who had been under colonial rule of the British Commonwealth, and the

protocols.<sup>112</sup> These model laws further highlight the lack of consistency among nations by allowing countries to choose among several legislative options provided to combat terrorism.<sup>113</sup> Practically speaking, the reliance on a diverse body of domestic counterterrorism criminal legislation and the nature of the body of law created by these thirteen UN treaties create an approach to combating terrorism that is not only ineffective and lacking uniformity, but that also permits States to superficially comply with their UN obligations with relating to counterterrorism.<sup>114</sup>

## 2. United Nations—Global Counterterrorism Strategy

In 2005, in addition to working on counterterrorism treaties, the UN General Assembly also adopted a Global Counterterrorism Strategy.<sup>115</sup> “This is the first time that all Member States have agreed to a common strategic approach to fight terrorism . . . sending a clear message that terrorism is unacceptable in all its forms and manifestation.”<sup>116</sup>

Included in the Global Counterterrorism Strategy are requirements for each nation to implement and fully cooperate with all General Assembly and Security Council resolutions striving to oppose terrorism.<sup>117</sup> The Strategy further requires States to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to “ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.”<sup>118</sup> The Strategy also encourages members to contribute to measures strengthening the role of the UN in combating terrorism.<sup>119</sup> Despite the unanimous agreement of the UN Member States in adopting the Global Counterterrorism Strategy, the actions of the Member States speak louder than words. The UN fails to escape the quagmire involved in drafting the fourteenth threat to counter terrorism—a Comprehensive Treaty on Terrorism.

## 3. United Nations—Comprehensive Treaty on Terrorism

“The United Nations itself has been anything but enthusiastic about taking on a larger role in countering terrorism.”<sup>120</sup> In 1997, the General Assembly passed Resolution 51/210 creating an Ad Hoc Committee on Terrorism to negotiate the draft Comprehensive Convention on International Terrorism and the draft Convention for the Suppression of Acts of Nuclear Terrorism.<sup>121</sup> In 2005, after nine sessions, the committee adopted the draft Convention for the Suppression of Acts of Nuclear Terrorism.<sup>122</sup> Work, however, remains stagnated on the Comprehensive Convention on International Terrorism.

In 1998, India submitted a draft Convention on the Suppression of Terrorism, but this draft was considered controversial in many areas.<sup>123</sup> Since the submission of this draft, the committee has disagreed on the scope of the proposed treaty.<sup>124</sup> In

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Commonwealth Secretariat, formed in 1965, is the main intergovernmental agency for the Commonwealth.); Organisation of Commonwealth United Nations Associations (OCUNA), [http://www.thecommonwealth.org/Internal/151814/151973/organisation\\_of\\_commonwealth\\_united\\_nations\\_associ/](http://www.thecommonwealth.org/Internal/151814/151973/organisation_of_commonwealth_united_nations_associ/) (last visited Sept. 25, 2007) (“OCUNA was established in the 1980s because there is so much in common between the United Nations and the Commonwealth and to lobby for those links to be further strengthened.”).

<sup>112</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 12.

<sup>113</sup> See Commonwealth Secretariat, *Model Legislative Provisions on Measures to Combat Terrorism* (Sept. 2002), [http://www.unodc.org/pdf/crime/terrorism/commonwealth\\_model\\_english.pdf](http://www.unodc.org/pdf/crime/terrorism/commonwealth_model_english.pdf) (providing the Model Legislation with options within many sections).

<sup>114</sup> *Contra* Michael Newton, *International Criminal Law Aspects of the War Against Terrorism*, in *INTERNATIONAL LAW AND THE WAR ON TERROR* 323, 345 (Fred L. Borch & Paul S. Wilson eds., 2003).

<sup>115</sup> UN Action to Counter Terrorism, <http://www.un.org/terrorism/strategy-counter-terrorism.html> (last visited Sept. 25, 2007).

<sup>116</sup> International Instruments to Counter Terrorism, Counter-Terrorism Strategy, <http://www.un.org/terrorism/instruments.html> (last visited Sept. 25, 2007).

<sup>117</sup> UN Global Counter-Terrorism Strategy, G.A. Res. 60/288, ¶ 2, U.N. Doc. A/Res/60/288/Annex (Sept. 8, 2005).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Edward C. Luck, *The U.S., Counterterrorism, and the Prospects for a Multilateral Alternative*, in *TERRORISM AND THE UN* 74, 80 (Jan Boulden & Thomas G. Weiss eds., 2004).

<sup>121</sup> G.A. Res. 51/210 (III), ¶ 9, U.N. Doc. A/51/210 (Jan. 16, 1997).

<sup>122</sup> See *supra* Part III.B.1.; see *infra* Annex B.

2000, in response to a recommendation for “a high-level conference on terrorism . . . [some delegations] said such a conference would just be an exercise in rhetoric and [would] distract States from conducting practical work.”<sup>125</sup> The events of September 11 seemed to quell open resistance to drafting this treaty.<sup>126</sup> However, in three successive progress reports, the Ad Hoc Committee reported that negotiations were near completion.<sup>127</sup> The apparent lack of progress on this comprehensive treaty leads one to surmise that despite a professed commitment to combating terrorism, a comprehensive definition of the criminal offense of terrorism is impossible.<sup>128</sup> Insight into the divide that exists over the definition of terrorism can be gained through examination of several regional counterterrorism instruments as well as the just war theory for each region.<sup>129</sup>

#### 4. League of Arab States—The Arab Convention for the Suppression of Terrorism

The League of Arab States adopted the Arab Convention for the Suppression of Terrorism [hereinafter 1998 Arab Convention] on 22 April 1998.<sup>130</sup> This convention entered into force just over a year later on 7 May 1999.<sup>131</sup> However, rather than helping to resolve the terrorism debate, this convention highlights the conflict that exists today concerning a definition of terrorism.

The preamble of this document asserts that as Arab nations committed to the tenets of Islamic *Sharia*, the League rejects “all forms of violence and terrorism and [advocates] the protection of human rights . . . based as they are on cooperation among peoples in the promotion of peace.”<sup>132</sup> The preamble provides that the Contracting States are committed to the UN Charter and all other international instruments to which the nations are parties.<sup>133</sup> Yet the definition of terrorism contained in Article 1<sup>134</sup> and the broad exceptions to this definition contained in Article 2(a)<sup>135</sup> contradict the assertions in the preamble.

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<sup>123</sup> Center for Nonproliferation Studies, *Draft Comprehensive Convention on International Terrorism* 9 (Aug. 11, 2006), available at [http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/intlterr.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/intlterr.pdf) [hereinafter Center for Nonproliferation Studies].

<sup>124</sup> *Id.* at 1.

<sup>125</sup> *Id.* at 7.

<sup>126</sup> Friedrichs, *supra* note 91, at 71.

<sup>127</sup> Center for Nonproliferation Studies, *supra* note 123, at 1-3 (“were almost complete” in 2004, “near consensus” in 2005, and “near completion” in 2006).

<sup>128</sup> See Friedrichs, *supra* note 91, at 75 (describing the “uncompromising stance of both sides,” in reference to the Organization of Islamic Conference and the Western countries, during the negotiations of this Treaty).

<sup>129</sup> See *id.* (stating that during the negotiations for the United Nations Comprehensive Treaty on Terrorism:

the 56 members of the Organization of the Islamic Conference (OIC) demanded the exemption of national liberation movements from the reach of the convention (citation omitted) . . . . The countries of the OIC were calling for a binding legal definition of international terrorism along these lines, which was rejected by the majority of Western countries.”)

*Id.*

<sup>130</sup> The Secretary-General, *Report of the Secretary-General on Measures to Eliminate International Terrorism*, ¶ 178.N., delivered to the General Assembly, Doc. A/60/228 (Jan. 16, 2006), available at [www.un.org/law/cod/sixth/60/status\\_update\\_jan\\_2006.pdf](http://www.un.org/law/cod/sixth/60/status_update_jan_2006.pdf) [hereinafter *Measures to Eliminate Terrorism*].

<sup>131</sup> *Id.* Twenty-one nations and the Palestinian Authority are signatories to this convention, and sixteen nations and the Palestinian Authority have ratified it.

<sup>132</sup> The Arab Convention for the Suppression of Terrorism, pmbl., Apr. 22, 1998, U.N. DEP’T OF POL. AFF., INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 152, UN Sales No. 01.V.3 (2001), available at [www.al-bab.com/arab/docs/league/terrorism98.htm](http://www.al-bab.com/arab/docs/league/terrorism98.htm) [hereinafter *The Arab Convention for the Suppression of Terrorism*] (unofficial translation from Arabic by the United Nations English translation service).

<sup>133</sup> *Id.* at 152-53.

<sup>134</sup> *Id.* art. 1, para. 2, at 153.

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

*Id.*

<sup>135</sup> *Id.* art. 2, at 154.

All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-

Article 2(a) clearly provides an exception to commit acts in situations of self-determination against non-Arab States that would otherwise fall within Article 1's definition of terrorism, but prohibits these same acts against the territory of any Arab State.<sup>136</sup> When considering Article 2(a) in light of the authority for *jihad* within Islam,<sup>137</sup> the offenses labeled as exceptions to the definition of terrorism are the same acts authorized under *jihad*. Essentially, acts of *jihad* within the Islamic religion<sup>138</sup> are not criminal acts of terrorism as defined by the Arab Convention for the Suppression of Terrorism.

Article 6 of the 1998 Arab Convention also limits the authority to grant requests for extradition.<sup>139</sup> Among other exceptions, when extradition is requested for a criminal offense, extradition can be refused when a Contracting State has domestic laws that categorize the act in question as a political offense.<sup>140</sup> Therefore, if a State considers an act not to be a crime because it is a political offense authorized as *jihad*, that State's law supersedes the authority of this regional convention. It seems the purpose of the 1998 Arab Convention was to have a pro forma terrorism convention rather than to actually suppress terrorism.

##### 5. Organization of Islamic Conference—Convention of the Organization of Islamic Conference on Combating International Terrorism

The Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999 Islamic Convention) closely follows the 1998 Arab Convention. The 1999 Islamic Convention was drafted in July 1999<sup>141</sup> and went into force on 7 November 2002.<sup>142</sup> Again, this Convention prohibits Contracting States from making reservations,<sup>143</sup> but the content of the Convention provides little need for reservation.

The preamble to the 1999 Islamic Convention appears to go further than the 1998 Arab Convention in condemning terrorism.<sup>144</sup> At first glance, this language seems to condemn acts committed for the purpose of destabilizing states, but, similar to the 1998 Arab Convention,<sup>145</sup> Articles 1 and 2 of the 1999 Islamic Convention severely limit the definition of

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determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

*Id.*

<sup>136</sup> Ben Saul, *Terrorism in International and Regional Treaty Law*, in *DEFINING TERRORISM IN INTERNATIONAL LAW* 129, 155 (2006); see also Murphy, *supra* note 104, at 418 ("To be blunt, this provision seeks to justify the commission of terrorist acts against Israel and reflects an attitude that prevented the Ad Hoc Committee on Terrorism from adopting measures against terrorism during the early 1970s.").

<sup>137</sup> See *supra* Part II.A.

<sup>138</sup> See *supra* notes 37-41 and accompanying text.

<sup>139</sup> The Arab Convention for the Suppression of Terrorism, *supra* note 132, art. 6, at 160.

<sup>140</sup> *Id.*

<sup>141</sup> It is interesting to note that the 1999 Islamic Convention was drafted only two months after the 1998 Arab Convention went into force. See *supra* note 131 and accompanying text.

<sup>142</sup> *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.O.

<sup>143</sup> Convention of the Organization of the Islamic Conference on Combating International Terrorism, art. 41, July 1, 1999, U.N. DEP'T OF POL. AFF., INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, at 208, UN Sales No. 01.V.3 (2001), available at [www.oic-oci.org/English/convention/terrorism\\_convention.htm](http://www.oic-oci.org/English/convention/terrorism_convention.htm) [hereinafter Convention of the Organization of the Islamic Conference on Combating International Terrorism].

<sup>144</sup> *Id.* pmb1., at 188:

*Believing that* terrorism constitutes a gross violation of human rights, in particular the right to freedom and security, as well as an obstacle to the free functioning of institutions and socio-economic development, as it aims at destabilizing States;

*Convinced that* terrorism cannot be justified in any way, and that it should therefore be unambiguously condemned in all its forms and manifestations, and all its actions, means and practices, whatever its origin, causes or purposes, including direct or indirect actions of States.

*Id.*

<sup>145</sup> See *supra* Part III.B.4.

terrorism by including vast political exceptions to that definition.<sup>146</sup> Echoing the 1998 Arab Convention, these exceptions mirror the Islamic authority of war through *jihad* and do not criminalize acts that would otherwise fall within the Convention's definition of terrorism.<sup>147</sup>

#### 6. Council of Europe—Convention on the Prevention of Terrorism

While the Arab States and Islamic Conference agreed on their definition of terrorist offenses (including exceptions for *jihad*), the Council of Europe and European Union failed to reach a uniform definition of terrorism. In 1977, the Council of Europe drafted the European Convention on the Suppression of Terrorism, which went into effect on 4 August 1978.<sup>148</sup> This Convention served as a basis for the 2005 Convention on the Prevention of Terrorism (2005 European Convention), but the later convention did not follow the definition of a terrorist offense utilized in Article 1 of the 1977 instrument.<sup>149</sup>

On 16 May 2005, the Council of Europe adopted the 2005 European Convention<sup>150</sup> which will be entered into force on 1 June 2007.<sup>151</sup> In this document, the definition of a terrorist offense is limited to those offenses “within the scope and as defined in one of the [ten] treaties listed in the Appendix.”<sup>152</sup> The ten treaties referenced in this definition are ten of the thirteen current UN treaties dealing with terrorism.<sup>153</sup> It appears, then, that the European Convention restricts the definition of terrorist offenses to those within the UN's existing, and ineffective, treaty framework. The Explanatory Report for the 2005 European Convention, however, provides that the scope of the definition could include “conduct that has the potential to lead to terrorist offenses,”<sup>154</sup> but this report also includes the disclaimer that it is not an “authoritative interpretation of the Convention, although it may serve to facilitate the application of the provisions contained therein.”<sup>155</sup> Thus, the lack of a cohesive or comprehensive definition of terrorism within the existing UN terrorism treaties is now a shortcoming manifested in the 2005 Council of Europe Convention on the Prevention of Terrorism.

The Committee of Experts on Terrorism that proposed and drafted the 2005 European Convention considered the definition of “terrorist act” set forth in the European Union's Council Common Position of 27 December 2001.<sup>156</sup> That

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<sup>146</sup> See Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 143, arts. 1-2, at 189-91.

<sup>147</sup> See *supra* note 138 and accompanying text.

<sup>148</sup> *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.P.

<sup>149</sup> Saul, *supra* note 136, at 149.

<sup>150</sup> *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.Z.

<sup>151</sup> Fight Against Terrorism, [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/Fight\\_against\\_terrorism](http://www.coe.int/t/e/legal_affairs/legal_co-operation/Fight_against_terrorism) (last visited Sept. 25, 2007).

<sup>152</sup> Council of Europe Convention on the Prevention of Terrorism, art. 1 and app., May 16, 2005, C.E.T.S. 196. The list of treaties for the scope of the definition of a terrorist offense:

- A. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on Dec. 16, 1970;
- B. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on Sept. 23, 1971;
- C. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on Dec. 14, 1973;
- D. International Convention Against the Taking of Hostages, adopted in New York on Dec. 17, 1979;
- E. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on Mar. 3, 1980;
- F. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on Feb. 24, 1988;
- G. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on Mar. 10, 1988;
- H. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on Mar. 10, 1988;
- I. International Convention for the Suppression of Terrorist Bombings, adopted in New York on Dec. 15, 1997;
- J. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on Dec. 9, 1999.

*Id.*

<sup>153</sup> See *supra* Part III.B.1. and *infra* Appendix B.

<sup>154</sup> Council of Europe, *Explanatory Report to the Convention on the Prevention of Terrorism*, para. 49, C.E.T.S. 196 (May 16, 2005) [hereinafter *Explanatory Report*].

<sup>155</sup> *Id.* para. II.

definition focused on three aims of terrorist acts and eleven actions that would achieve those aims.<sup>157</sup> Nonetheless, the Committee of Experts on Terrorism did not use that definition because it was crafted for the Common Position and not for the prevention of terrorism or for a comprehensive treaty on terrorism.<sup>158</sup> The international community's need to clarify the meaning of terrorism is highlighted by the fact that the Council of Europe and European Union, two organizations with many of the same members, formulated two divergent definitions of what constitutes a terrorist offense and both definitions differ from the 1977 Convention definition.<sup>159</sup>

#### IV. Proposal for the War Crime of Non-State International Terrorism

*There is absolutely no doubt that we must take vigorous action against terrorism and craft a long-term strategy in order to defeat this scourge . . . [without] creat[ing] divisions between people of different religions and cultures, nor polariz[ing] the world into mutually hostile camps.*<sup>160</sup>

Because the UN is “uniquely placed to foster international and regional cooperation [in the fight against terrorism],”<sup>161</sup> it should assume the burden of creating an international standard to control and punish terrorist acts and not rely on domestic criminal legislation to fulfill this requirement. However, as illustrated by the current status of international counterterrorism treaties and the recently created regional terrorism treaties, a great divide currently exists in the action against terrorism.<sup>162</sup> Some governments call for the classification of acts as terrorist crimes while others consider these same acts lawful.<sup>163</sup> As

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<sup>156</sup> *Id.* para. 48.

<sup>157</sup> Council Common Position (EU) No.931/2001 of Dec. 27, 2001, art 1, para. 3, O.J. (L 344) 93, 93-94.

3. For the purposes of this Common Position, “terrorist act” shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or
- (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:
  - (a) attacks upon a person's life which may cause death;
  - (b) attacks upon the physical integrity of a person;
  - (c) kidnapping or hostage taking;
  - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
  - (e) seizure of aircraft, ships or other means of public or goods transport;
  - (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
  - (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
  - (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
  - (i) threatening to commit any of the acts listed under (a) to (h);
  - (j) directing a terrorist group;
  - (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, “terrorist group” shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. “Structured group” means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

*Id.*

<sup>158</sup> *Explanatory Report, supra* note 154, para. 48.

<sup>159</sup> *See* Saul, *supra* note 136, at 155.

<sup>160</sup> Press Release, Secretary General, Secretary-General Commends African Efforts Against Terrorism, Urges Ratification, Implementation of Existing Conventions, U.N. Doc. SG/SM/799 (Oct. 22, 2001).

<sup>161</sup> Thierry Tardy, *The Inherent Difficulties of Interinstitutional Cooperation in Fighting Terrorism*, in *TERRORISM AND THE UN* 120, 122 (Jan Boulden & Thomas G. Weiss eds., 2004) (quoting the executive director of the U.N. Office for Drug Control and Crime Prevention).

<sup>162</sup> *See supra* Part III.B.

previously discussed, one of the tenets of Islam is *jihad*, and as such, followers of the Islamic religion cannot and will not allow *jihad* to be considered a criminal act.<sup>164</sup> Consequently, the negotiations for a comprehensive definition for the crime of terrorism may be unattainable. Successful resolution to control international violence depends upon “avoiding the notion of inherently *good* and *bad* governments.”<sup>165</sup>

The UN must create a legal regime based on the law of armed conflict<sup>166</sup> and completely separate from domestic criminal laws to control international acts of violence and aggression conducted by non-State actors.<sup>167</sup> Just as the UN Charter serves as the rule of law and places limitations on warfare between nations, the UN must come together and limit international terrorism.<sup>168</sup>

When the framers of the UN sought to limit warfare in a world where individual nations went to war based on justifications each nation thought proper, the Charter they drafted did not consider one just war theory good or another bad; it determined that war between nations was only justified in self-defense, or as authorized by the UN Security Council to restore international peace and security.<sup>169</sup> Article 2 of the UN Charter prohibits the “threat or use of force against the territorial integrity or political independence of any state”<sup>170</sup> without regard to motive. This rule applies equally to all nations.

Unlike the UN Charter’s self-defense exception for armed conflict between States,<sup>171</sup> a total ban on international terrorist acts should be implemented. Prohibitions on terrorist offenses must apply equally to the citizens of all Member Nations notwithstanding any motives or justifications for such acts. After eliminating motive, all forms and manifestations of terrorism are reduced to their elemental form of threatened or actual armed force and aggression. In this light, terrorism can be seen in its truest form—as unlawful warfare.<sup>172</sup> The existing international law of armed conflict, though, applies to States involved in international armed conflict,<sup>173</sup> and a portion of the law of armed conflict applies during non-international armed conflict.<sup>174</sup> Consequently, in today’s world unlawful warfare, in the form of international terrorism, is everywhere operating outside the law.<sup>175</sup> Although premised on the law of armed conflict, this new body of law should supplement the existing Geneva Conventions and Additional Protocols because “international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal, and were unanticipated when the [UN] Charter was drafted.”<sup>176</sup>

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<sup>163</sup> See *supra* notes 91-98 and accompanying text.

<sup>164</sup> See *supra* Part II.A.

<sup>165</sup> Stephen, *supra* note 91, at 4 (emphasis in original).

<sup>166</sup> See Christopher Greenwood, *Terrorism: The Proper Law and the Proper Forum*, in INTERNATIONAL LAW AND THE WAR ON TERROR 353, 354-60 (Fred L. Borch & Paul S. Wilson eds., 2003).

<sup>167</sup> *Contra* Newton, *supra* note 114, at 327, 351. Despite advocating the use of domestic criminal laws to prosecute terrorists, the author desires domestic prosecution for “terrorists who survive military action against them,” so he is advocating action against terrorists that should be governed by the law of armed conflict.

<sup>168</sup> The purpose of the United Nations as written in Article 1 of the United Nations Charter should be the justification for the elimination of international acts of violence by non-State actors. U.N. Charter, art. 1.

<sup>169</sup> See *supra* Part II.C.

<sup>170</sup> U.N. Charter art. 2, para. 4.

<sup>171</sup> *Id.* art. 51.

<sup>172</sup> See Almond, *supra* note 107, at 207.

<sup>173</sup> See Common Article 2, present in the four Geneva Conventions [hereinafter Geneva Conventions] which are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

<sup>174</sup> Brooks, *supra* note 70, at 704 nn.99-101.

<sup>175</sup> *Id.* at 761.

## A. Proposed Guidelines for the Definition of Non-State International Terrorism

*Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability. Globalization brings home to us the importance of a truly concerted international effort to combat terrorism.*<sup>177</sup>

For international efforts to succeed, terrorism must be defined so as to provide clear guidelines for distinguishing terrorist conduct that violates international law from other unacceptable conduct that may not violate international law or conduct that violates the existing law of armed conflict. The following proposal attempts to remove the “cultural, professional, or political biases that can strongly affect the definition [of terrorism]”<sup>178</sup> by requiring three essential elements: a non-State actor, an international act of violence, and a sufficient level of participation.

### I. Non-State Actors

When devising a definition for international terrorism, the identity of the actor must be considered. The existing law of armed conflict applies to “Members”<sup>179</sup> of the UN and “High Contracting Parties”<sup>180</sup> to the Geneva Conventions during “armed conflict . . . between two or more of the High Contracting Parties . . . [or] partial or total occupation of the territory of a High Contracting Party.”<sup>181</sup> In a world with vastly different circumstances than at the time of the Geneva Conventions’ creation, individuals and groups commit violent acts independent of any UN Member or High Contracting Party.<sup>182</sup> To fill the void in the existing law of armed conflict, a new proposed convention on international terrorism should focus only on non-State actors.

One point of discussion in this area centers on actions by members of regular armed forces or other individuals who perform official duties for a nation.<sup>183</sup> A simple resolution based on “scope of employment”<sup>184</sup> exists. The existing law of armed conflict applies when an individual commits an international act of threatening behavior, intimidation, aggression or violence that was performed within the scope of employment of a nation. Additionally, if a member of the armed forces or another State official, during a period of armed conflict or other military operations, commits an act contrary to the law of armed conflict, measures for enforcement and punishment of that act already exist.<sup>185</sup> Lastly, when not in a situation of armed conflict and not acting within the scope of employment, a member of the armed forces or other State official could fall within the purview of this proposed definition of terrorism if that person committed an international act of terrorism.<sup>186</sup> After determining that an actor is not in the scope of a State’s employment, the focus shifts to the nature of the act in question.

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<sup>176</sup> Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOKLYN J. INT’L L. 405, 461 (2006) (noting that the United Nations Charter focuses on warfare between States, and the Geneva Conventions and Additional Protocols maintain that focus even though they were ratified in 1949 and 1977 respectively).

<sup>177</sup> LEGISLATIVE GUIDE, *supra* note 101, para. 5 (quoting Kofi Annan, *Preface* to U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, U.N. Sales No. E.01.V.3 (2001)).

<sup>178</sup> DONALD J. HANLE, *TERRORISM: THE NEWEST FACE OF WARFARE* 104 (1989).

<sup>179</sup> U.N. Charter art. 2.

<sup>180</sup> Geneva Conventions, *supra* note 173, art. 2, para. 1.

<sup>181</sup> *Id.* art. 2, para. 2.

<sup>182</sup> BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 1-3 (2006) (providing a discussion of several individuals and groups who have committed acts of violence).

<sup>183</sup> *See generally* John R. Bolton, Former U.S. Ambassador to the United Nations and Former Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (Nov. 14, 2002) (detailing several reasons the United States opposes the International Criminal Court), *available at* <http://www.state.gov/t/us/rm/15158.htm>.

<sup>184</sup> “Scope of employment” is “the reasonable and foreseeable activities that an employee engages in while carrying out the employer’s business.” BLACK’S LAW DICTIONARY 564 (8th ed. 2004).

<sup>185</sup> *See, e.g.*, First Geneva Convention, *supra* note 173, art. 49; Second Geneva Convention, *supra* note 173, art. 50; Third Geneva Convention, *supra* note 173, art. 129; Fourth Geneva Convention, *supra* note 173, art. 146 (requiring signatory States to criminalize “grave breaches” of their respective Geneva Convention); First Geneva Convention, *supra* note 173, art. 50; Second Geneva Convention, *supra* note 173, art. 51; Third Geneva Convention, *supra* note 173, art. 130; Fourth Geneva Convention, *supra* note 173, art. 147 (defining which acts constitute grave breaches of their respective Geneva Convention); War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (criminalizing, *inter alia*, grave breaches of the Geneva Conventions as war crimes).

## 2. International Act of Violence

Whether committed by an individual, group, or State, violence waged by residents of one nation toward the people, property or government of another nation logically rises to the level of an international event.<sup>187</sup> Within this proposal, to be contrary to international law, an act of violence or aggression must be international in nature. As recent history has shown, a group or an individual intent on causing harm may find a way to do so that was previously unimaginable.<sup>188</sup> For this reason, a definition or set of guidelines on terrorism should not revolve around a set of specific prohibited acts. Rather, a general prohibition against threatening behavior, intimidation, aggression and violence of an international nature that is committed by a non-State actor is necessary to include terrorist acts not yet contemplated.

Since this proposal seeks to supplement existing law, the definition of international terrorism should not apply to hostile acts committed by lawful combatants.<sup>189</sup> This proposition may face resistance from proponents of freedom fighters who (the argument goes) must resort to violence for their cause. In many instances, violence by freedom fighters in a war of national liberation<sup>190</sup> falls within domestic law or the existing law of armed conflict, so the definition of international terrorism would not apply to those actions. The actions of freedom fighters, though, are also the most common example of acts that should fall within the proposed definition of international terrorism.

“Freedom fighters” are ordinarily seen as individuals or groups resisting oppressive regimes, colonial domination, or alien occupation.<sup>191</sup> Generally, resistance of an oppressive regime would be an internal conflict and not within the realm of international violence. For example, Colombia is engaged in a four decades-long war involving the Revolutionary Armed Forces of Colombia (FARC),<sup>192</sup> an organized force structured like a military, with the majority of its actions targeting the Colombian military.<sup>193</sup> The UN considers the situation in Colombia to be an internal armed conflict.<sup>194</sup> As such, under the law of armed conflict, Common Article 3 and Additional Protocol II protections apply during armed conflict between the FARC, a dissident armed force, and the armed forces of Colombia, a UN Member.<sup>195</sup>

The FARC, however, also engages in violent acts that do not target the Columbian government or military: assassinations, kidnappings, extortion, and murder of civilians.<sup>196</sup> Generally, these actions do not fall within the proposed

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<sup>186</sup> See *infra* Part IV.A.2.

<sup>187</sup> See *Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, U.N. Doc. A/C.6/L.850, art. 1 (Sept. 25, 1972), available at 1972 *United States Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM* 445, 445 (M. Cherif Bassiouni ed., 1988) (relying on the international nature of the act as the major criteria for an offense qualifying as terrorism as provided in Article 1 of this draft convention).

<sup>188</sup> Press Release, General Assembly, Opening its Fifty-sixth Session, General Assembly Condemns Heinous Acts of Terrorism Perpetrated in Host City and Washington, U.N. Doc. GA/9903 (Sept. 12, 2001).

<sup>189</sup> See generally Yoram Dinstein, *Unlawful Combatancy*, *INTERNATIONAL LAW AND THE WAR ON TERROR* 151, 151-74 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing unlawful and lawful combatancy and the distinctions between them).

<sup>190</sup> Mark Freeman, *International Law and Internal Armed Conflicts: Clarifying the Interplay Between Human Rights and Humanitarian Protections*, *J. HUMANITARIAN ASSISTANCE*, available at <http://www.jha.ac/articles/a059.htm> (last visited Sept. 25, 2007) (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, para. 4, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination”)).

<sup>191</sup> See Rama Mani, *The Root Causes of Terrorism and Conflict Prevention*, in *TERRORISM AND THE UN* 219, 221 (Jan Boulden & Thomas G. Weiss eds., 2004) (providing a discussion on “self-determination terrorism”); see also *id.* (providing discussion of the humanitarian law during war of national determination).

<sup>192</sup> Revolutionary Armed Forces of Columbia Fuerzas Armadas Revolucionarios de Columbia—FARC, <http://www.fas.org/irp/world/para/farc.htm> (last visited Sept. 25, 2007) [hereinafter FARC] (providing information on the FARC, its activities, and the conflict in Columbia).

<sup>193</sup> *Id.*

<sup>194</sup> U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Report of the United Nations High Commission for Human Rights on the Situation of Human Rights in Columbia*, ¶ 3, U.N. Doc. E/CN.4/2006/9 (May 16, 2006).

<sup>195</sup> If the freedom fighters reach a level of fighting that can be fairly characterized as “internal” or “non-international” armed conflict (i.e., civil war), then Common Article 3 of Geneva Conventions provides minimal *international* protections; see also Protocol II Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International and Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Nevertheless, the government of the nation involved in a civil war retains domestic criminal jurisdiction over all residents therein, including freedom fighters.

definition of international terrorism because they are violence or aggression committed by one of Colombia's citizens toward persons or property within that same nation. Colombia's domestic law would apply to these acts.<sup>197</sup> However, violent acts by the FARC against individuals who are not citizens of Colombia do fall squarely within the proposed definition of international terrorism.<sup>198</sup> These acts no longer fall under the guise of righteous resistance from oppression, but appear as threats or breaches of peace, contrary to the UN's purpose of maintaining international stability and security.<sup>199</sup>

Most arguments supporting freedom fighters in a war of liberation concern acts of violence against colonial rule, State aggression, and alien occupation. The UN considers colonial rule to be non-existent since the last of eleven territories under trusteeship had completed its transition to self-governance in 1994,<sup>200</sup> therefore this article will not address freedom fighters seeking liberation from colonial rule.

On the other hand, State aggression and alien occupation involve one State's incursion of another State; both exist today. In 1974, the UN General Assembly issued a resolution defining State aggression: "The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."<sup>201</sup> As this definition of State aggression requires armed force, State aggression clearly falls within the purview of the existing law of armed conflict.<sup>202</sup> Within international armed conflicts, protection of freedom fighters as lawful combatants seems to require these fighters to instantly and spontaneously target armed forces,<sup>203</sup> and other possible protections may hinge upon consideration of the aggressor as an occupier or not.<sup>204</sup> As illustrated above, in an international setting, the existing law of war is extremely limited in its application to so-called freedom fighters. Many actions of freedom fighters, however, occur outside periods of armed conflict and/or target people and property other than those of armed forces directly engaged in hostilities.<sup>205</sup>

### 3. Level of Participation

An individual's level of participation in an act of international terrorism is the third essential element for defining terrorism. The point at which a person's contribution rises to the level of international terrorism may be difficult to determine. This determination should consider an act in terms of possible outcomes; when a peaceful or lawful outcome of an act is not realistically possible, then that act would rise to the level of direct participation in terrorism. To illustrate, consider a clerk who unknowingly provides false identification documents to an individual, who in turn commits an act of

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<sup>196</sup> See Tom Regan, *Columbia's FARC Rebels Still Undermine Peace Effort*, CHRISTIAN SCI. MONITOR, July 25, 2006, available at <http://www.csmonitor.com/2006/0725/dailyUpdate.html?s=mesdu> (reporting the July 2006 FARC killing of "more than a dozen rural woodcutters in a rural region of Colombia"). See also *Q&A: Columbia's Civil Conflict*, BBC NEWS, May 24, 2005, available at <http://news.bbc.co.uk/go/pr/ft/-/2/hi/Americas/1738963.stm> (describing the violence by the FARC rebel group).

<sup>197</sup> See *supra* note 195.

<sup>198</sup> See FARC, *supra* note 192 (discussing the 2003 FARC kidnapping of three American contractors and frequent kidnapping of foreign nationals for ransom).

<sup>199</sup> U.N. Charter art. 1, para. 1.

<sup>200</sup> Trusteeship Council, <http://www.un.org/Depts/dpi/decolonization/council.htm> (last visited Feb. 4, 2007); see also Friedrichs, *supra* note 91, at 90 ("The times of colonialism and the Cold War are over.").

<sup>201</sup> G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc A/9631 (1974).

<sup>202</sup> Geneva Conventions, *supra* note 173, at art. 2; see also Protocol II, *supra* note 195.

<sup>203</sup> Third Geneva Convention, *supra* note 173, art. 4, para. (A)(6) (addressing individuals who are not affiliated with a "Party to the conflict." This provision, however, only allows "inhabitants of a non-occupied territory, who . . . spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they . . . respect the laws and customs of war.").

<sup>204</sup> See Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1025-72 (Summer 2004) (arguing that in situations when a resident of an occupied territory commits a hostile act against the armed forces of a State aggressor who is an alien occupier, a strong case may exist for consideration of this unlawful enemy combatant as a protected person under the Fourth Geneva Convention if that individual is within an occupied territory or the home territory of a belligerent country and satisfies the nationality requirements outlined in Article 4 of the Fourth Geneva Convention; the Fourth Geneva Convention may not protect a similar individual fighting a State aggressor before occupation; and citizens of neutral countries who entered Iraq during the occupation would not be protected under the Fourth Geneva Convention. Illustration of this point is made by comparing the occupation of Iraq with the armed conflict in Afghanistan that did not rise to the level of occupation). But see Sinor, *supra* note 108, at 107 (stating that even if individuals participating in conflicts are granted POW status, that "status is not effective to address the threat.").

<sup>205</sup> See *supra* note 92 and accompanying text.

international violence.<sup>206</sup> One realistic possibility for using this false documentation is to escape an oppressive government. Although providing false identification is unlawful, a peaceful outcome realistically exists, and one would be hard-pressed to find that the clerk's actions constituted international terrorism. On the other hand, consider a black marketer who internationally trafficks in weapons. Even though the weapons dealer does not commit overt acts of violence or aggression and may have no knowledge of the intended use of these weapons, a realistic outcome that is peaceful or lawful arguably does not exist.<sup>207</sup>

## B. Proposals for Enforcing the Prohibition Against International Terrorism

### 1. Prosecution of International Terrorism as a War Crime

Consideration of international terrorism as a *war crime* and not simply a domestic crime has many political and legal benefits. As a war crime, prosecution of alleged offenses of international terrorism could be conducted in an international forum based on the principle of universal jurisdiction,<sup>208</sup> and not in a domestic forum based solely on the domestic criminal statutes implemented by an individual nation.<sup>209</sup> Universal jurisdiction for international terrorism also ensures that "any state apprehending any actor for an agreed offense could . . . deliver the actor to [the appropriate] jurisdiction."<sup>210</sup> Additionally, coupled with the removal of political motives or exceptions in the definition of international terrorism, an international forum would "be largely immune to political interference."<sup>211</sup> Establishing the forum for adjudication of cases of alleged war crimes of international terrorism at an international tribunal would also ensure uniformity in the process.

By establishing a tribunal for all cases of alleged war crimes of international terrorism by non-State actors, individuals would be afforded the same due process no matter the nationality of the accused or the nationality of the victims. This due process should include the assistance of counsel, periodic review hearings, and the right to appeal any adverse decision.<sup>212</sup> One forum for adjudication ensures the length of the adjudication process for each individual would be relatively similar. A single forum for adjudication would also create a body of law to serve as precedents for subsequent trials. Most importantly, for the international community to successfully come together to fight international terrorism, the actions cannot merely be considered criminal, but must be considered conduct that is contrary to the purposes of the UN.

Since this proposal to limit international violence must remain separate from domestic criminal law, currently the International Criminal Court (as implemented by the 1998 Rome Statute) cannot support prosecution of these offenses because "the fourth major hurdle to International Criminal Court jurisdiction is the principle of complementarity."<sup>213</sup> Under this proposal for international terrorism, the prohibition against international violence by non-State actors would not be punishable as a domestic crime, so States cannot have jurisdiction over these offenses. However, if an amendment to the Rome Statute allowed prosecution of these offenses with sole jurisdiction at the International Criminal Court, then this forum would be appropriate for these cases. In essence, the procedure for the International Criminal Court to have jurisdiction over a war crime under the existing law of war would be distinct from the procedure for a case under the proposed convention.<sup>214</sup>

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<sup>206</sup> See, e.g., Brooks, *supra* note 70, at 757.

<sup>207</sup> But see 18 U.S.C. § 2339A (2000) (specifying that the criminal offense of providing material support to terrorists requires knowledge and intent that the material support is for any one of several specified criminal acts).

<sup>208</sup> See generally Lieutenant Commander James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259 (2006) (discussing the history and authority for the international community or a State to prosecute war crimes).

<sup>209</sup> BYERS, *supra* note 19, at 141.

<sup>210</sup> Sinor, *supra* note 108, at 110.

<sup>211</sup> *Id.* at 144. But see Benoit, *supra* note 208, at 294 (citing Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, The International Criminal Court*, Aug. 2, 2002, available at <http://www.state.gov/t/pm/rls/fs/2002/23426.htm> (discussing the United States' concerns that the ICC Prosecutor will conduct politicized investigations)).

<sup>212</sup> Brooks, *supra* note 70, at 758.

<sup>213</sup> Benoit, *supra* note 208, at 292 (explaining that domestic courts essentially have a "right of first refusal" over cases falling within the jurisdiction of the International Criminal Court).

<sup>214</sup> Article III § 2 of the U.S. Constitution, 28 U.S.C. § 1251, and various other special statutes confer jurisdiction of cases to the Supreme Court of the United States.

Amendment to the Rome Statute to allow for jurisdiction over these cases would prevent the creation of an additional international forum with the duplication of many positions and less efficiency in the process.<sup>215</sup>

## 2. Potential for Sanctions Against State Sponsors of Terrorism

Whether considering a proposed new protocol on international terrorism by non-State actors or the current law of armed conflict, there must be recourse against those nations who aid individuals in committing international terrorism. Many scholars believe “tacit and covert state support to [non-State terrorist groups] can be significant.”<sup>216</sup> The UN must establish a system of sanctions to prevent this State support and to ensure compliance with counterterrorism instruments and the law of armed conflict as a whole. These sanctions would be most effective when levied in the form of fines or economic penalties.<sup>217</sup> With respect to countering terrorism, the imposition of sanctions against a State should occur in cases of State support of non-State actors, refusal to turn over accused war criminals, and other instances of a State impeding the apprehension and trial of accused international terrorists.

## V. Conclusion

*It is not enough to yearn for peace. . . . Machinery for the just settlement of international differences must be found. Without such machinery, the entire world will have to remain an armed camp. The world will be doomed to deadly conflict, devoid of hope for real peace.*<sup>218</sup>

Prior to the creation of the UN, nations waged war based on two major schools of thought concerning its justification: *jihad* and *jus ad bellum*. The Islamic populace, its scholars, and its leaders followed the word of Allah and the practices of Muhammad, which are the foundations for *jihad* and Islam.<sup>219</sup> At the same time, much of the Western world relied upon *jus ad bellum*, heavily based upon Christian scholars and philosophers, to justify a nation’s going to war.<sup>220</sup> World War II, with its widespread death and destruction, served as a catalyst for the creation of the UN. The world faced danger from a war of nations and alliances of nations. In the pursuit of peace and security in the world and “to save succeeding generations from the scourge of war,”<sup>221</sup> nations voluntarily departed from the justifications previously relied upon to go to war. Instead, Member Nations adopted a prohibition on aggression and warfare among members of the UN for any reason other than self-defense, or as authorized by the UN Security Council to restore international peace and security. Generally, nations have complied with the obligations of the UN Charter and the Geneva Conventions. Consequently, few wars between nations have occurred since the UN formed.<sup>222</sup> Individuals and groups committing violent acts domestically and internationally, however, have filled the void of war between nations.<sup>223</sup> The same purposes that motivated the UN to adopt the law of armed conflict also support the need for banning international violence committed by non-State actors.

At first glance, the UN’s purpose of “self-determination of peoples”<sup>224</sup> seems to support the notion of freedom fighters and groups rising to power within their nations. Historically, these freedom fighters fought against governments that practiced totalitarianism, imperialism, and colonialism. Today, however, acts of violence are now international and

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<sup>215</sup> See Benoit, *supra* note 208, at 304-05 nn.324-33 and accompanying text (discussing the United States’ objection to the International Criminal Court for lack of efficiency).

<sup>216</sup> Mani, *supra* note 191, at 223.

<sup>217</sup> Murphy, *supra* note 104, at 425-29.

<sup>218</sup> Harry S. Truman, President of the United States, Address Before a Joint Session of the Congress (Apr. 16, 1945), available at <http://www.trumanlibrary.org/ww2/stofunio.htm> (providing a transcript of the speech made by President Truman to the U.S. Congress one day after the burial of former President Franklin Delano Roosevelt).

<sup>219</sup> See *supra* notes 28-36 and accompanying text.

<sup>220</sup> See Johnson, *supra* note 20, 3-26.

<sup>221</sup> U.N. Charter pmbl.

<sup>222</sup> See Flashback: Invasion of Kuwait, *supra* note 15.

<sup>223</sup> See *supra* notes 171-76 and accompanying text.

<sup>224</sup> *Id.* art. 1, para. 2.

frequently target civilians. The acts of violence waged today are chosen for their destructiveness and are increasingly lethal. This international violence is a “threat to peace and stability of all legitimate states—that is, all those states which live under the rule of law.”<sup>225</sup>

The international community continues to assert its commitment to suppressing terrorism, however, its actions do not conform to its rhetoric. The inability of the UN to reach a consensus on the definition of terrorism since the 1960s has caused an ineffective framework of criminal law-based treaties that rely on domestic laws for the adjudication of actions that are considered terrorist offenses.<sup>226</sup> The lack of uniformity created by this framework has allowed nations to enact regional treaties on terrorism and domestic criminal laws that vary widely in their application, and most egregiously, it has allowed individuals to commit international acts of violence that are outside the law.<sup>227</sup> “Traditional criminal law formulae have not worked to control the threat [of terrorism].”<sup>228</sup> The world has seen changes in warfare, and the nature of acts of terrorism now exceed the capabilities of the domestic criminal law systems to properly address the offenses.

“The lack of an international enforcement mechanism [for terrorism] reflects the unwillingness of states to commit to a regime that might disrupt the world order. But, where the adversary is already undermining world order, effective response is critical.”<sup>229</sup> Unlike the nations who came together from 1942–1945, today’s UN Member States hold tightly to steadfast positions concerning the definition of terrorism and are unwilling to follow the guidance of President Roosevelt to sacrifice for peace.<sup>230</sup> All, however, must make sacrifices. Sacrifices by Western nations, namely the United States, would include abdicating responsibility to an international forum for adjudication of international terrorism cases and agreeing that it is unreasonable to expect Islamic nations to proclaim that a fundamental part of their religion, *jihad*, is a crime.

To solve this dilemma, just as the UN Charter restricts a nation’s ability to go to war, so too must the UN restrict an individual’s ability to commit international acts of violence. The existing law of armed conflict, however, is inadequate to address the growing violence and aggression waged by non-State actors. A new convention on international terrorism must supplement the existing law of armed conflict. To create a world, in the spirit of the “fundamental values of peace, nonaggression, sovereignty, and nonintervention that are embedded in the Charter,”<sup>231</sup> the UN must adapt to the changing world. Through cooperation of the UN, international terrorism must be banned “without discrimination of race, religion, color, language, region, and state”<sup>232</sup> and without exception for motive.

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<sup>225</sup> Jones, *supra* note 99, at 195.

<sup>226</sup> See *supra* notes 104-13 and accompanying text.

<sup>227</sup> See generally Luck, *supra* note 120, at 80-81 (stating that no penalties for non-compliance exist).

<sup>228</sup> *Id.* at 104.

<sup>229</sup> Sinor, *supra* note 108, at 114.

<sup>230</sup> See *supra* note 67 and accompanying text.

<sup>231</sup> S. Neil MacFarlane, *Charter Values and the Response to Terrorism*, in TERRORISM AND THE UN 27, 27 (Jan Boulden & Thomas G. Weiss eds., 2004).

<sup>232</sup> Kulwant Kaur, *US War on Terrorism in Afghanistan—A Human Rights Perspective*, in TERRORISM AND HUMAN RIGHTS 27, 33 (Mahendra Gaur ed., 2003).

## Appendix A

The following verses from the Qur'an are taken from *The Islamic Theory of Jihad and the International System*.<sup>233</sup> In that work, Md. Moniruzzaman relied upon *The Al-Qur'an, The Holy Qur'an; English Translation of the meanings and Commentary*, Madinah: King Fahd Holy Qur'an Printing Complex. The *Qur'an*, in Arabic, is believed to be the literal word of Allah and any translation from Arabic is an interpretation and cannot be equated to the Arabic Qur'an.<sup>234</sup>

To those against whom war is made, permission is given (to fight) because they are wronged- and verily, Allah is Most Powerful for their aid.  
(Surah *Al Hajj* : 39)

Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.  
(Surah *Al Baqarah* : 190)

Fighting is prescribed upon you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not.  
(Surah *Al Baqarah* : 216)

Then fight in the cause of Allah and know that Allah heareth and knoweth all things.  
(Surah *Al Baqarah* : 244)

And fight them on until there is no more tumult or oppression, and there prevails justice and faith in Allah altogether and everywhere; but if they cease, verily Allah doth see all that they do.  
(Surah *Al Anfal* : 39)

Those who believe and adopt exile, and fight for the faith, in the cause of Allah, as well as those who give (them) asylum and aid- these are (all) in very truth the Believers: for them is the forgiveness of sins and a provision most generous.  
(Surah *Al Anfal* : 74)

And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?- men, women, and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help."  
(Surah *Al Nisa* : 75)

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<sup>233</sup> MONIRUZZAMAN, *supra* note 30, at 19-21.

<sup>234</sup> The Noble Qur'an, *supra* note 28.

## Appendix B

### United Nations Counterterrorism Treaties<sup>235</sup>

#### **Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963)**

- Applies to acts affecting in-flight safety;
- Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and
- Requires Contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

#### **Convention for the Suppression of Unlawful Seizure of Aircraft (1970)**

- Makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft” or to attempt to do so;
- Requires parties to the convention to make hijackings punishable by “severe penalties”
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and
- Requires parties to assist each other in connection with criminal proceedings brought under the Convention.

#### **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) (aka Montreal Convention)**

- Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts;
- Requires parties to the Convention to make offences punishable by “severe penalties”; and
- Requires parties that have custody of offenders to either extradite the offenders or submit the case for prosecution.

#### **Convention on the Prevention and Punishment of Offenses against Internationally Protected Persons, Including Diplomatic Agents (1973)**

- Defines an “internationally protected person” as a Head of State, Minister for Foreign Affairs, or representative or official of a State or international organization who is entitled to special protection in a foreign State, and his/her family; and
- Requires parties to criminalize and make punishable “by appropriate penalties which take into account their grave nature” the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person; a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an act; and an act “constituting participation as an accomplice.”

#### **International Convention against the Taking of Hostages (1979)**

- Provides that “any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention.”

#### **Convention on the Physical Protection of Nuclear Material (1980)**

- Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.

#### **Amendments to the Convention on the Physical Protection of Nuclear Material**

- Makes it legally binding for State parties to protect nuclear facilities and materials in peaceful domestic use, storage as well as transport; and
- Provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

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<sup>235</sup> UN Action to Counter Terrorism, *supra* note 115 (listing the thirteen major conventions and protocols dealing with terrorism as well as offering full versions of these documents).

**Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)**

- Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation.

**Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)**

- Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and
- Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

**Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)**

- Criminalizes the use of a ship as a device to further an act of terrorism;
- Criminalizes the transporting on board a ship various materials knowing that they are intended to be used to cause, or to threaten to cause, death, serious injury, or property damage to further an act of terrorism;
- Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and
- Introduces procedures for governing the boarding of a ship believed to have committed an offense under the Convention.

**Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)**

- Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against for international aviation.

**Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005)**

- Adapts the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.

**Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)**

- Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am Flight 103 bombing);
- Obligates parties in their respective territories to ensure effective control over “unmarked” plastic explosives;
- Provides that each party must, inter alia, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

**International Convention for the Suppression of Terrorist Bombings (1997)**

- Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

**International Convention for the Suppression of the Financing of Terrorism (1999)**

- Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running;
- Commits States to hold those who finance terrorism criminally, civilly, or administratively liable for such acts; and
- Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

**International Convention for the Suppression of Acts of Nuclear Terrorism (2005)\***

- Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors;
- Covers threats and attempts to commit such crimes or to participate in them, as an accomplice;
- Stipulates that offenders shall be either extradited or prosecuted;
- Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and
- Deals with both crisis situations (assisting States to solve the situation) and post crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).

\*Note: This Convention is not yet in force. It was adopted in April 2005, opened for signature on 14 September 2005 and will enter into force when it has been ratified by twenty-two Member States.