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The Game Changer: How the P5 Caused a Paradigm Shift in Norm Diffusion Post-9/11

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The Game Changer: How the P5 Caused a Paradigm Shift in Norm Diffusion Post-9/11

CATHERINE MOORE*

This Commentary recognizes a policy shift across nations of favoring national security over human rights and argues that smaller states were influenced by the key international decision makers, the Permanent Five Members (P5) of the United Nations Security Council, via norm diffusion. In doing so, it offers an alternative theory for how and why human rights norms have consistently been violated in the pursuit of security. Oppressive regimes have used the term “counterterrorism” or “national security” to justify rights violations because they see larger powers allowing these violations. This Commentary contends that the P5 are responsible for beginning this phenomenon and in doing so created a paradigm shift in the types of norms that are diffused globally, resulting in “negative norm diffusion.”

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INTRODUCTION

“If all your friends jumped off a bridge, would you?”

It is perhaps one of the oldest questions that a parent will ask a child after he or she uses the excuse that “everyone else was doing it” to justify his or her behavior. Post-9/11 prioritization of security over human rights has operated in a similar fashion, despite obligations to respect and protect human rights. This begs the question of why and how states felt justified in this prioritization. When and where did this prioritization originate and how has this prioritization spread throughout so many different states?

National security and human rights have long been at a crossroads.¹ Counterterrorism measures in the post-9/11 era have tested the tension that exists between these two areas of law. “How resilient is the human

1. *See, e.g.*, HCJ 5100/94 Public Committee against Torture in Israel v. State of Israel 53(4) PD 817 [1999] (Isr.), translated in 14 Isr. L. Rep. 567, 605 (1998–1999) (“We are aware that this decision [allowing the defense of necessity for torture] does make it easier to deal with that reality [of Israel’s difficult situation]. This is the destiny of democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”); Ben Golder & George Williams, *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*, 8 J. COMP. POLY ANALYSIS 43 (2006) (advocating a balancing approach to these competing norms).

rights norm in the counter-terrorist era?"² scholar Rosemary Foot asked at the height of the debate on national security and human rights during the Bush Presidency. While she focuses on the work of the committees created by UN Security Council Resolutions (UNSCRs) 1267 and 1373,³ her question remains relevant today as human rights are continually tested by counterterrorism measures and their implementation by states. Although the UN committee procedures in place today actually afford greater attention to human rights than ever before, they have been altered to do so.⁴ Human rights in the days following 9/11 were not a priority for many and remain a low priority for those states that feel justified in ignoring their obligations.⁵ But how far have we truly come?

Many states across the globe are dealing with varying levels of security threats,⁶ and unfortunately, most respond with policy shifts or changes in law that restrict fundamental rights, as this Commentary will demonstrate. Human rights protections have been compromised for the sake of security and justified, for example, under the derogation clauses of treaties.⁷ In particular, freedom of speech has been restricted;⁸ detentions have been indefinite and arbitrary;⁹ and torture has been justified¹⁰ — all in the name of security.

2. Rosemary Foot, *The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489, 489 (2007).

3. *Id.* at 490.

4. *Id.*

5. See HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003) [hereinafter HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM], available at http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf. According to a Human Rights Watch study, more than 140 countries either enacted or revised one or more counterterrorism laws since 9/11, and at least 130 such laws included one or more provisions that could be used to violate human rights. *Global: 140 Countries Pass Counterterror Laws Since 9/11*, HUM. RTS. WATCH (June 29, 2012), <http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-911>; HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY: COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, at 5 (2012), available at http://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf [hereinafter HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY].

6. See NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM [START], GLOBAL TERRORISM DATABASE (2013), available at <http://www.start.umd.edu/gtd>.

7. See, e.g., International Covenant on Civil and Political Rights art. 4(1), adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations . . ."); Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L. & POL'Y 58 (2003) (rationalizing the "War on Terror" as a public emergency and therefore concluding that it fulfills the obligation for derogation).

8. See discussion *infra* Parts III.A.1. (freedom of speech in the P5) & III.C. (P5 influence on states such as Turkey and Zimbabwe).

9. See discussion *infra* Parts III.A.2. (arbitrary detention in the P5) & III.C. (P5 influence on states such as Bosnia-Herzegovina and Yemen).

10. See discussion *infra* Parts III.A.3. (torture in the P5) & III.C. (P5 influence on states such as Macedonia and Sweden).

Currently, Jordan is modifying legislation with a new definition of terrorism that now includes “any act meant to create sedition, harm property or jeopardise international relations, or to use the Internet or media outlets to promote ‘terrorist’ thinking.”¹¹ In Egypt, an expansion in the definition of terrorism would make simply holding a leadership position in the Muslim Brotherhood an offense punishable by death.¹² In Saudi Arabia, terrorism has been redefined to cover anyone who “[c]alls for atheist thought in any form, or call[s] into question the fundamentals of the Islamic religion on which this country is based[,] [a]nyone who disregards their loyalty to the country’s rulers,” and anyone who “[i]ncites or make[s] countries, committees, or international organisations antagonistic to the kingdom.”¹³ Freedom of speech and the press is at risk worldwide, as journalists and human rights defenders continue to be imprisoned as they report on anti-government protests or speak out against their governments.¹⁴

This Commentary will consider how states first perceived themselves able to introduce measures that circumvent these protected rights. In the area of counterterrorism, the choice of national security over protection of human rights can be linked to the theory of securitization. Under this theory, policy makers reframe a policy issue and then link that newly framed policy to security.¹⁵ For example, the denial of water rights could be linked to security, requiring the authorities to step in and impose martial law to enforce the policy. After a number of such policy decisions, the public comes to accept these limitations over a period of time in the name of security. Thus, the restriction of human rights in the name of security becomes the norm.

Was the circumvention of rights an instinctual reaction to protecting state interests, as the theory of securitization suggests?¹⁶ Or, as this

11. Areej Abuqudairi, *Jordan Anti-Terrorism Law Sparks Concern*, AL JAZEERA, Apr. 25, 2014, <http://www.aljazeera.com/news/middleeast/2014/04/jordan-anti-terrorism-law-sparks-concern-201442510452221775.html>.

12. Erin Cunningham, *Egyptian Draft Laws to Widen ‘Terror’ Definition Drawing Fierce Criticism*, WASH. POST, Apr. 22, 2014, http://www.washingtonpost.com/world/egypt-draft-law-to-widen-terror-definition/2014/04/19/c79e5f3a-7725-4a25-a43a-0e005aa99b69_story.html.

13. Ludovica Iaccino, *Saudi Arabia: New Law Defines Atheism as Terrorism*, INT’L BUS. TIMES, Apr. 1, 2014, <http://www.ibtimes.co.uk/saudi-arabia-new-law-sees-atheism-terrorism-1442819>.

14. See Press Release, U.N. Office of the High Comm’r for Human Rights, UN Experts Urge Ethiopia to Stop Using Anti-terrorism Legislation to Curb Human Rights (Sept. 18, 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sssthas.dB5hpGEC.dpuf>; Amy Brouillette, *Crackdown on Journalists: State Security vs Human Rights*, AL JAZEERA, Apr. 21, 2014, <http://www.aljazeera.com/indepth/opinion/2014/04/crackdown-journalists-state-sec-201442153837498790.html>; *Disproportionate Penalties for Media in Cameroon’s Anti-Terrorism Law*, REPORTERS WITHOUT BORDERS (Dec. 18, 2014), <http://en.rsf.org/cameroon-disproportionate-penalties-for-18-12-2014,47401.html>.

15. See BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS 23–24 (1998).

16. See *id.* (noting that securitization occurs when an “issue is presented as an existential threat,

Commentary will suggest, do weaker or smaller states look to more powerful states to see how far they can go and still be within an internationally respectable range of restrictions?

The initial reaction to the events of 9/11 — to restrict rights and prioritize security in the days following the attacks — is not surprising in many ways. Some would argue that this shift in counterterrorism laws was a necessary byproduct of 9/11, and indeed, the threat of a terrorist attack still looms.¹⁷ However, such a rationale does not explain the widespread and continued restriction of rights across the globe more than a decade after 9/11, especially when some states, like Antigua and Barbuda¹⁸ or Vanuatu,¹⁹ have never been victims of a terror attack linked to Al Qaeda.²⁰ This Commentary will suggest that the policy shift is not attributable to securitization but, rather, to the influence of other states on counterterrorism policy.

This Commentary will argue that the “other states” that influence the rest of the world are the Permanent Five (P5) of the United Nations Security Council. Although it was noted by Saad Eddin Ibrahim, an Egyptian human rights activist, that “[e]very dictator in the world is using what the United States has done under the Patriot Act and other derivative measures to justify their past violations of human rights, as well as declaring a license to continue to abuse human rights at present and in the future,”²¹ the United States was not acting alone post-9/11. The influence

requiring emergency measures and justifying actions outside the normal bounds of political procedure”).

17. Examples of recent terrorist attacks include the attack on the U.S. Consulate in Benghazi, Libya, as well as attacks by the Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq, al Shabaab in Somalia, and Boko Haram in Nigeria.

18. For Antigua & Barbuda’s anti-terrorism legislation, see Prevention of Terrorism Act 2005, No. 12 (2005), art. 22 (Ant. & Barb.) (allowing a judge to authorize the detention of an individual suspected of terrorism for up to five days without charge); see also COMMONWEALTH HUMAN RIGHTS INITIATIVE, ANTIGUA & BARBUDA COUNTRY REPORT: ANTI-TERRORISM LAWS & POLICING 1 (2007), available at http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/07_1011_chogm07_antigua_&_barbuda_anti_terrorism_policing_country_report2007.pdf (“Antigua and Barbuda’s adoption of terrorism legislation was in response to international obligations since 2001 and can also be linked to pressure resulting from its economic relationship with the [United States] and [United Kingdom].”).

19. See, e.g., *Vanuatu Journalist Arrested over Social Media Post*, AUSTRALIAN BROAD. CORP., May 6, 2013, <http://www.abc.net.au/news/2013-05-07/an-vanuatu-journalist-arrested/4674078> (describing charges against Vanuatu journalist for social media post apparently misconstrued as supporting terrorism).

20. START, *supra* note 6 (recording only two terrorism-type instances in Antigua and Barbuda, 1992 and 1997, neither of which was attributable to Al Qaeda, and only two instances in Vanuatu, both in 1996, each of which was attributable to the Vanuatu Mobile Force).

21. CARTER CTR., HUMAN RIGHTS DEFENDERS ON THE FRONTLINES OF FREEDOM: PROTECTING HUMAN RIGHTS IN THE CONTEXT OF THE WAR ON TERROR 29 (2004), available at <http://www.cartercenter.org/documents/1682.pdf>.

of the P5 spread via norm diffusion to other states that modeled their own behavior after the power elite, thereby furthering the view that security is the priority in the face of terrorism.

Part I will assess the literature, exploring counterterrorism measures and their relation to human rights. Additionally, it will review the theory of norm diffusion and the role that the P5 play in diffusing norms. Finally, it will introduce and summarize the new normative theory of negative norm diffusion.

Part II will outline the research framework and methodology to be used in order to evaluate the theory of negative norm diffusion explained in Part I.

Part III will test the theory of negative norm diffusion by demonstrating that there has been a shift in how the world analyzes counterterrorism measures and human rights. P5 case studies will illustrate how these states individually passed domestic laws that violated human rights obligations — particularly freedom of speech, the prohibition of arbitrary detention, and the prohibition of torture — in favor of counterterrorism measures. Part III will identify further support through examination of UNSCR 1373 and its implementation and through case studies of states across various regions that were both members and non-members of the United Nations as of the passage of UNSCR 1373.

Part IV will conclude that the influence of the P5 has led to a shift in counterterrorism measures and the protection of human rights. States emulate the actions of the P5 with regard to the drafting of their own counterterrorism measures in order to gain international acceptance. Additionally, states emulate and learn from the rights-violating behavior that they observe of the P5. States are also coerced into breaching these obligations, typically through individual state pressure, and feel compelled to mimic these counterterrorism measures in order to stay “competitive.” However, preexisting repressive regimes cannot be discounted in this discussion, as they often look to what other states are doing to further justify their own actions.

I. A THEORETICAL FRAMEWORK FOR NEGATIVE NORM DIFFUSION: VIEWING COUNTERTERRORISM AND HUMAN RIGHTS THROUGH THE LENS OF NORM DIFFUSION

A. Relationship Between Counterterrorism Measures and Human Rights

There has been a long-running debate as to whether national security and counterterrorism measures should take priority over human rights

obligations.²² Described as a “significant casualty of the struggle against terrorism,”²³ human rights have often been relegated to second-tier commitments. While it is not the purpose of this Commentary to take a position on whether security or human rights has more value in the international system, it is necessary to recognize the underlying issues in the debate.

For example, Andrea Bianchi, renowned scholar in international law and terrorism, asserts in his book, *Enforcing International Law Norms Against Terrorism*, that there is actually no real difficulty in the debate between the two concepts of security and human rights. He attributes a state’s disregard of human rights obligations to the fact that the state’s ratification of human rights treaties does not actually mean protection of human rights. Bianchi argues that ratification provides only the appearance of human rights protection.²⁴ These accusations of state self-satisfaction correspond with many scholars’ questioning whether or not human rights treaties and their ratification even matter.²⁵

Nevertheless, counterterrorism measures, implemented both internationally and domestically, have had a significant impact on the protection of human rights. With the passage of UNSCR 1373, the dynamic between the two competing norms shifted, although they theoretically should be able to coexist.²⁶ In fact, scholars,²⁷ courts,²⁸ and

22. See, e.g., Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375 (1989); Anthony Lewis, Address, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257 (2003); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Emanuel Gross, *The Struggle of a Democracy against Terrorism — Protection of Human Rights: The Right to Privacy Versus the National Interest — the Proper Balance*, 37 CORNELL INT’L L.J. 27 (2004); Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. & SOC’Y 507 (2005); Tiberiu Dragu, *Is There a Trade-off Between Security and Liberty? Executive Bias, Privacy Protections, and Terrorism Prevention*, 105 AM. POL. SCI. REV. 64 (2011).

23. Foot, *supra* note 2, at 490.

24. Andrea Bianchi, *Conclusions: Enforcing International Law Norms Against Terrorism: Achievements and Prospects*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 491, 525 (Andrea Bianchi ed., 2004) (calling a state’s agreement to protect such rights an indulgence “in a rhetorical exercise of self-complacency”).

25. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1939 (2002) (addressing whether human rights treaties make a difference in the actual protection of human rights through a “large-scale quantitative analysis of the relationship between human rights treaties and countries’ human rights practices”); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 612 (2007) (finding that states’ decisions to commit to human rights treaties depend in part on the likely domestic effects of implementation); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 925 (2005) (indicating “that rarely does treaty ratification have unconditional effects on human rights,” but rather, “improvement in human rights is typically more likely the more democratic the country”).

26. See, e.g., Luis Miguel Hinojosa Martínez, *The Legislative Role of the Security Council in Its Fight Against Terrorism: Legal, Political and Practical Limits*, 57 INT’L & COMP. L.Q. 333, 342 (2008) (“With . . . Resolution [1373], for the first time the [U.N. Security Council] acted by establishing general, permanent obligations, unconnected to any given controversy. They are new obligations . . . created by the [Security Council], so the argument that this institution is limited to codifying pre-existing law

the UN Charter itself²⁹ recognize that the Security Council is bound by the UN Charter and, by default, its human rights obligations.

Because UNSCR 1373 required that all states adopt counterterrorism legislation, without further specifying what this requirement actually entailed, oppressive regimes were able to justify restriction of human rights under their UNSCR 1373 obligations.³⁰ As a prime example, Cuba submitted an extensive report of the “terrorist woes allegedly suffered . . . [in an] attempt to justify Cuba’s penal legislation against ‘saboteurs and terrorists’ . . . [and] the Central Bank of Cuba’s abundant efforts to patrol all ‘suspicious’ financial transactions.”³¹ Although the restriction of rights in an abusive regime such as Cuba remains a concern for the international human rights community, including the United Nations itself, the Council appears to “endorse a template of ‘model’ counter terrorism domestic legislation that condones or ignores universal human rights standards.”³²

There are many different rights and freedoms implicated in counterterrorism laws themselves. This Commentary focuses, however, on three of the key human rights issues at stake — freedom of speech,

cannot be defended. The Resolution imposes on all States, independently of their relation to the terrorist phenomenon, the adoption of a series of penal, administrative and procedural measures that require legislative reforms in national law.” (internal citations omitted); Andrew Hudson, *Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT’L L. 203 (2007).

27. See, e.g., Nicholas Angelet, *International Law Limits to the Security Council*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 71, 74 (Vera Gowlland-Debbas et al. eds., 2001); Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT’L L. 159 (2003); Christopher C. Joyner, *The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights and Civil Liberties*, 5 INT’L STUD. PERSP. 240 (2004); Clémentine Olivier, *Human Rights Law and the International Fight Against Terrorism: How Do Security Council Resolutions Impact on States’ Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)*, 73 NORDIC J. INT’L L. 399 (2004).

28. See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[N]either the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”).

29. U.N. Charter art. 24, para. 2 (“In discharging these duties [of maintaining international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”).

30. José E. Alvarez, *The UN’s ‘War’ on Terrorism*, 31 INT’L J. LEGAL INFO. 238, 246–47 (2003); see also Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted for Terror Offenses Since September 11 Attacks*, WORLD POST (Nov. 3, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html (quoting John Bellinger, former legal adviser to the U.S. State Department, as saying that “[more authoritarian countries are using the real threat of terrorism as an excuse and a cover to crack down in ways that are abusive of human rights]”).

31. Alvarez, *supra* note 30, at 246; see also Chairman of the Counter-Terrorism Comm., Letter dated 9 January 2002 from the Chairman of the Security Council Comm. established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, Annex, U.N. Doc. S/2002/15 (Jan. 2, 2002) (submitting Cuba’s report).

32. Alvarez, *supra* note 30, at 247.

arbitrary detention, and torture. These issues are the most implicated in laws enacted to combat terrorism and, as such, a precarious balance exists between combating terrorism, on the one hand, and protecting freedom of speech and preventing arbitrary detention and torture, on the other. A tip of the scales in the wrong direction could have dire consequences. There have been multiple studies on the relationship between the infringement of these very rights and terrorist attacks.³³ One such study concluded that there is a correlation between respecting these rights and observing fewer terrorist attacks.³⁴ Others conclude that the abuse of these protected rights actually promotes and encourages terrorism.³⁵ Given these findings, it is most troubling that both the P5 and other states continue to perpetuate violations of these rights in the name of security.

Counterterrorism measures are viewed by states as a positive step towards the protection of international peace and security. As the world united post-9/11 for the greater good of combating Al Qaeda and Osama bin Laden, measures were adopted in many countries across the globe to prevent the spread of terrorism. Some of these measures, including implementing new law and changing old definitions, were adopted at an alarmingly fast rate and many with little or no debate.³⁶

This begs the questions, though, of how these measures have affected the protection of human rights and whether any lack of protection constitutes a global trend.³⁷ Therefore, counterterrorism measures should be explored in light of the concept of norm diffusion to fully appreciate the global aspect of the trend to compromise human rights in the name of security.

33. See, e.g., Alberto Abadie, *Poverty, Political Freedom, and the Roots of Terrorism*, 96 AM. ECON. REV. 50 (2006) (finding that states that guarantee individual participation in the political process experience a reduction in terrorism); Max Abrahms, *Why Democracies Make Superior Counterterrorists*, 16 SECURITY STUD. 223 (2007) (concluding that states that guarantee the right to freedom of expression, association, and personal autonomy reduce terrorism).

34. See James I. Walsh & James A. Piazza, *Why Respecting Physical Integrity Rights Reduces Terrorism*, 43 COMP. POL. STUD. 551 (2010); see also James A. Piazza & James I. Walsh, *Transnational Terror and Human Rights*, 53 INT'L STUD. Q. 125 (2009); James Walsh, *Does Torture Stop Terror? Nope., PREVENTING TORTURE WITHIN THE FIGHT AGAINST TERRORISM* (Int'l Rehab. Council for Torture Victims, Copenhagen, Den.), May 2009, at 1, available at http://www.irct.org/Files/Filer/publications/Torture_terror/Torture_TerrorNewsletter13_May09.pdf.

35. See, e.g., Andreas E. Feldmann & Majju Perälä, *Reassessing the Causes of Nongovernmental Terrorism in Latin America*, 46 LATIN AM. POL. & SOC'Y 101 (2004) (suggesting that terrorist attacks are more likely in regions and areas that restrict or do not protect human rights and where rule of law is weak or unstable).

36. Beth Elise Whitaker, *Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World*, 28 THIRD WORLD Q. 1017 (2007) (conducting an empirical study on over forty states, focusing on Third World countries, and identifying the level of debate on counterterrorism legislation in those states).

37. Bianchi, *supra* note 24, at 491.

B. Norm Diffusion in International Relations Theory

There has been a substantial amount of literature focusing on norm creation, evolution, and diffusion in international relations theory.³⁸ The literature discusses the various ways in which states are impacted. As “[i]nternational interdependence is at the core of the international relations discipline,”³⁹ it is no wonder that we find ourselves in an increasingly connected, globalized world.

Scholars observe that “[i]nternational [norm] diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries.”⁴⁰ The end result adopted by a given state is directly related to the actions, policy implementation, or the laws enacted and enforced by another state.⁴¹ It is often evidenced through the examination of a particular law enacted or the parliamentary debates surrounding its implementation. External evidence, such as external funding tied to a change in the law, can also prove the existence of norm diffusion.

1. Ways in Which Norms Diffuse

The literature on the various ways in which norms diffuse through different actors is expansive and well-grounded in international relations theory. In his seminal chapter in the *Handbook for International Relations*, international relations scholar Fabrizio Gilardi focuses on four modes of norm diffusion covered by the literature: coercion, competition, learning, and emulation.⁴² Coercion involves one or multiple states pressuring other

38. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479 (1990); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997).

39. Fabrizio Gilardi, *Transnational Diffusion: Norms, Ideas, and Policies*, in HANDBOOK OF INTERNATIONAL RELATIONS 453, 453 (Walter Carlsnaes et al. eds., 2013).

40. Beth A. Simmons et al., *Introduction: The Diffusion of Liberalization*, in THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY 1, 7 (Beth A. Simmons et al. eds., 2007).

41. See, e.g., David Strang & Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 ANN. REV. SOC. 265, 266 (1998) (“Diffusion refers to the spread of something within a social system. The key term here is ‘spread,’ and it should be taken . . . to denote flow or movement from a source to an adopter, paradigmatically via communication and influence. . . . [T]he term ‘practice’ . . . denote[s] the diffusing item, which might be a behavior, strategy, belief, technology, or structure. Diffusion is the most general and abstract term we have for this sort of process, embracing contagion, mimicry, social learning, organized dissemination, and other family members.”).

42. Gilardi, *supra* note 39, at 460; see also Frank Dobbin et al., *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. 449, 454 (2007) (“Coercion typically involves a change in incentives to nations, as when the World Bank conditions aid on fiscal austerity or when the United States implies that tariff reduction will put a nation in America’s good graces.”).

states into compliance with a given norm.⁴³ Through competition, “policy makers anticipate or react to the behavior of other countries in order to attract or retain economic resources.”⁴⁴ Learning implies that a state observes the results of an action in another state to better estimate the likely consequences in its own.⁴⁵ As distinguished from learning, emulation is simply “the process whereby policies diffuse because of their normative and socially constructed properties instead of their objective characteristics.”⁴⁶

The peer pressure of coercion has many different venues for norm diffusion. One key example is development assistance by both the International Monetary Fund (IMF) and the World Bank, which requires that states intending to borrow funds adhere to certain requirements, which typically involve increasing trade output while at the same time reducing expenses domestically.⁴⁷ An additional type of coercion exists for European Union membership, as a state must adhere to the entirety of the EU’s regulations, including human rights, trade, and tax regulations and treaty obligations, prior to being accepted into the Union.⁴⁸ Although the

43. Gilardi, *supra* note 39, at 461; *see also* JOHN R. HALL, *COERCION AND CONSENT: STUDIES ON THE MODERN STATE* (1994); Finnemore & Sikkink, *supra* note 38.

44. Gilardi, *supra* note 39, at 462; *see also* Philipp Genschel, *Globalization, Tax Competition, and the Welfare State*, 30 *POL. & SOC’Y* 245 (2002).

45. Gilardi, *supra* note 39, at 463–64; *see also* Helge Jörgens, *Governance by Diffusion: Implementing Global Norms Through Cross-National Imitation and Learning*, in *GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: THE CHALLENGE OF ADAPTING FORM TO FUNCTION* 246 (William M. Lafferty ed., 2004); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 *GOVERNANCE* 5 (2000).

46. Gilardi, *supra* note 39, at 466; *see also* Daniel Brinks & Michael Coppedge, *Diffusion Is No Illusion: Neighbor Emulation in the Third Wave of Democracy*, 39 *COMP. POL. STUD.* 463 (2006); Finnemore & Sikkink, *supra* note 38; Jörgens, *supra* note 45; James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 *INT’L ORG.* 943 (1998); Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935*, 28 *ADMIN. SCI. Q.* 22, 26 (1983) (“[O]rganizations conform to what is societally defined as appropriate and efficient, largely disregarding the actual impact on organizational performance.” (internal citations omitted)).

47. Gilardi, *supra* note 39, at 461 (“[I]nternational financial institutions (IFIs) such as the International Monetary Fund (IMF) and the World Bank tie their financial help to mostly neoliberal economic reforms to be enacted by the recipient governments, usually some combination of fiscal austerity and market creation.” (internal citations omitted)); *see also* Thomas J. Biersteker, *Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions*, 34 *INT’L STUD. Q.* 477 (1990); Dobbin et al., *supra* note 42 (“[T]he preferences of the U.S. government, the European Union (EU), the International Monetary Fund (IMF), and the World Bank may shape policy in countries reliant on those entities for trade, foreign direct investment, aid, grants, loans, or security.”).

48. Gilardi, *supra* note 39, at 461 (“[T]he EU makes accession conditional on wide-ranging reforms, including the national transposition of EU legislation and the restructuring of domestic political institutions and practices. If these efforts are successful, they cause policies to spread quite straightforwardly.”); *see also* Frank Schimmelfennig & Ulrich Sedelmeier, *Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe*,

adherence to all EU regulations is linked to EU treaty obligations, of which a given state was aware prior to signing the treaty, this does not make the process of compliance any less coercive.⁴⁹

In order to better explain the concept of competition, the literature relies on examples related to economic growth, focusing on tax rates and product standards.⁵⁰ For example, a lower tax rate in a state makes it more attractive to development and new businesses, which in turn stimulates economic growth.⁵¹ Because of these incentive effects, multiple states compete with each other to attract new business to their own state. Some states even lower taxes in a “tit for tat” fashion to stay competitive.⁵² However, this mode of norm diffusion is not limited to economic issues. In light of national security, the intergroup competition amongst states as a result of the Cold War resulted in the nuclear arms race, which pushed both powerful and developing states to strive to acquire nuclear weapons.⁵³ This security facet of diffusion via competition cannot be overlooked.

Diffusion via learning allows policy makers to observe actual results in another state prior to implementation in their own.⁵⁴ In fact, a state is more likely to adopt a new norm if it has already been tested.⁵⁵ However, it is important to note that even if a state observes a norm in another state, which has similar conditions to its own, the outcome is not always guaranteed to be the same, and, in fact, states often “draw the wrong lessons from observation.”⁵⁶ Merely copying and pasting legislation that

11 J. EUR. PUB. POL'Y 918 (2004).

49. See Dobbin et al., *supra* note 42, at 457 (“In empirical investigations of conditionality, it is necessary to identify the coercive actors, to show that they promote the policy in question, and to show evidence that their promotion increases the likelihood of policy adoption. Studies should be designed to demonstrate that countries subject to leverage (trade, aid, or security dependence) are more likely, *ceteris paribus*, to adopt reforms promoted by powerful actors.”).

50. Gilardi, *supra* note 39, at 462; see also GEOFFREY GARRET, PARTISAN POLITICS IN THE GLOBAL ECONOMY (1998); Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811, 825 (2006); David Vogel, *Trading up and Governing Across: Transnational Governance and Environmental Protection*, 4 J. EUR. PUB. POL'Y. 556, 561–62 (1997) (“Political jurisdictions which have developed stricter product standards often force foreign producers in nations with weaker domestic standards . . . to design products that meet those standards, since otherwise they will be denied access to its markets.”).

51. Gilardi, *supra* note 39, at 462.

52. *Id.*

53. See, e.g., William C. Potter, *The Diffusion of Nuclear Weapons*, in THE DIFFUSION OF MILITARY TECHNOLOGY AND IDEAS 146 (Emily O. Goldman & Leslie C. Eliason eds., 2003).

54. Gilardi, *supra* note 39, at 463–66; see also COVADONGA MESEGUER, LEARNING, POLICY MAKING, AND MARKET REFORMS (2009); Elkins et al., *supra* note 49, at 831–33; Dobbin et al., *supra* note 42, at 460 (“International policy diffusion can therefore occur when policy makers update their beliefs about what will work in their country on the basis of other countries’ experiences.”).

55. Gilardi, *supra* note 39, at 466 (“[E]mpirical evidence tends to support the idea that policy makers are more likely to adopt a policy if it was successful elsewhere, which suggests that they learn from the experience of others.”).

56. Dobbin et al., *supra* note 42, at 463.

works in State A will not necessarily have the same effect in State B, in which case true learning has not occurred. This may, however, be emulation.

Emulation is not centered on the consequences of an action like the other modes of diffusion. Rather, it is centered on the “logic of appropriateness,” which is explained by the social construct aspect of emulation.⁵⁷ Frank Dobbin and others refer to emulation as social constructivism, relying on the “social acceptance” of a policy. This is merely another name for emulation in the literature, whereby “leading countries serve as exemplars.”⁵⁸ Once a norm has become so widely practiced, it is often perceived to be the only appropriate avenue of action.⁵⁹

2. *Types of Norms Diffused*

As evidenced in the literature, norm diffusion is typically viewed as a process by which “good” norms are promulgated.⁶⁰ For example, international humanitarian law and the tenets of the Red Cross spread through norm diffusion so as to protect the wounded, medical personnel, and the civilian population during armed conflict.⁶¹ Women’s suffrage is now virtually universal.⁶² The use of election monitors has become a norm that has taken shape over the past sixty years in an attempt to show the world that a state is pro-democracy.⁶³ These norms represent the quintessential norm to be spread — one that protects or promotes human rights or human dignity.

57. Gilardi, *supra* note 39, at 466; *see also* Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT’L ORG. 801 (2005); Tolbert & Zucker, *supra* note 46, at 26.

58. Dobbin et al., *supra* note 42, at 452.

59. Gilardi, *supra* note 39, at 467 (“[I]f this process is strong enough, norms may become so deeply accepted that they end up being taken for granted as the only appropriate type of behavior. This is the ‘internalization stage.’”); *see also* Hiro Katsumata, *Mimetic Adoption and Norm Diffusion: Western Security Cooperation in Southeast Asia?*, 37 REV. INT’L STUD. 557 (2011); Finnemore & Sikkink, *supra* note 38 (discussing the phenomenon of “norm cascade”).

60. *See, e.g.*, Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1 (2001); Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 562 (2000) (discussing the “protection of children” as a basic norm).

61. Finnemore & Sikkink, *supra* note 38, at 897.

62. *Id.*; *see also* Francisco O. Ramirez et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890–1990*, 62 AM. SOC. REV. 735 (1997).

63. *See, e.g.*, Thomas Carothers, *The Observers Observed: The Rise of Election Monitoring*, 8 J. DEMOCRACY 17 (1997); Susan D. Hyde, *Catch Us if You Can: Election Monitoring and International Norm Diffusion*, 55 AM. J. POL. SCI. 356 (2011); Judith Kelley, *Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring*, 62 INT’L ORG. 221 (2008); Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20 (2001); Arturo Santa-Cruz, *Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Election Monitoring*, 59 INT’L ORG. 663 (2005).

Outside the scope of human rights, the former arms race has taken a modern turn towards disarmament through treaties and conventions restricting the types of arms available. Small arms control⁶⁴ and the banning of landmines,⁶⁵ in particular, are two such security norms that stand out as being separate from a discussion of human rights but are still viewed as “good” norms that spread.

The literature on norm diffusion, until recently, has focused only on such positive norms. As will be discussed below,⁶⁶ the idea that negative norms can be diffused in the same way has yet to be fully explored.

3. Forums for Norm Diffusion

States as norm diffusers require a way to diffuse a norm, and there are a variety of forums where this can occur.⁶⁷ Policy can be diffused via international organizations, such as the United Nations, or other non-governmental organizations (NGOs) and actors.⁶⁸ The Bretton Woods institutions are an example of how an international organization (IO) might spread and diffuse norms.⁶⁹ Oftentimes, NGOs have great influence on decision makers within a state, through various campaigns or civic engagement.⁷⁰

Although the United Nations was not specifically designed with norm diffusion in mind, it does have the “advantage of resources and leverage over weak or developing states [that international organizations, like the United Nations,] seek to convert to their normative convictions.”⁷¹ Returning to the example of small arms, the creation by the United

64. See DENISE GARCIA, SMALL ARMS AND SECURITY: NEW EMERGING INTERNATIONAL NORMS 45–46 (2006).

65. TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES (Maxwell A. Cameron et al. eds., 1998); Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561 (2003).

66. See *infra* Part I.D.

67. See Finnemore & Sikkink, *supra* note 38, at 897; see also Liesbet Hooghe, *Several Roads Lead to International Norms, but Few Via International Socialization: A Case Study of the European Commission*, 59 INT'L ORG. 861 (2005).

68. See, e.g., Simmons et al., *supra* note 40; David H. Bearce & Stacy Bondanella, *Intergovernmental Organizations, Socialization, and Member-State Interest Convergence*, 61 INT'L ORG. 703 (2007); Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993); Katharina Fuglister, *Where Does Learning Take Place? The Role of Intergovernmental Cooperation in Policy Diffusion*, 51 EUR. J. POL. RES. 316 (2012).

69. See, e.g., SUSAN PARK & ANTJE VETTERLEIN, OWNING DEVELOPMENT: CREATING POLICY NORMS IN THE IMF AND THE WORLD BANK 287 (2010); Biersteker, *supra* note 47.

70. See, e.g., Strang & Soule, *supra* note 41, at 272 (“In social movements, experts cannot be distinguished so easily from adopters, as activists move seamlessly across the two roles. But it is clear that strategies and tactics are often imported into local settings.”).

71. Finnemore & Sikkink, *supra* note 38, at 900.

Nations of a Panel of Experts on Small Arms and a subsequent conference on illegal trafficking in arms actually spurred states to action.⁷² This promoted and developed the norm of small arms control. The idea, therefore, that a norm diffuser could be a group of states acting collectively, as the United Nations does, is feasible.

When discussing the role that the United Nations plays in diffusing norms related to counterterrorism, the specific role of the P5 and the Security Council must be examined in order to appreciate the magnitude of their power and influence.

C. Role of the P5 and Security Council in Norm Diffusion

The scope of literature is extremely large and varied when dealing with issues of national security, counterterrorism, and human rights, as this became a “hot topic” issue post-9/11. While useful for their summary of these issues, prior articles often focus on a broad, universal study, examine in depth a single state, or are confined to certain geographic or cultural areas (i.e., former Commonwealth states, EU states, etc.).⁷³ None of these studies investigates the true power core of the United Nations — the Permanent Five Members of the Security Council. The P5 present an opportunity for an interesting case study of norm diffusion since their actions arguably have immense influence on other states’ actions. This Commentary intends to show that this is particularly true in the area of counterterrorism laws in relation to human rights protection.

1. The P5 and Security Council Are Norm Diffusers

It is indisputable that the Security Council wields an enormous amount of power both within the UN system — mainly due to the Council’s mandate to maintain international peace and security and its authority to pass binding Chapter VI resolutions⁷⁴ — and in everyday international relations. The individual P5 states hold a significant amount of political power in their capacity on the Council. The policy decisions made by the P5, both as a collective unit in the Security Council and individually as a part of their respective national security agendas, have impacted the international community.

In order to understand how and why the P5 have such an impact outside the Council, it is important to understand international relations

72. GARCIA, *supra* note 64, at 45–46.

73. See Kent Roach, *Sources and Trends in Post 9-11 Anti-Terrorism Laws*, in SECURITY AND HUMAN RIGHTS 227 (Benjamin J. Goold & Liora Lazarus eds., 2007) [hereinafter Roach, *Sources and Trends*]; Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); Kim Lane Scheppele, *Other People’s Patriot Acts: Europe’s Response to September 11*, 50 LOY. L. REV. 89 (2004).

74. U.N. Charter art. 39.

theory. The “reference group approach” theorizes the reason why states mimic other states’ behavior.⁷⁵ A reference group is a group of “states that set and enforce standards of behaviour for other states, or are accepted by the political elites of other states as an appropriate source of information for making judgments about the legitimacy and adequacy of their actions.”⁷⁶ The P5 is the ultimate example of a reference group. Reference groups are, in fact, a forum for emulation. This Commentary argues that other states look to the P5 as a reference group to see what the P5 states are doing, both in and out of the Council, and to emulate their behavior.

“Thematic Issues of Peace and Security” (TIPS) resolutions are evidence of the Council’s role itself as a norm diffuser.⁷⁷ TIPS resolutions are non-coercive resolutions that apply to all states and are non-geographic and non-situation specific.⁷⁸ These resolutions address a broad range of issues, including women’s and children’s rights, child soldiers, disarmament, and terrorism.⁷⁹ Although these resolutions are non-coercive, the fact that states often look to them as a guide for behavior is evidence that the P5, through the work of the Council, are key norm diffusers.⁸⁰

2. *Types of Norms Diffused by the P5 and the Council*

In general, the P5 and the Council are thought to be promoters of “good” norms, just like the United Nations itself and other IOs.⁸¹ One of the Council’s goals and missions is to “spread, inculcate, and enforce global values and norms,” but this often depends on the Council’s capacity to persuade and effect change within states.⁸² In the Council, there is an interesting power dynamic between the P5 and the rest of the Council, with the P5 influencing the resolutions that are passed, which norms spread, and which norms lie dormant.⁸³

75. See Mariya Y. Omelicheva, *Reference Group Perspective on State Behaviour: A Case Study of Estonia’s Counterterrorism Policies*, 61 EUR.-ASIA STUD. 483 (2009).

76. *Id.* at 486.

77. C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT’L L. & POL. 115, 138 (2007).

78. *Id.*

79. *Id.* (citing as examples S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (women, peace, and security); S.C. Res. 1261, U.N. Doc. S/RES/1261 (Aug. 30, 1999) (children in armed conflict)).

80. *Id.* at 174.

81. See THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996); MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 713 (1999); Jeffrey W. Legro, *Which Norms Matter? Revisiting the “Failure” of Internationalism*, 51 INT’L ORG. 31 (1997).

82. Barnett & Finnemore, *supra* note 81.

83. See *id.* (“[T]o overlook how state power and organizational missionaries work in tandem and the ways in which IO officials channel and shape states’ exercise of power is to disregard a fundamental feature of value diffusion.”).

Although the P5 have certainly promoted “good” norms,⁸⁴ they have also circumvented international human rights obligations.⁸⁵ Other states, mimicking this negative behavior, often view themselves as legitimized in doing so since they are merely following the power elite’s actions. This theory has previously been observed with a limited scope,⁸⁶ but this Commentary will discuss and demonstrate on a more global scale how these counterterrorism policies and subsequent restrictions of human rights are attributable to the theory of “negative” norm diffusion.

D. Negative Norm Diffusion — The Paradigm Shift

In the paradigm shift of post-9/11 counterterrorism enforcement, the norms that are spreading are ones that impact rights in a negative way, i.e., restricting freedom of expression and assembly, denying due process rights, or normalizing the use of torture. If restriction of rights due to counterterrorism policies has indeed been diffused as a norm, the question becomes whether the restriction of rights rather than their promotion represents a shift in the global trend of norm diffusion and whether the P5 are responsible for this trend.

1. Theory of Negative Norm Diffusion

Although much has been written on the theory behind how norms are diffused,⁸⁷ it is important to note that the literature focuses mainly on positive norms such as international development⁸⁸ or decolonization.⁸⁹ There is a distinct lack of studies in the area of negative norm diffusion, generally. A study of the Challenger explosion proposed the idea of “normalization of deviance,” where those working in the space program

84. See, e.g., True-Frost, *supra* note 77, at 146–68 (evaluating the protection of women and human security issues).

85. See *infra* Part III.A. (discussing P5 state practice).

86. See, e.g., Roach, *Sources and Trends*, *supra* note 73, at 227 (“It is possible to focus on only a few sources [of antiterrorism laws], in part because there has been a faddish aspect to post 9/11 antiterrorism laws, with a number of countries following trends established by a small number of influential international and domestic instruments. In some instances, the directions set by influential sources of anti-terrorism law already seem dated even though it has been only five years since the new wave of anti-terrorism laws was launched.”); Kent Roach, *The Post-9/11 Migration of Britain’s Terrorism Act 2000*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 374 (Sujit Choudhry ed., 2006) [hereinafter Roach, *The Post-9/11 Migration*].

87. See, e.g., Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT’L ORG. 239 (2004); Finnemore & Sikkink, *supra* note 38; Gilardi, *supra* note 39.

88. See, e.g., Susan Park, *Norm Diffusion Within International Organizations: A Case Study of the World Bank*, 8 J. INT’L REL. & DEV. 111 (2005).

89. Barnett & Finnemore, *supra* note 81, at 713 (“The UN Charter announced an intent to universalize sovereignty as a constitutive principle of the society of states at a time when over half the globe was under some kind of colonial rule . . .”).

began to accept certain deviations as standard practice.⁹⁰ Over time, the deviation becomes the norm and not the exception.⁹¹

Applying a similar theory, scholars have recently explored the theory of norm regression in several other areas of law, including counterterrorism and human rights.⁹² It is possible for norms to disappear since the premise of their existence is that states internalize and promulgate a given norm. Once a state no longer views the norm as binding, priorities shift, and it may violate the norm in question.⁹³ However, under this theory, norms still remain valid regardless of whether or not there is compliance.⁹⁴ Nonetheless, a violation can trigger a “non-compliance cascade,” ultimately resulting in the loss of that norm’s prescriptive force.⁹⁵ This non-compliance cascade is, in fact, norm diffusion, with the new norm of non-compliance taking over. Yet, norm regression does not truly address the how or why a state feels compelled to prioritize security or that it can violate human rights in the name of security.

In a recent article, Andrew Guzman and Katerina Linos introduce a new theory of “human rights backsliding.”⁹⁶ This theory focuses mainly on the issues that arise from setting a minimum standard of protection in international human rights law. In doing so, states in which there is a high protection for human rights feel justified in lowering that standard to meet the new international standard.⁹⁷ As such, the state “backslides” in the protection offered.⁹⁸ Although this theory could provide an alternative

90. DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* 119–52 (1996) (highlighting several key areas in space shuttle mechanics where the expansion of the acceptable risk led to norm deviation and, as a result, the Challenger explosion); see also Barnett & Finnemore, *supra* note 81, at 721–22.

91. Barnett & Finnemore, *supra* note 81, at 721–22.

92. See, e.g., David W. Bowker, *Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody*, in *THE TORTURE DEBATE IN AMERICA* 194 (Karen J. Greenberg ed., 2006); Rosemary Foot, *Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era*, 20 *INT’L REL.* 131 (2006); Karen J. Greenberg, *Introduction: The Rule of Law Finds Its Golem: Judicial Torture Then and Now*, in *THE TORTURE DEBATE IN AMERICA*, *supra*, at 5; Ryder McKeown, *Norm Regress: US Revisionism and the Slow Death of the Torture Norm*, 23 *INT’L REL.* 5 (2009); Françoise Sironi & Raphaëlle Branche, *Torture and the Borders of Humanity*, 54 *INT’L SOC. SCI. J.* 539 (2002).

93. See Diana Panke & Ulrich Petersohn, *Why International Norms Disappear Sometimes*, 18 *EUR. J. INT’L REL.* 719, 734 (2011) (“[T]he necessary condition for the degeneration of norms is that some actors experience a mismatch between their preferences, beliefs or identities, on the one hand, and an international norm, on the other hand, and therefore develop an interest in violating a norm.”).

94. Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 *INT’L ORG.* 753, 768 (1986) (“[N]either the violation of norms, nor, in some special circumstance, even their [formal] ‘nonexistence,’ necessarily refutes their validity.”).

95. See Panke & Petersohn, *supra* note 93.

96. Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 *CALIF. L. REV.* 603 (2014).

97. *Id.* at 608 (“[J]ust as international norms can lead to the expansion of rights in low-performing countries, a relatively low international standard can arm opponents of the expansion with a neutral, external benchmark and strengthen the persuasiveness of their arguments.”).

98. *Id.* at 603 (“Norms capable of generating improved behavior in poorly performing states

argument as to why human rights protection has decreased since 9/11, there is no indication that an international minimum standard exists for the protection of human rights while countering terrorism. To this point, Kim Lane Scheppele, in her article exploring whether there is an international standardization of counterterrorism law and policy, makes the argument that since the “new global security mandates are not truly coordinated in the way that they deal with terrorism, the international standardization of national security law has so far failed to produce the seamless web of legal interdiction that the Security Council aimed to achieve.”⁹⁹

Benedikt Goderis and Mila Versteeg demonstrate empirically in their recent article, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, that there has been a restriction of rights in the name of security.¹⁰⁰ Those states with strong judicial review experienced the phenomenon less acutely than other states.¹⁰¹ Through their study of 150 states, Goderis and Versteeg provide evidentiary proof that there has been a decline in rights protection since 9/11, but they do not spend much time discussing or comparing the laws of different states to identify similarities.

European scholars Regina Heller, Martin Kahl, and Daniela Pisoui theorize that the more that states gravitate toward a “bad norm” in their fight against terrorism, the more the practice is allowed to continue and the more the practice becomes institutionalized.¹⁰² Permitting a practice to continue in one state makes it more likely that another state adopts the norm through the mode of learning. And in turn, the more states that adopt this norm, the more likely it is to become diffused internationally through emulation or learning.

sometimes also exert a downward pull on high-performing states. This downward pull leads to what we term ‘human rights backsliding’ — a tendency for high-performing states to weaken their domestic human rights regimes relative to prior behavior or relative to what they would otherwise have done.”).

99. Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. & POL'Y 437, 452 (2010).

100. Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, 41 J. LEGAL STUD. 131, 131 (2012) (“This paper empirically investigates the effect of the post-9/11 terror threat on human rights . . . [and] find[s] strong evidence of a systematic increase in rights violations in the United States and its ally countries after 9/11.”).

101. *Id.* (“When testing the importance of checks and balances, we find that this increase is significantly smaller in countries with independent judicial review (countermajoritarian checks) . . .”).

102. Regina Heller et al., *The ‘Dark Side’ of Normative Argumentation – The Case of Counterterrorism Policy*, 1 GLOBAL CONSTITUTIONALISM 278, 282 (2012) (“In the long run, altering normative expectations may set in motion a negative spiral of normative change, a setback with respect to the international human rights regime.”).

2. *Negative Norm Diffusion, Counterterrorism Measures, and Human Rights*

Although Martha Finnemore and Kathryn Sikkink note that “there are no bad norms from the vantage point of those who promote the norm,”¹⁰³ the restriction of rights can be viewed as an objectively “bad” norm — e.g., a government coup where democratic elections are ignored, lack of religious freedom, restriction of the press — since it would contradict the very purpose of the United Nations and the subsequent treaty bodies protecting human rights.¹⁰⁴

This question of human rights norm erosion through counterterrorism norm diffusion, has not, until recently, been explored. Yet, counterterrorism measures can and do bring about the norm erosion of civil and political rights.¹⁰⁵ In order to validate a state’s decisions, it is necessary to examine whether there is a recurring justification for acts that infringe upon rights. If that justification is terrorism prevention, over time these restrictions of rights become more and more legitimate. As they are legitimized, other states begin to use these actions as justifications for their own actions, learning and emulating behavior.

Heller and her co-authors primarily focus on the United States’ actions and its violations of human rights for the sake of security.¹⁰⁶ There is brief mention of another P5 member, Russia, but not to the same repetitive consistency as the United States.¹⁰⁷ This theoretical approach may place too much emphasis upon one state’s actions in the diffusion of a negative norm.

In Kent Roach’s book, *The 9/11 Effect: Comparative Counter-Terrorism*, he examines the responses to 9/11 by the United States, the United Kingdom, Australia, and Canada to those of Egypt, Syria, Israel, Singapore, and Indonesia.¹⁰⁸ He also focuses on the actions of the UN Security Council and the United Nations, as a whole.¹⁰⁹ Although his book is a useful contribution to the literature on the subject of comparative

103. Finnemore & Sikkink, *supra* note 38, at 892.

104. See U.N. Charter pmb. (“We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . have resolved to combine our efforts to accomplish these aims.”).

105. Heller et al., *supra* note 102; see also Goderis & Versteeg, *supra* note 100 (proving empirically, before other scholars, that there has been a restriction of rights in favor of security).

106. See, e.g., Heller et al., *supra* note 102, at 287–88, 294–97, 298–99 (discussing, *inter alia*, the Patriot Act justification, Guantanamo, Abu Ghraib, the Torture Memos, and the CIA Terrorist Surveillance Program).

107. See, e.g., *id.* at 279, 288 (highlighting that in Russia the “right to security” is often framed as the “right to life”).

108. KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* (2011) (exploring these states and their practices throughout the book, with specific chapters or parts of chapters devoted to each state).

109. *Id.* at 21–76 (focusing in Chapter 2 primarily on the UN response to terrorism since 9/11).

counterterrorism and human rights, it falls short of providing a global view. For example, he finds that Singapore's United Nations (Anti-Terrorism Measures) Regulations,¹¹⁰ Indonesia's Draft Law Concerning the Eradication of Terrorism,¹¹¹ and Australia's Anti-Terrorism Act [No. 2] 2005¹¹² all draw inspiration from the United Kingdom.¹¹³ In a separate publication, but in the same vein, Roach discusses the further exportation of the U.K. Terrorism Act 2000.¹¹⁴ While such studies are useful to provide evidence of the norm diffusion of counterterrorism laws and human rights restrictions, his works do not account for the French, Russian, and Chinese role in post-9/11 counterterrorism policies.

In 2003, Human Rights Watch (HRW) issued a working paper on a comparative study of counterterrorism measures and human rights in ten different states, which included the P5 minus France. Its study yields findings similar to both Heller et al.'s and Roach's studies, and HRW highlights the United States' support for various states' policies and laws. For example, the counterterrorism efforts in Georgia were supported by the United States, including by stationing sixty U.S. military personnel in the country to train the local security forces.¹¹⁵ The report, particularly related to Georgia, focuses primarily on the United States' influence on counterterrorism. The report fails to mention or make the link, however, that in Georgia's next-door neighbor, Russia, suspected terrorists are known to "disappear,"¹¹⁶ suggesting that human rights-compromising influences may not be limited solely to the United States.

Although the United States and the United Kingdom clearly act as norm diffusers, a fuller account of P5 practice must be assessed in order to fully appreciate their roles, especially since all five states enabled the

110. United Nations (Anti-Terrorism Measures) Regulations, G.N. No. S 561/2001 (Jan. 31, 2003) (Sing.).

111. See ROACH, *supra* note 108, at 146 (describing the draft bill and its later withdrawal).

112. *Anti-Terrorism Act (No. 2) 2005* (Cth) (Austl.).

113. ROACH, *supra* note 108, at 137 ("In 2002, [Singapore's] regulation was replaced by legislation that contained a definition of terrorist activity based in part on the United Kingdom's Terrorism Act, 2000, and the [Internal Security Act]."); *id.* at 146–47 (noting that the Indonesian draft law's "broad definition of terrorism, like many post-9/11 antiterrorism laws, was influenced by the United Kingdom's Terrorism Act, 2000, which similarly defined terrorism to include all forms of politically (and religiously) motivated property damage and to include threats of actions"); *id.* at 339 ("Australian federal law did not authorize either preventive detention or control orders for terrorist suspects until the passage of the Anti-Terrorism Bill (No. 2) in late 2005. These amendments were a response to the London bombings of July 2005 . . ."); see also ANDREW LYNCH & GEORGE WILLIAMS, WHAT PRICE SECURITY?: TAKING STOCK OF AUSTRALIA'S ANTI-TERROR LAWS 55–56 (2006).

114. Roach, *The Post-9/11 Migration*, *supra* note 86 (discussing the diffusion of the U.K. law to both Hong Kong and South Africa).

115. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM, *supra* note 5, at 13–14.

116. *Id.* at 18–19; see also HUMAN RIGHTS WATCH, WORSE THAN A WAR: "DISAPPEARANCES" IN CHECHNYA — A CRIME AGAINST HUMANITY 7 (2005), available at <http://www.hrw.org/legacy/backgrounder/eca/chechnya0305/chechnya0305.pdf>.

passage of resolutions that can and are used to justify the restriction of human rights in the name of security.

The power of coercion in norm diffusion is a strong factor that has yet to be properly examined globally. Although Roach highlights the binding nature of UNSCR 1373, Heller et al. fail to address this facet of norm diffusion properly in their theory. Therefore, the coercive effects of the Security Council's actions must be explored in greater depth and detail to appreciate how there has been a shift in the type of norms diffused in this area.

Although Heller and her co-authors present a potential theoretical framework for the theory of negative norm diffusion, relevant global data is needed to fully support their theory. The only way in which to determine whether there has been norm erosion or diffusion is through empirical research, something they themselves admit.¹¹⁷ Their article and the other comparative works in the area of counterterrorism and human rights are merely starting points from which to frame the empirical research on negative norm diffusion.

II. EMPIRICAL RESEARCH FRAMEWORK: FINDING EVIDENCE OF NEGATIVE NORM DIFFUSION

The basis for this research framework is to look at counterterrorism laws and their implementation on a global scale in order to determine whether there is sufficient evidence to constitute a global trend toward the restriction of human rights in the name of security. As mentioned previously, case studies on particular areas and regions have been completed, but these never assert that the root of the problem lies with the P5 states.

Despite the fact that, for many years during the Cold War, action by the Security Council was essentially blocked, the Council in the past twenty years has been much more active, and members have been willing to work together on various issues.¹¹⁸ During the years leading up to the attacks of 9/11, the Council took steps to combat the global spread of terrorism, with a particular focus on Osama bin Laden, Al Qaeda, the Taliban, and the financing of terrorism.¹¹⁹ As this Commentary discusses, further

117. Heller et al., *supra* note 102, at 283 ("Whether processes of norm contestation lead to the erosion or strengthening of a given norm is an empirical question and cannot be decided on purely conceptual grounds." (emphasis omitted)).

118. *See, e.g.*, True-Frost, *supra* note 77, at 191 (noting that the number of TIPS resolutions has increased exponentially in the years following the end of the Cold War).

119. *See* S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (concerning Afghanistan); S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (condemning terrorism and requesting that states implement anti-terrorism conventions); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (demanding that Taliban turn over Osama bin Laden and establishing sanctions list).

measures were taken again after 9/11 by the Council, asserting its role in maintaining international peace and security.

Other than the P5, the remaining seats of the Council are filled according to region and are elected every two years.¹²⁰ This is important to note since the only consistent members of the Council since UNSCR 1373 was passed in 2001 to present are the P5. As such, the influence of the P5 within the Council itself is self-evident.

The role of the P5 will be examined in relation to their drafting influence on UNSCR 1373 and in the promotion of their own domestic legislation. This will demonstrate that, for the P5, the restriction of rights in favor of security was the only effective means to act concerning the terrorist threat and, given their status, it was within their power to control and influence global policy.

Using the UN Office for Drug and Crime Terrorism Legislation Database, this Commentary conducts a high-level overview of counterterrorism legislation in order to determine how much of an influence the P5 have had on how other states, with varying human rights records, have acted in their counterterrorism laws, policies, and practices. The overview presented focuses on states where there have been major rights abuses that can be linked to one of the P5 states, whether by direct or indirect influence. It explores where states' counterterrorism policies look similar, if not identical, to those of the P5 and then observes whether these states have violated human rights obligations in a similar way.

The study then considers what states say they are doing, since it is often difficult to understand why a state acts a certain way. For example, the Indian government "actually refer[ed] to the [recently enacted] American and British [antiterrorism] statutes" in drafting and swiftly passing its own counterterrorism law, the Prevention of Terrorism Ordinance, in October 2001.¹²¹ In 2002, "Eritrea's Ambassador to the United States justified his government's arrest of journalists by claiming that detention without charge was consistent with the practices of democratic countries," including the United States.¹²² Such examples provide evidence that a norm is diffusing. The various modes of diffusion are explored in relation to these states' behavior to fully appreciate how the human rights norm has regressed.

This study also explores the counterterrorism measures of states that joined the United Nations after UNSCR 1373 was passed. In doing so, a

120. U.N. Charter art. 23, para. 2.

121. MARK SIDEL, MORE SECURE, LESS FREE?: ANTITERRORISM POLICY & CIVIL LIBERTIES AFTER SEPTEMBER 11, at 163 (2004).

122. *Opportunism in the Face of Tragedy: Repression in the Name of Anti-Terrorism*, HUM. RTS. WATCH, <http://www.hrw.org/legacy/campaigns/september11/opportunismwatch.htm> (last visited Jan. 12, 2015).

truer picture of norm diffusion may become available. Since those states that are already a part of the United Nations are automatically bound by Security Council resolutions, the true test is whether or not those states that are not a part of the United Nations or became member states after UNSCR 1373 still find themselves swayed by the norm that counterterrorism may come at the expense of human rights. In doing so, the intent is to demonstrate that restricting rights in favor of security has become the new standard operating procedure due to the influence of the P5.

In sum, the research framework consists of examining P5 state behavior, both individually and as the Security Council, and considering the extent to which P5 behavior has influenced both UN member and non-member states.

III. FINDINGS: NEGATIVE NORM DIFFUSION, COUNTERTERRORISM, & HUMAN RIGHTS

A. The P5 as Individual Norm Entrepreneurs

While a collective unit in the Security Council, these five states are also individual states, each with unique security concerns. Counterterrorism measures within each state vary depending on the state's own definition of terrorism. Regardless of the definition, all five have statutes on the books that allow for them to take action to suppress the threat and spread of terrorism. Through the application of these laws, the P5 have often opted in favor of security over human rights. The following rights — freedom of speech, freedom from arbitrary detention, and the prohibition of torture — have been deemed less important, argued around, or ignored by the P5 in both the construction and application of counterterrorism laws.¹²³

1. Freedom of Speech

a. United States

Freedom of speech is at the foundation of the American Constitution, memorialized in its First Amendment.¹²⁴ Protected speech takes various forms, from wearing armbands¹²⁵ to hate speech.¹²⁶ The latter allowance is

123. The examples listed are not meant to be exhaustive of either the counterterrorism laws in force or the instances of human rights violations. They are used to show examples of how each of the P5 states has prioritized security over human rights and, thus, influenced other states.

124. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

125. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

where the American view on this freedom becomes exceptional and is much less restrictive than elsewhere in the world. In fact, the United States filed a reservation to Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR),¹²⁷ stating that it would not restrict speech that was guaranteed by its constitution.¹²⁸

However, it appears that when terrorism and national security are involved, the rules governing freedom of speech change. In *Holder v. Humanitarian Law Project*,¹²⁹ the Supreme Court held that providing “expert advice” to an organization deemed by the United States to be a terrorist organization was prohibited by the USA PATRIOT Act of 2001¹³⁰ and that this restriction was not in conflict with the First Amendment. Under the Act, such advice is considered “material support.” The decision has come under fire from many, including former President Jimmy Carter, whose non-governmental organization, the Carter Center, works to promote peace.¹³¹ Based on the U.S. government’s arguments, the Carter Center’s “election monitoring team could [have been] prosecuted for . . . advising Hezbollah during the 2009 Lebanese elections.”¹³² In contrast, it is completely legal to sell to states that support terrorist groups items such as “[c]igarettes, popcorn and chewing gum.”¹³³

In application, the ruling in *Holder v. Humanitarian Law Project* has led to the issuance of at least eight search warrants by the FBI in order to search for any activities linked to the “material support” of terrorism, in particular to Hezbollah, the Popular Front for the Liberation of Palestine,

126. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

127. ICCPR, *supra* note 7, art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

128. Human Rights Comm., Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto: Note by the Secretary-General, 40, U.N. Doc. CCPR/C/2/Rev.4 (Aug. 24, 1994).

129. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

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

131. Press Release, Am. Civil Liberties Union, Supreme Court Rules “Material Support” Law Can Stand (June 21, 2010), available at <http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand> (attributing to former President Carter the following statement: “We are disappointed that the Supreme Court has upheld a law that inhibits the work of human rights and conflict resolution groups. The ‘material support law’ . . . actually threatens our work and the work of many other peacemaking organizations that must interact directly with groups that have engaged in violence. The vague language of the law leaves us wondering if we will be prosecuted for our work to promote peace and freedom.” (internal quotation marks omitted)).

132. David Cole, Op-Ed., *Chewing Gum for Terrorists*, INT’L N.Y. TIMES, Jan. 2, 2011, http://www.nytimes.com/2011/01/03/opinion/03cole.html?_r=2.

133. *Id.* (“[T]he Treasury Department, under a provision ostensibly intended for humanitarian aid, was secretly granting licenses to American businesses to sell billions of dollars[] worth of food and goods to the very countries we have blockaded for their support of terrorism.”); see also Jo Becker, U.S. *Approved Business with Blacklisted Nations*, INT’L N.Y. TIMES, Dec. 23, 2010, <http://www.nytimes.com/2010/12/24/world/24sanctions.html?pagewanted=all>.

and the Revolutionary Armed Forces of Colombia.¹³⁴ Homes of members of the Anti-War Committee who had protested the war in Iraq and Afghanistan and military aid going to Colombia were searched.¹³⁵ The Supreme Court ruling opens the door for future, similar investigations, and it threatens the rights of those who are vocal about beliefs that differ from governmental policies. As will be discussed further, similar behavior is seen in more authoritative states. In the name of fighting terrorism, U.S. constitutional rights to free speech have been re-prioritized for the sake of security.

b. United Kingdom

The United Kingdom's Counter-Terrorism Act 2008,¹³⁶ amends the definition of terrorism in the Terrorism Act 2000 as well as other counterterrorism legislation and regulations,¹³⁷ referring to terrorism as violent or threat of violent acts with the goal of "advancing a political, religious[,] [racial] or ideological cause."¹³⁸ This law, in contrast with those of other Commonwealth countries,¹³⁹ does not include a caveat that such speech must be intended to cause death or physical harm and is, therefore, a blanket prohibition. The lack of precision in the United Kingdom's definition creates an opportunity for the U.K. government to abuse its provisions to restrict freedom of speech.

Although the Counter-Terrorism Act 2008 amended the majority of the counterterrorism legislation in United Kingdom, the Terrorist Act 2006 has remained. This act was passed, in part, because of the 2005 London bombings, and it creates new offenses for terrorism.¹⁴⁰ In the judgment of the UN Human Rights Committee, Section 1, the offense of "encouragement of terrorism," is problematic because it may be triggered even though the individual "did not intend members of the public to be

134. Colin Moynihan, *F.B.I. Searches Antiwar Activists' Homes*, N.Y. TIMES, Sept. 24, 2010, <http://www.nytimes.com/2010/09/25/us/politics/25search.html>.

135. *Id.*

136. Counter-Terrorism Act 2008, c. 28 (U.K.).

137. *Id.* § 75(2); *see also* Terrorism Act 2000, c. 11 (U.K.); Anti-Terrorism, Crime, and Security Act 2001, c. 24 (U.K.); Criminal Justice Act 2003, c. 44 (U.K.); The Terrorism (United Nations Measures) Order 2006, S.I. 2006/2657 (U.K.); Anti-terrorism (Financial and Other Measures)(Overseas Territories) Order 2002, S.I. 2002/1822 (U.K.); Terrorism (United Nations Measures)(Overseas Territories) Order 2001, S.I. 2001/3366 (U.K.); Terrorism (United Nations Measures)(Isle of Man) Order 2001, S.I. 2001/3364 (U.K.); Terrorism (United Nations Measures)(Channel Islands) Order 2001, S.I. 2001/3363 (U.K.).

138. Counter-Terrorism Act 2008 § 75(1) (adding "racial" to existing list of causes).

139. *See, e.g., Security Legislation Amendment (Terrorism) Act 2002* (Cth) (Austl.); Criminal Code, R.S.C. 1985, c. C-46, art. 83.01(1)(b)(ii) (Can.) Note, however, that this provision of the Canadian legislation includes an option that the act be intended to cause serious disruption to the public or private essential services, facilities, or systems, even if not intended to cause death or physical harm.

140. Terrorist Act 2006, c. 11 (U.K.).

directly or indirectly encouraged by [the] statement to commit acts of terrorism, but where [the] statement was understood by some members of the public as encouragement to commit such acts.”¹⁴¹ The Committee found that this could amount to an interference with freedom of expression and recommended that it be amended so as to not interfere with this right.¹⁴² Despite this concern, the statute, including the “encouragement of terrorism” provision, remains in place today.

Most recently, the U.K. High Court held that the detention of David Miranda at Heathrow Airport and the seizure of computer material was “an indirect interference with press freedom” but could be permitted “by legitimate and ‘very pressing’ interests of national security” under Schedule 7 of the Terrorism Act 2000.¹⁴³ The court of appeal has permitted an appeal,¹⁴⁴ in part because the U.K. Supreme Court is allowing a case on a similar Schedule 7 issue to go forward.¹⁴⁵ Despite the recent interventions by the U.K. courts, the application of the law itself is evidence that the prioritization of security over human rights continues today.

c. France

France, in fact, has a long history of restricting freedom of speech in the name of security. The Freedom of the Press Act of 1881 criminalizes the incitement of terrorism and the “glorification”¹⁴⁶ of terrorism.¹⁴⁷ The penalty for such a crime is five years’ imprisonment and a fine.¹⁴⁸ Incitement can be committed via “speeches, shouts, or threats expressed in public places or meetings,”¹⁴⁹ but also by written word or drawings,¹⁵⁰

141. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: United Kingdom of Great Britain and Northern Ireland, ¶ 26, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008).

142. *Id.*

143. *Miranda v. Sec’y of State for the Home Dep’t* [2014] EWHC (Admin) 255, [73] (Eng.); Alan Travis et al., *David Miranda Detention at Heathrow Airport Was Lawful, High Court Rules*, GUARDIAN, Feb. 19, 2014, <http://www.theguardian.com/world/2014/feb/19/david-miranda-detention-lawful-court-glenn-greenwald>.

144. Owen Bowcott, *David Miranda Allowed to Appeal Ruling on Heathrow Detention*, GUARDIAN, May 15, 2014, <http://www.theguardian.com/world/2014/may/15/david-miranda-appeal-high-court-ruling-detention-heathrow>.

145. *See Sylvie Beghal v. Dir. of Pub. Prosecutions* [2013] EWHC (Admin) 2573, [7] (dealing with a similar detention at Heathrow airport under Schedule 7 of a woman whose husband was in French prison on allegations of terrorist offenses).

146. “Glorification” of terrorism is known as *l’apologie du terrorisme*.

147. Loi 637 du 29 juillet 1881 sur la liberté de la presse [Law 637 of July 29, 1881, on the Freedom of the Press] (Fr.), available at www.legifrance.gouv.fr.

148. *Id.* art. 24.

149. *Id.* art. 23 (“soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics”).

150. *Id.* (“soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l’écrit”).

which calls into question freedom of the press. With the Law on the Guidelines and Programming for the Performance of Internal Security (LOPPSI 2), enacted March 14, 2011, cyber communications now fall within the scope of laws governing the freedom of the press.¹⁵¹ This could potentially have wide implications, as the Internet is a vast, often stateless place, where it is often unclear what jurisdiction an act is committed in and which law applies.

In 2008, the European Court of Human Rights (ECtHR) examined the Freedom of the Press Act of 1881 in light of France's obligation under the European Convention of Human Rights to protect speech. In *Leroy v. France*,¹⁵² a cartoonist was convicted under the Freedom of the Press Act for inciting and glorifying terrorism by publishing a caricature of the 9/11 attacks. With the caption, "We have all dreamt of it . . . Hamas did it" underneath, the cartoon was published in a Basque newspaper on September 13, 2001. The Court held that because of where the cartoon was published, it could provoke a public reaction that could disrupt public order.¹⁵³ The Court held that France was well founded in charging and fining him, especially considering all the relevant factors. The Court also emphasized that the relatively small size of the fine was "proportionate to the legitimate aim pursued by the interference."¹⁵⁴

Empirical evidence indicates that France actually applies this law on a limited basis. It has only been applied fourteen times since 1994. Eight such instances fell between September 15 and October 18, 2001, just after the attacks of 9/11.¹⁵⁵ The wording of the law itself, though, is not without caution, and legal terms are presented vaguely and without precision. It enables other states to learn from France's legal wording and use it for their own repressive regimes, as will be discussed below.

151. Loi 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure [Law 2011-267 of March 14, 2011 on the Guidelines and Programming for the Performance of Internal Security], art. 34, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 15, 2011, p. 4582.

152. *Leroy v. France*, App. No. 36109/03, Eur. Ct. H.R. (2008), available at <http://hudoc.echr.coe.int>.

153. *Id.* ¶ 45.

154. Comm. of Experts on Terrorism [CODEXTER], Council of Eur., *Freedom of Expression and Apologie du Terrorisme*, ¶ 30, CODEXTER Doc. No. (2008) 30 (2008), available at http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2008/CODEXTER%20_2008_%2030%20E%20Freedom%20of%20expression%20and%20apologie%20du%20terrorisme.pdf.

155. Projet de Loi, Renforçant la Prévention et la Répression du Terrorisme: Etude d'Impact [Bill, Reinforcing the Prevention and Suppression of Terrorism: Impact Study [on the Bill]], 10, Apr. 2012 ("[L]e délit d'apologie d'un acte de terrorisme a été sanctionné à 14 reprises depuis [1994] . . . Sur les 14 condamnations recensées depuis 1994, il s'avère que 8 d'entre elles concernent des faits commis entre le 15 septembre et le 18 octobre 2001, soit immédiatement après les attentats commis aux Etats-Unis le 11 septembre 2001.").

d. Russia

Russia's Federal Law on Mass Media¹⁵⁶ enables authorities to restrict journalists from entering zones deemed for "counterterrorism operations."¹⁵⁷ Movement can be even further restricted as "the procedure for collection of information by journalists in the territory of a counterterrorism operation shall be defined by the head of the counterterrorism operation."¹⁵⁸ This prevents journalists from reporting on counterterrorism operations¹⁵⁹ as well as potential breaches of human rights obligations. Furthermore, the law has been applied to ban journalists from justifying or endorsing terrorists' actions¹⁶⁰ or disseminating information "containing public incitement to terrorist activity, . . . providing public justification of terrorism, or . . . [distributing] other extremist materials."¹⁶¹ Under this definition of terrorist activity, freedom of speech and the press are severely restricted.

The Federal Law on Combating Extremist Activity, passed in July 2002, introduced a range of severe sanctions for acts that the government considered to amount to "extremism." The list of acts considered to be extremist is broad. Many of these acts have been criticized for being ill defined and limiting the freedom of speech and expression.¹⁶²

156. Federal Law of the Russian Federation on Mass Media, No. 2124-1, Dec. 27, 1991, *amended* by Federal Law No. 153, July 27, 2006.

157. HUMAN RIGHTS WATCH, "AS IF THEY FELL FROM THE SKY": CONTERINSURGENCY, RIGHTS VIOLATIONS, AND RAMPANT IMPUNITY IN INGUSHETIA 29 (2008) [hereinafter HUMAN RIGHTS WATCH, "AS IF THEY FELL FROM THE SKY"], *available at* http://www.hrw.org/sites/default/files/reports/russia0608_1.pdf.

158. *Id.* at 33 (quoting Federal Law of the Russian Federation on Mass Media, *supra* note 156 (internal quotation marks omitted)).

159. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 43; *see also* HUMAN RIGHTS WATCH, "AS IF THEY FELL FROM THE SKY", *supra* note 157, at 29.

160. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 43.

161. *Id.* at 44 (citing Federal Law of the Russian Federation on Mass Media, *supra* note 156, art. 4 (internal quotation marks omitted)); *see also* HUMAN RIGHTS WATCH, AS IF THEY FELL FROM THE SKY, *supra* note 157, at 33.

162. *See* SOVA CTR. FOR INFO. & ANALYSIS, THE STRUCTURE OF RUSSIAN ANTI-EXTREMIST LEGISLATION 6–7 (2010), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201011/20101129_3_10sova_en.pdf (providing, in the appendix, examples of poorly defined extremist acts); *see also* GABRIELA ECHEVERRIA, TERRORISM, REDRESS, COUNTER-TERRORISM, AND TORTURE: INTERNATIONAL LAW IN THE FIGHT AGAINST TERRORISM 5, 39–44 (Carla Ferstman ed., 2004), *available at* <http://www.redress.org/downloads/publications/TerrorismReport.pdf>; Nabi Abdullaev, *Anti-Extremism Bill Riles Human Rights Activists*, ST. PETERSBURG TIMES, June 7, 2002, http://www.sptimes.ru/index.php?action_id=100&story_id=7348; Fred Weir, *Russian Bill Pits Free Speech Against National Security*, CHRISTIAN SCI. MONITOR, June 21, 2002, <http://www.csmonitor.com/2002/0621/p09s01-woeu.html>.

e. China

Unlike the rest of the P5, China signed but never ratified the ICCPR.¹⁶³ Thus, it is not a state party. Nevertheless, its signature requires, under international treaty law, that China not defeat the object and purpose of the treaty prior to ratification.¹⁶⁴ Though there is much debate over the object and purpose of the ICCPR,¹⁶⁵ this Commentary assumes the ICCPR's object and purpose is to protect the civil and political rights provided for therein.

In 2002, the East Turkestan Islamic Movement (ETIM) in Xinjiang was placed by the Security Council on the Al Qaeda sanctions list pursuant to UNSCR 1267, despite the fact there were no reports of significant military activity by the movement.¹⁶⁶ This "separatist organization, founded by Turkic-speaking Uighurs in China's western Xinjiang province," was allegedly "disseminating peaceful religious and cultural messages" as a front; Chinese authorities accused ETIM members of being "terrorists who had simply changed tactics."¹⁶⁷ Prior to 9/11, Xinjiang authorities contended that the region was stable and that only a small minority conducted violence in the area.¹⁶⁸ However, in a post-9/11 world, these acts were deemed acts of "international terrorism" by authorities, despite the lack of intelligence linking the group to Al Qaeda and Osama bin Laden.¹⁶⁹

Even if members of the ETIM are, in fact, legitimate terrorists with ties to Al Qaeda, many of the abuses associated with the ETIM and the Uighur population, in general, are related to freedom of religion.¹⁷⁰ If an

163. *Status of Ratification Interactive Dashboard: China*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, available at <http://indicators.ohchr.org/> (last visited Jan. 30, 2015) (China signed the ICCPR in 1998).

164. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

165. See, e.g., MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (2d ed., 2005); Human Rights Comm., Comm'n No. 50/1979, ¶ 10.2, U.N. Doc. CCPR/C/OP/1 (1985) ("[T]he terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning."); Shiyan Sun, *The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification*, 6 CHINESE J. INT'L L. 17, 18 (2007).

166. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 34.

167. *Id.*; see also HUMAN RIGHTS WATCH, NO. 17(2), DEVASTATING BLOWS: RELIGIOUS REPRESSION OF UIGHURS IN XINJIANG 16 (2005) [hereinafter HUMAN RIGHTS WATCH, DEVASTATING BLOWS], available at <http://www.hrw.org/reports/2005/china0405/china0405.pdf>.

168. HUMAN RIGHTS WATCH, DEVASTATING BLOWS, *supra* note 167.

169. *Id.* at 16–17; see also JAMES MILLWARD, EAST-WEST CTR. WASH., POLICY STUDIES 6, VIOLENT SEPARATISM IN XINJIANG: A CRITICAL ASSESSMENT (2004).

170. HUMAN RIGHTS WATCH, DEVASTATING BLOWS, *supra* note 167, at 57 ("China typically justifies the detention or defrocking of clerics as a response either to 'illegal activities' — often activities integral to the free exercise of religion — or to 'religious extremism,' a code term for terrorism.").

imam is not allowed to speak freely regarding his beliefs, then this is also, by extension, a restraint on his freedom of speech. For example, in the summer of 1999, an imam gave a public Friday prayer requesting intervention by Allah to provide jobs to those women who had been forced into prostitution.¹⁷¹ The authorities determined this to be a “one-sided[] debate [of] a hot social issue [that] fan[s] feelings of dissatisfaction,” which equates to separatism or terrorism under Chinese law.¹⁷²

Despite the fact that much of this legislation and state practice occurred prior to 9/11, China used the terrorist attacks in the United States to justify continued violations of human rights for the sake of security.¹⁷³ Furthermore, China took full advantage of 9/11 to argue for the inclusion of the ETIM on the terrorist sanction list.¹⁷⁴

2. *Arbitrary Detention*

a. United States

The United States has chosen to operate the “War on Terror”¹⁷⁵ under the war paradigm and not under the domestic, criminal law paradigm, as most states treat terrorism. Therefore, the law applicable to U.S. detention

171. *Id.*

172. *Id.*; see also Interim Provisions for Party Disciplinary Actions Against Communist Party Members and Party Organizations Involved in Violations of Political Discipline in the Struggle Opposing National Separatism and Safeguarding the Unification of the Motherland (promulgated by the Discipline Inspection Comm’n of the Xinjiang Uighur Autonomous Region Chinese Communist Party Comm., Dec. 14, 2000) art. 8, translated in HUMAN RIGHTS WATCH, DEVASTATING BLOWS, *supra* note 167, at 94 (“Persons who stick to the stand of national separatism and openly publish articles, speeches, declarations, and statements that endanger the unification of the motherland and national unity shall be expelled from the Party.”).

173. See, e.g., Comm’n on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to China*, ¶ 65, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006) [hereinafter Comm’n on Human Rights, *Rep. of the Special Rapporteur*] (“Under international human rights law, Governments can only interfere with the expression of political opinions, religious convictions, moral values or minority views when they constitute incitement to hatred or violence or a direct threat to national security or public safety in the country. A system of State surveillance of citizens with non-conformist views and with severe punishments for such “deviant behaviour”, such as long-term prison sentences for vaguely defined crimes, including endangering national security, undermining the unity of the country, subverting State power, or unlawfully supplying State secrets to individuals outside the territory, as well as subjecting them to [reeducation through labor], seems to be incompatible with the core values of a society based upon a culture of human rights and leads to intimidation, submissiveness, self-censorship and a ‘culture of fear’ . . .”).

174. HUMAN RIGHTS WATCH, DEVASTATING BLOWS, *supra* note 167, at 17.

175. See President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001) (transcript available at <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>) (“[The] war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).

practices is international humanitarian law (IHL),¹⁷⁶ which is significantly different than other states' criminal law paradigms. According to IHL concerning both international and non-international armed conflict, a party to the conflict may detain anyone deemed to have combatant status or who is directly participating in hostilities until the end of hostilities or until they no longer pose a threat.¹⁷⁷

Members of Al Qaeda who have been detained are not afforded Prisoner of War status under the Geneva Conventions, as they are not a High Contracting Party.¹⁷⁸ Furthermore, they do not fulfill the Third Geneva Convention's requirements to qualify as prisoners of war.¹⁷⁹ The George W. Bush Administration deemed these detainees "unlawful enemy combatants,"¹⁸⁰ a title that has been dropped by the Obama Administration, although the Obama Administration continued to assert the right to detain those in Guantanamo until the end of hostilities or they no longer pose a threat.¹⁸¹

176. See Marco Sassòli, *The Status of Persons Held in Guantánamo Under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96 (2004) ("[P]ersons who were arrested in Afghanistan are protected by IHL of international armed conflicts. . . . [I]here are two categories of 'protected persons': combatants, who become prisoners of war protected by the Third Geneva Convention if they fall into the power of the enemy; and civilians protected by the Fourth Geneva Convention when in enemy hands."); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789 (2004).

177. See Chatham House & Int'l Comm. of the Red Cross, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, 91 INT'L REV. RED CROSS 859, 863 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf> ("[P]arties to a conflict may capture persons deemed to pose a serious security threat and . . . such persons may be interned as long as they continue to pose a threat.").

178. See Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.").

179. *Id.* art. 4 (listing requirements that include having a set command structure, wearing a recognizable, distinct symbol, carrying arms openly, and conducting all operations according to the law of armed conflict).

180. See Memorandum from President George W. Bush to the Vice President, Secretaries of State and Defense, Attorney General, and Other Officials ¶ 2(d) (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (concluding that Taliban detainees are "unlawful combatants" and that Al Qaeda detainees are not entitled to prisoner-of-war protections); Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy ¶ (a) (July 7, 2004), available at <http://www.defense.gov/news/jul2004/d20040707review.pdf> (defining as enemy combatant "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners").

181. See Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (D.D.C. Mar. 13, 2009); BENJAMIN WITTES ET AL., BROOKINGS INST., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 16-17* (2010), available at http://www.brookings.edu/~media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122_guantanamo_wittes_chesney.pdf (describing the minor changes to detention

During the Bush Administration individuals were detained outside of Guantanamo in “black sites.”¹⁸² This practice is concerning since individuals that are detained are seemingly “off the books,” without proper records and oversight. The potential for human rights violations in such situations is high. The Obama Administration has continued operating black sites with perhaps the same frequency as its predecessor. In the “first publicly known example,” a Somali national linked to Al Qaeda as a weapons broker was secretly detained onboard a U.S. Navy ship for two months in 2011.¹⁸³ Additionally, the CIA, in conjunction with the Somali National Security Agency (Somali NSA), detains those with suspected links to al-Shabaab, a Somali militant group.¹⁸⁴ Al-Shabaab did not officially become affiliated with Al Qaeda until 2012.¹⁸⁵ Therefore, prior to this affiliation, the Somalian domestic law, rather than IHL, should have governed the detention of such individuals. Even though al-Shaabab is now a part of Al Qaeda, the CIA arguably lacks detention authority. The Authorization to Use Military Force (AUMF) only authorizes the armed forces to detain Al Qaeda or “associated forces that are engaged in hostilities against the United States or its coalition partners.”¹⁸⁶ Even if al-Shaabab is considered a part of Al Qaeda and associated forces, the CIA arguably is not a lawful combatant in the hostilities against Al Qaeda since it does not fulfill the requirements under the Third Geneva Convention.¹⁸⁷

authority introduced by the Obama Administration).

182. See OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 5, 11, 30–60 (2013), available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (describing 136 named detainees, assembled from purportedly credible sources, who “reportedly were subjected to CIA secret detention and/or extraordinary rendition operations”); *Bush Admits to CIA Secret Prisons*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/5321606.stm> (last updated Sept. 7, 2006); Joanna Berendt & Nicholas Kulish, *Polish Ex-Official Charged with Aiding C.I.A.*, INT’L N.Y. TIMES, Mar. 27, 2012, http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html?_r=0; Amnesty Int’l, “Rendition” and Secret Detention: A Global System Of Human Rights Violations: Questions and Answers, AI Index POL 30/003/2006 (Jan. 2006), available at <http://www.amnesty.org/en/library/asset/POL30/003/2006/en/db1dbfd1-d468-11dd-8743-d305bea2b2c7/pol300032006en.pdf>.

183. Ken Dilanian, *Terrorism Suspect Secretly Held for Two Months*, L.A. TIMES, July 6, 2011, <http://articles.latimes.com/2011/jul/06/nation/la-na-somali-detainee-20110706>.

184. Jeremy Scahill, *The CIA’s Secret Sites in Somalia*, NATION, July 12, 2011, available at http://www.nationinstitute.org/featuredwork/fellows/2283/the_cia's_secret_sites_in_somalia/?page=entire.

185. *Al-Shabaab Joining al Qaeda, Monitor Group Says*, CNN, <http://www.cnn.com/2012/02/09/world/africa/somalia-shabaab-qaeda/> (last updated Feb. 10, 2012) (“Somalia’s Al-Shabaab rebel movement has tightened its ties to the al Qaeda terror network, with its leader pledging loyalty to al Qaeda leader Ayman al-Zawahiri.”).

186. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (codified in scattered sections of the U.S. Code); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (accepting a materially similar definition of “enemy combatant” for purposes of the case).

187. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 177; see also Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 134

Therefore, international human rights law should apply to CIA actions, prohibiting such arbitrary detentions.¹⁸⁸

b. United Kingdom

The U.K. counterterrorism law's limits on the duration of detention without charge have been repeatedly revised. For many years, the detention limit was seven days, but was subsequently doubled to fourteen days in 2003 and twenty-eight days in 2006.¹⁸⁹ Both former Prime Ministers Tony Blair and Gordon Brown requested, unsuccessfully, extensions of this period, and one such request was for a ninety-day limit.¹⁹⁰ While the twenty-eight day limit has since been reduced to fourteen days,¹⁹¹ those suspected of terrorism can be deprived of their liberty in such a fashion that "still exceeds international standards for being promptly informed of any criminal charges."¹⁹² The applicable international standards reference the use of the word "promptly" in the ICCPR, which has been interpreted by the UN Human Rights Committee to "not exceed a few days."¹⁹³

The U.K. Prevention of Terrorism Act 2005 was enacted, in part, to respond to the House of Lords ruling in *A and others v. Secretary of State for*

(2010) ("[O]nly lawful combatants (or privileged belligerents) are permitted to participate in hostilities. The CIA is a civilian agency and not a branch of the U.S. Armed Forces. Even under a liberal reading of Article 4 from [Geneva Convention Relative to the Treatment of Prisoners of War], the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command (albeit not always a military chain of command), as a group they do not wear uniforms or otherwise distinguish themselves, nor do they carry their arms openly."); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

188. See Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶ 292(a), U.N. Doc. A/HRC/13/42, 13th Sess. (Feb. 19, 2010) [hereinafter Human Rights Council, Promotion and Protection] ("Secret detention should be explicitly prohibited, along with all other forms of unofficial detention."); Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Opinions Adopted by the Working Grp. on Arbitrary Detention, Opinion No. 29/2006 (U.S.), ¶¶ 21–22, U.N. Doc. A/HRC/4/40/Add.1 (Feb. 2, 2007) (holding that arbitrary detention was not legal).

189. Criminal Justice Act 2003, c. 44 (U.K.); Terrorism Act 2000, c. 11, sch. 8, § 23 (as amended by the Terrorism Act 2006) (U.K.); HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 66; Alan Travis, *Theresa May Allows 28-Day Limit on Detaining Terror Suspects Without Charge to Lapse*, GUARDIAN, Jan. 19, 2011, <http://www.guardian.co.uk/politics/2011/jan/19/28-day-limit-terror-suspects-lapse>.

190. Travis, *supra* note 189; HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 66.

191. Travis, *supra* note 189.

192. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 7.

193. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 179, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 27, 2008) [hereinafter Compilation of General Comments] (providing in General Comment 8 the Human Rights Committee's 1982 comments on Article 9 of ICCPR).

the Home Department,¹⁹⁴ concerning the detention without trial of the “Belmarsh 8.” Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA),¹⁹⁵ providing for the imposition of control orders over those suspected of involvement in terrorism, was found to be incompatible with the European Convention on Human Rights (ECHR) obligations.¹⁹⁶ Section 3 of the Prevention of Terrorism Act 2005 was declared incompatible with the Convention’s Article 6, which provides for the right to a fair trial, and called “an affront to justice” by a British high court judge.¹⁹⁷ In a statement issued after this ruling, the Home Office indicated its decision to continue to operate under the Act because it was in the interest of national security, effectively disregarding the human rights implications.¹⁹⁸ Later, this judgment was partially reversed in the Court of Appeal, where it was held that although the victim’s Article 5 right to liberty had been breached, there was no infringement on Article 6 rights.¹⁹⁹ Although the Home Office was “concerned about [the decision’s] effects on public safety . . . [since] control orders form an essential part of [the] fight against terrorism,”²⁰⁰ it was unsuccessful in its appeal and the House

194. *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) (appeal taken from Eng.) The “Belmarsh 8” were eight detainees at the Belmarsh prison who were held in indefinite detention without trial under the Anti-terrorism, Crime and Security Act 2001 (ATCSA 2001). *Id.*

195. Anti-terrorism, Crime and Security Act 2001, c. 24 (U.K.).

196. *A. v. United Kingdom*, App. No. 3555/05, Eur. Ct. H.R., Judgment, ¶ 172 (2009), available at <http://hudoc.echr.coe.int> (“The Court reiterates that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1 . . .”). Control orders are made by the Home Secretary and restrict the movement of an individual who is suspected of terrorism. Such restrictions include when and where they travel, with whom they speak, electronic tagging, and tracking of movements. *See id.* ¶¶ 20, 83, 84.

197. *See Re: MB* [2006] EWHC (Admin) 1000, [104] (Eng.) (“[T]he procedures under section 3 of the [Prevention of Terrorism Act 2005] relating to the supervision of the court of non-derogating control orders made by the Secretary of State are incompatible with the respondent’s right to a fair hearing under Article 6.1, and I will make a declaration of incompatibility to that effect . . .”); Vikram Dodd & Carlene Bailey, *Terror Law an Affront to Justice – Judge*, GUARDIAN, Apr. 12, 2006 (internal quotation marks omitted), <http://www.guardian.co.uk/politics/2006/apr/13/humanrights.terrorism>; Alan Travis, *Reid’s Curfew Orders on Six Terror Suspects Are Illegal, Say Judges*, GUARDIAN, Aug. 1, 2006, <http://www.guardian.co.uk/uk/2006/aug/02/terrorism.humanrights>.

198. Dodd & Bailey, *supra* note 197 (“The ruling will not limit the operation of the act . . . We will not be revoking either the control order which was the subject of this review, nor any of the other control orders currently in force on the back of this judgement. [sic] Nor will the judgment prevent the secretary of state from making control orders on suspected terrorists where he considers it necessary to do so in the interests of national security in future.” (quoting Home Office) (internal quotation marks omitted)).

199. *Sec’y of State for the Home Dep’t v. MB* [2007] UKHL 46, [2008] 1 A.C. 440 (H.L.) (appeal taken from Eng.).

200. Travis, *supra* note 197 (quoting Home Secretary John Reid) (internal quotation marks omitted).

of Lords held that eighteen-hour curfews are a deprivation of liberty.²⁰¹ The House of Lords relied heavily on ECtHR jurisprudence in its decision, taking into account the fourteen-hour standard set in *Guzzardi v. Italy*.²⁰²

The control order system disappeared with the Terrorist Prevention and Investigation Measures (TPIM) Act 2011.²⁰³ The United Kingdom replaced it with a new “lighter-touch regime” with a two-year limitation, and now there is no confinement to a particular area.²⁰⁴ It remains to be seen how effective TPIM will be in protecting against the threat of terrorism, but it is finally a measure that appears to be in line with human rights.

c. France

According to France’s counterterrorism law, passed in 2006, the police may request a judicial order in order to hold a suspect for up to six days without charge and without appearing before a judge.²⁰⁵ However, this law appears to be in direct contravention of the 1989 ECtHR judgment in *Brogan and Others v. United Kingdom*, which found that holding a terrorist suspect for a period longer than four days and six hours was a violation of Article 5(3) of the Convention.²⁰⁶ Although this decision dates back to 1988, *Brogan* remains the law as a valid interpretation of the obligations under the European Convention. It is not clear why France would pass such a law knowing that it is in violation of the country’s Convention obligations, especially when France’s previous law and the current ECHR standard validly permit four days for terrorist suspects.²⁰⁷

201. Sec’y of State for the Home Dep’t v. JJ, [2007] UKHL 45, [2008] 1 A.C. 385 (H.L.) (appeal taken from Eng.).

202. *Guzzardi v. Italy*, App. No. 7367/76, 3 Eur. H.R. Rep. 333 (1981).

203. Terrorist Prevention and Investigation Measures Act 2011, c. 23 (U.K.).

204. Owen Bowcott, *UK Terror Suspects Sent into Internal Exile Under Control Orders*, GUARDIAN, Mar. 26, 2012, <http://www.guardian.co.uk/politics/2012/mar/26/terror-suspects-exile-control-orders>.

205. Loi 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers [Law 2006-64 of 23 January 2006 on the fight against terrorism and containing various provisions relating to security and border controls], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 24, 2006, p. 1129 (Fr.), available at www.legifrance.gouv.fr; see also CODEXTER, *Information on Other Activities of the Council of Europe: Parliamentary Assembly of the Council of Europe (PACE), Respect for Human Rights in the Fight Against Terrorism*, ¶ 70, Doc. No. CODEXTER (2007) 14 (2007), available at http://www.libertysecurity.org/IMG/pdf_CODEXTER_2007_14_E_PACE.pdf.

206. *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. H.R. Rep. 117, ¶ 62 (1989).

207. See CODEXTER, *Information on Other Activities of the Council of Europe: Parliamentary Assembly of the Council of Europe (PACE), Respect for Human Rights in the Fight Against Terrorism*, supra note 205, ¶¶ 70, 71, 81 (describing the prior four-day limit under French law and calling into question the compatibility of the 2006 change with *Brogan*).

d. Russia

Russia is a state party to the ECHR, and, therefore, Article 5 and its jurisprudence are applicable. As in the United Kingdom and France, holding a terrorist suspect for a period longer than four days and six hours is a violation of Article 5(3).²⁰⁸

A recent report issued by the Committee for the Prevention of Torture (CPT) found significant violations in the North Caucasus region of Russia²⁰⁹ — an area which is considered to be one of the “most unstable regions in the world.”²¹⁰ When the CPT delegation visited facilities in this area, it noted that authorities continued to hold suspects in detention longer than the legal limit of ten days.²¹¹ For example, in one facility, a suspect was detained for thirty-seven days, and, in response to a CPT question, the head of the facility indicated that “in case[s] of persons charged with terrorist offences, it happens.”²¹²

In the Republic of Dagestan and the Chechen Republic, the CPT received several claims of “unrecorded detentions and detentions in unlawful locations” for those who were suspected of terrorist offenses under Article 205 of the Russian Criminal Code.²¹³ The delegation noted in particular the “case of Mr. K, who was allegedly illegally detained . . . [at] the Headquarters of the Special Purpose Police Unit (OMON) of the Ministry of Internal Affairs for the Chechen Republic . . . between December 2009 and April 2010.”²¹⁴

e. China

As previously mentioned, China is not a state party to the ICCPR, and thus it is not required to adhere to the ICCPR’s prohibition of arbitrary

208. *Brogan*, 11 Eur. H.R. Rep. 117, ¶ 62.

209. Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment [CPT], Council of Eur., *Report to the Russian Government on the Visit to the North Caucasian Region of the Russian Federation Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 April to 6 May 2011*, Doc. No. CPT/Inf (2013) 1 (2013), available at <http://www.cpt.coe.int/documents/rus/2013-01-inf-eng.pdf>.

210. Ariel Cohen, *Anti-Terrorism Operation in North Caucasus Exposes Russia’s Vulnerabilities*, DAILY SIGNAL (Oct. 23, 2012), <http://dailysignal.com/2012/10/23/anti-terrorism-operation-in-north-caucasus-exposes-russias-vulnerabilities/>.

211. CPT, *supra* note 209, ¶ 41.

212. *Id.* (quoting a prison official) (internal quotation marks omitted).

213. *Id.* ¶ 23 (including charges under Articles 205, 208, 209, and 222); see also Mairbek Vatchagaev, *Officially Sanctioned Kidnappings Alienate the Dagestani Public*, EURASIA DAILY MONITOR (Jamestown Found., Wash., D.C.), Oct. 4, 2012, http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=39926&cHash=09815e4e17b1f60fe7ac7ccffee57d07#.VLa8RmB0yM9; Ugolovnyi Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code] art. 205 (Russ.) (defining terrorist crimes).

214. CPT, *supra* note 209, ¶ 23.

detention.²¹⁵ Article 73 of China's Criminal Procedure Law was amended in 2012 to allow authorities to keep "suspects in detention for up to six months at a location determined by the police in cases involving terrorism, state security, or serious instances of corruption."²¹⁶ This new law is arguably an infringement on the freedom from arbitrary detention, with the high potential for other abuses such as torture and other ill treatment.

As demonstrated in the discussion of China's limitations on speech,²¹⁷ even instances of expression of a religion can be considered terrorism in China. Following a protest in July 2009 in Urumqi, 1,434 Uighurs were detained, and a stern statement issued by Chinese officials indicated their desire to quash any type of uprising.²¹⁸ The numbers of detainees rose to approximately 4,000, although reports left it unclear whether that total included only those then in detention or, alternatively, all of those who had been detained and subsequently released.²¹⁹ One account detailed a raid that occurred on July 6 involving police sweeps, mass arrests, and enforced disappearances,²²⁰ noting that these operations continued throughout the month of July.²²¹ Based on witness reports and evidence surrounding the arrests and enforced disappearances, these actions arguably violated both Chinese and international law.²²² Enforced disappearances such as these are often linked with arbitrary arrest and detention,²²³ reinforcing the

215. ICCPR, *supra* note 7, art. 9.

216. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, *supra* note 5, at 74 (citing China Criminal Procedure Law art. 73, as amended Mar. 14, 2012); see also *China: Don't Legalize Secret Detention*, HUM. RTS. WATCH (Sept. 1, 2011), <http://www.hrw.org/news/2011/09/01/china-don-t-legalize-secret-detention>.

217. See discussion *supra* Part III.A.1.e (discussing the Uighur population of China).

218. HUMAN RIGHTS WATCH, "WE ARE AFRAID TO EVEN LOOK FOR THEM": ENFORCED DISAPPEARANCES IN THE WAKE OF XINJIANG'S PROTESTS 18 (2009) [hereinafter HUMAN RIGHTS WATCH, "WE ARE AFRAID TO EVEN LOOK FOR THEM"], available at <http://www.hrw.org/sites/default/files/reports/xinjiang1009web.pdf> (noting authorities' statement that "every suspect, without any exception, will be arrested and punished according to the law to root out any hidden danger" (internal quotation marks omitted)); see also *Urumqi Police Detain Another 319 People in Riot Probe*, XINHUA NEWS AGENCY, Aug. 2, 2009, http://news.xinhuanet.com/english/2009-08/02/content_11814102.htm.

219. HUMAN RIGHTS WATCH, "WE ARE AFRAID TO EVEN LOOK FOR THEM", *supra* note 218.

220. *Id.* at 22–23 ("That day, a large group of armed police arrived to our neighborhood and took many Uighur men away. They went after every young man they could catch — those who lived there, and those who just happened to be there. I saw how they were taken away — the police loaded a full bus of these young men." (quoting Human Rights Watch interview) (internal quotation marks omitted)).

221. *Id.* at 22.

222. See *id.* at 24 ("[T]he security forces did not introduce themselves and did not explain the reasons for arrest, and failed to inform the families of the location where the detainees [had] been taken." (quoting Human Rights Watch interview) (internal quotation marks omitted)).

223. *Id.* at 34; see also Comm'n on Human Rights, 58th Sess., Civil and Political Rights, Including Questions of: Disappearances and Summary Executions, Rep. Submitted by Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances Pursuant to Paragraph 11 of

concern that the updated Criminal Procedure Law legitimizes secret detention centers in China.

3. Torture

a. United States

For the United States, one only need recall the time of “enhanced interrogation techniques” to be reminded of the Executive Branch’s preference for security over human rights. The “Torture Memos”²²⁴ not only argued for not applying detainee status to those held in Guantanamo, but justified interrogation techniques which probably violate the ICCPR.²²⁵ For example, Guantanamo detainee Abu Zubaydah was waterboarded at least eighty-three times within one month alone.²²⁶ Additionally, twenty-hour interrogations and “hooding” during transportation and questioning were allowed as long as their use satisfied an “important government objective.”²²⁷

These early memos justified torture by exploiting the loopholes of the relevant statute, Section 2340, rather than by focusing on the acts in question. In one such memo, Jay S. Bybee, Office of Legal Counsel, U.S. Department of Justice, focuses on the “specific intent” of Section 2340, arguing that the statute requires there to be a “specific intent to inflict severe pain” and that “such pain must be the . . . precise objective.”²²⁸ He distinguishes this specific intent from “general intent,” where an individual

Commission Resolution 2001/46, ¶ 76, U.N. Doc. E/CN.4/2002/71 (Jan. 8, 2002).

224. See, e.g., Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush (Jan. 25, 2002) (draft), available at <http://texscience.org/reform/torture/gonzales-bush-25jan02.pdf>; Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep’t of State, to John C. Yoo, Deputy Assistant Attorney Gen. (Jan. 11, 2002), available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020111.pdf>; Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 9, 2002) (draft), available at <http://texscience.org/reform/torture/yoo-delahunty-9jan02.pdf>.

225. See Compilation of General Comments, *supra* note 193, at 200 (discussing in General Comment 20 the freedom from torture, inhuman, and degrading treatment under ICCPR Article 7).

226. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency 37 (May 30, 2005), available at http://www2.gwu.edu/~nsarchiv/torture_archive/docs/Bradbury%20memo.pdf; see also Shane Scott, *2 Suspects Waterboarded 266 Times*, INT’L N.Y. TIMES, Apr. 20, 2009, http://www.nytimes.com/2009/04/21/world/21detain.html?pagewanted=all&_r=0.

227. Memorandum from Diane E. Beaver for Commander, Joint Task Force 170, to Commander, Joint Task Force 170 (Oct. 11, 2002), available at <http://www.american-buddha.com/911.torture101102ussc20.htm> (stating that these acts were legal so long as they were “not done for the purpose of causing harm or with the intent to cause prolonged mental suffering”).

228. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, White House Counsel 3 (Aug. 1, 2002), available at <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>; see also Carter v. United States, 530 U.S. 255, 269 (2000).

“act[s] knowing that severe pain or suffering was reasonably likely to result from his actions.”²²⁹ Taking an additional step and relying upon Supreme Court decisions, Bybee contends that “even if the defendant knows that severe pain will result from his actions, if causing such harm is not [the] objective,”²³⁰ he has not met the threshold requirement for specific intent. Therefore, torture has only been committed when the “express purpose”²³¹ of the act is to cause this level of suffering. Although a jury can determine specific intent through the factual circumstances,²³² jury trials in this context are a rarity, at most. Attorney General Eric Holder closed the last two open investigations related to allegations of torture that occurred during the Bush Administration.²³³

Furthermore, under the Bybee definition, inflicting “pain or suffering” qualifies as torture only if the results are “severe.”²³⁴ As Section 2340 does not define “severe,” Bybee invokes the dictionary definition of the term, landing upon the definition that the pain “must be of such a high level of intensity that the pain is difficult for the subject to endure.”²³⁵ Instead of concluding there, he looks to other U.S. Code uses of the term whereby “[s]uch damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function” to qualify as torture.²³⁶

Evidence has emerged that the CIA carried out “enhanced interrogation techniques” in secret detention centers.²³⁷ Moreover, the International Committee for the Red Cross (ICRC) issued a report documenting the treatment of fourteen detainees who were transferred from one of these secret locations to Guantanamo Bay.²³⁸ These detainees recounted acts that amount to cruel and inhumane treatment and even torture. Such acts included prolonged stress positions and shackling,²³⁹ sleep deprivation,²⁴⁰ confinement to a box,²⁴¹ and suffocation by water, i.e.,

229. Memorandum from Jay S. Bybee, *supra* note 228, at 3–4.

230. *Id.* at 4.

231. *Id.*

232. *See id.* at 4.

233. Glenn Greenwald, *Obama’s Justice Department Grants Final Immunity to Bush’s CIA Torturers*, GUARDIAN, Aug. 31, 2012, <http://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer>.

234. Memorandum from Jay S. Bybee, *supra* note 228, at 5.

235. *Id.*

236. *Id.* at 6.

237. *See* OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 182, at 15–19.

238. Int’l Comm. of the Red Cross [ICRC], *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, at 3 (Feb. 14, 2007), available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

239. *Id.* at 11.

240. *Id.* at 15.

241. *Id.* at 13.

waterboarding.²⁴² In its report, the ICRC determined that these acts amounted to torture.²⁴³

President Barack Obama rescinded the previous executive orders of President Bush on January 22, 2009.²⁴⁴ However, reports indicate that torture and other ill treatment continue to be a feature of the fight against terrorism.²⁴⁵ In the report, *Globalizing Torture*, the Open Society Justice Initiative finds that fifty-four states participated in various ways in the U.S. torture system since 9/11. Among these states are Bosnia-Herzegovina, Egypt, Germany, Kenya, Macedonia, Morocco, Somalia, Spain, Sweden, Turkey, and Zimbabwe.²⁴⁶

b. United Kingdom

The United Kingdom has been complicit in torture by rendering terrorist suspects to a country where they were likely to be tortured, a violation of its ECHR obligations, as previously discussed. Linked to the United States' program of rendition, the United Kingdom allegedly knew about the CIA's plan to secretly abduct and detain terrorist suspects within a few days of 9/11.²⁴⁷ Additionally, the U.K. government, at a North Atlantic Treaty Organization (NATO) meeting the following month, "pledged logistics support for the rendition program[]," including a guarantee that flights en route to secret prisons could stop over in Britain and have free use of British airspace.²⁴⁸

Sami al-Saadi, a victim of such a program, claims that the United Kingdom had arranged his extraordinary rendition to Libya in 2004.²⁴⁹ According to al-Saadi, British authorities had promised him safe passage from China to Hong Kong if only he would report first to the British consulate in Hong Kong.²⁵⁰ However, he was arrested upon arrival in

242. *Id.* at 10; *see also* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 182, at 17.

243. *Id.* at 26.

244. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

245. *See, e.g.*, OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 182, at 21 (reporting secret detentions by U.S. authorities in Afghanistan in 2010 and the poor treatment detainees endured); *id.* at 7 (finding that extraordinary rendition continued under the Obama Administration).

246. *Id.* at 6 (internal citations omitted) (providing the full list); *see also* discussion *infra* Part III.C.

247. Richard Norton-Taylor, *UK Intelligence Officers Knew of CIA's Rendition Plans Within Days of 9/11*, *GUARDIAN*, Oct. 22, 2012, <http://www.guardian.co.uk/world/2012/oct/22/british-cia-rendition-9-11>.

248. *Id.* (citation omitted) (internal quotation marks omitted).

249. Andrew Gilligan, *Libya: MI6 Tricked Me into Trap, Claims Torture Victim*, *TELEGRAPH*, Sept. 7, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8748437/Libya-MI6-tricked-me-into-trap-claims-torture-victim.html>; *see also* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 182, at 54; HUMAN RIGHTS WATCH, *DELIVERED INTO ENEMY HANDS: US-LED ABUSE AND RENDITION OF OPPONENTS TO GADDAFI'S LIBYA 9* (2012), *available at* http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf.

250. Gilligan, *supra* note 249.

Hong Kong and flown to Libya.²⁵¹ His detention in Libya lasted for six years, and he allegedly suffered acts that constitute torture and cruel and degrading treatment under almost any definition.²⁵² When al-Saadi sued the former head of U.K. counterterrorism for civil damages stemming from both the rendition and complicity in torture, the government settled the case without admitting liability.²⁵³

Under the United Kingdom's ECHR obligations, transferring someone out of the United Kingdom who could be subject to torture or other ill treatment is, at least under some circumstances, a violation of Article 3 of the ECHR.²⁵⁴ In order for there to be a breach of Article 3, there must be "substantial grounds" for believing that there would be a "real risk" of such treatment.²⁵⁵ Furthermore, in *Chahal v. United Kingdom*,²⁵⁶ the ECtHR held that even when an individual is suspected of committing terrorist acts, the state must not extradite the individual if there are substantial grounds to believe that the individual will be exposed to torture or other ill-treatment. Despite this obligation, the U.K. government has not fulfilled its ECHR obligations in the years following 9/11. Recently, the government entered into a settlement with six individuals who sued for damages arising out of the government's alleged complicity in their transfer to Guantanamo and ill treatment.²⁵⁷ The settlement came after the Court of Appeal held in May 2010 that all allegations of torture were to be heard in public,²⁵⁸ a possibility that clearly concerned the U.K. government.

By participating in the rendition program and allowing terrorist suspects to be sent to locations where they would be tortured, the United Kingdom has vicariously participated in and condoned the use of torture in the "War on Terror."

251. *Id.*

252. *Id.*; see also OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 182, at 114 ("[He] . . . alleges . . . he was beaten with a black wooden stick that was just over a foot long, whipped with a rope, slapped, kicked, punched, and subjected to electric shocks on the neck, chest, and arms.').

253. Richard Norton-Taylor, *Government Pays Libyan Dissident's Family £2.2m over MI6-Aided Rendition*, GUARDIAN, Dec. 13, 2012, <http://www.theguardian.com/uk/2012/dec/13/libyan-dissident-mi6-aided-rendition>.

254. *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989), available at <http://hudoc.echr.coe.int>; see also Factsheet, European Court of Human Rights, Expulsions and Extraditions (July 2013), available at http://www.echr.coe.int/Documents/FS_Expulsions_Extraditions_ENG.pdf.

255. *Cruz Varas v. Sweden*, App. No. 15576/89, Eur. Ct. H.R., Judgment, ¶ 69 (1991), available at <http://hudoc.echr.coe.int>.

256. *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. (1996), available at <http://hudoc.echr.coe.int>.

257. *Government to Compensate Ex-Guantanamo Bay Detainees*, BBC NEWS, <http://www.bbc.co.uk/news/uk-11762636> (last updated Nov. 16, 2010).

258. *Id.*

c. France

Despite considering itself the “cradle of human rights and the birthplace of modern humanitarianism,”²⁵⁹ France’s recent record on torture appears to be far removed, as the country frequently cooperates with states that practice torture. Additionally, French police have mistreated those held on suspicion of terrorism.²⁶⁰

Based on the testimonies of thirteen terrorism suspects, corroborated by police reports, HRW has documented the various treatments administered to those in French detention.²⁶¹ In addition to physical abuse, the individuals were also victims of psychological abuse, which included threats of physical harm or threats to send the individual to another country where torture would be almost certain.²⁶²

According to HRW, “torture evidence from third[-party] countries has been introduced and deemed admissible in French courts,” as in the March 2004 conviction of Djamel Beghal.²⁶³ He was convicted “based in part on statements he made under torture and ill-treatment in the United Arab Emirates.”²⁶⁴

In September and October 2005, two individuals who were allegedly plotting a terrorist attack in Paris were arrested based on information from Algeria’s Department for Information and Security,²⁶⁵ which has a history of subjecting those in its custody to torture and ill treatment.²⁶⁶ The

259. HUMAN RIGHTS WATCH, “NO QUESTIONS ASKED”: INTELLIGENCE COOPERATION WITH COUNTRIES THAT TORTURE 44 (2010) [hereinafter HUMAN RIGHTS WATCH, “NO QUESTIONS ASKED”], available at <http://www.hrw.org/sites/default/files/reports/ct0610webwcover.pdf>.

260. HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE 65–73 (2008) [hereinafter HUMAN RIGHTS WATCH, PREEMPTING JUSTICE], available at <http://www.hrw.org/sites/default/files/reports/france0708webwcover.pdf>.

261. *Id.* at 67 (“[They were] subjected to relentless, oppressive questioning and in some cases psychological and physical ill-treatment. Interrogations can take place at any time of the day or night, and there are no rules about the amount of rest a detainee must have between sessions. We heard of sleep deprivation, disorientation, constant, repetitive questioning, and psychological pressure. A pattern of extended questioning and sleep deprivation was corroborated by the details in five police reports . . .”).

262. *Id.* at 68 (quoting detained individual as saying that the relevant official “threatened me saying that I still had two more days to talk since I hadn’t yet said much, or else he’d send me as a ‘gift package to the Moroccans who have different ways of doing things.” (internal quotation marks omitted)); *id.* (“[A]n officer told him, ‘You’re lucky we’re in France or I’d put a bullet in your head.’”).

263. HUMAN RIGHTS WATCH, “NO QUESTIONS ASKED”, *supra* note 259, at 51.

264. HUMAN RIGHTS WATCH, “NO QUESTIONS ASKED”, *supra* note 259, at 51–52 (“Beghal credibly asserted he was subjected to harrowing treatment while in UAE custody, including freezing temperatures, beatings on the soles of his feet, the pulling out of toe nails and teeth, sleep deprivation, and deafening noises. Under torture, he confessed alleged plans to attack [U.S.] interests in France.”).

265. HUMAN RIGHTS WATCH, PREEMPTING JUSTICE, *supra* note 260, at 35.

266. See Amnesty Int’l, *Unrestrained Powers: Torture by Algeria’s Military Security*, 29–31, AI Index MDE 28/004/2006 (July 2006) [hereinafter Amnesty Int’l, *Unrestrained Powers*], available at <http://www.amnesty.org/en/library/asset/MDE28/004/2006/en/00e4bf65-d456-11dd-8743->

alleged tip came from M'hamed Benyamina, a legal French resident arrested in Algeria upon France's request.²⁶⁷ The conditions surrounding his treatment in Algeria are suspect,²⁶⁸ calling into question the accuracy of the information he provided.

Despite its obligations under the ECHR, France continues to rely on evidence obtained using torture and other ill-treatment, which, when taken in its totality, could constitute torture, as part of its fight against terrorism.

d. Russia

President Vladimir Putin has often linked issues in the Caucasus region to the ongoing international campaign to combat terrorism, allowing him to shape law and policy based on what others were doing then to fight terrorism.²⁶⁹ The CPT report indicates that Russian security forces' use of torture is linked with counterterrorism efforts in the North Caucasus, and evidence of such practices is still widespread.²⁷⁰ The Committee noted that "ill-treatment is particularly prevalent in respect of persons suspected of [terrorism] offences under [Article] 205 . . . of the Criminal Code (CC)."²⁷¹

The ECtHR, in its judgment in *Velkhiyev and Others v. Russia*,²⁷² confirmed that Russian security officials in the Republic of Ingushetia used torture, violated the right to life, and failed to properly conduct an

d305bea2b2c7/mde280042006en.pdf; see also Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, 40th Sess., Apr. 28–May 16, 2008, ¶ 10, U.N. Doc. CAT/C/DZA/CO/3 (May 26, 2008).

267. Amnesty Int'l, *Unrestrained Powers*, *supra* note 266.

268. See *id.*

269. See, e.g., Igor Torbakov, *Moscow Moves to Wage Its Own War Against Terrorism*, EURASIANET.ORG (Sept. 26, 2001, 7:00 PM), <http://www.eurasianet.org/departments/insight/articles/eav092701.shtml>; INT'L HELSINKI FED'N FOR HUMAN RIGHTS, ANTI-TERRORISM MEASURES, SECURITY AND HUMAN RIGHTS: DEVELOPMENTS IN EUROPE, CENTRAL ASIA AND NORTH AMERICA IN THE AFTERMATH OF SEPTEMBER 11, at 70 (2003) [hereinafter INT'L HELSINKI FED'N FOR HUMAN RIGHTS, ANTI-TERRORISM MEASURES] ("By comparing its own campaign in Chechnya with the [U.S.]-led campaign against Al Qaida and Osama Bin Laden, the Russian government has been able to reduce significantly [the] international scrutiny of its human rights record in Chechnya.")

270. Valery Dzutsev, *Russian Government Allows Council of Europe to Publish Torture Report on the North Caucasus*, NORTH CAUCASUS ANALYSIS (Jamestown Found., Wash., D.C.), Jan. 28, 2013, http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=40376&no_cache=1#.VAN9PmS wKHc ("Even though Russian prisons in general are known for massive breaches of human rights, when it comes to non-Russians, and especially those that were sentenced for connections to rebel activities, the authorities' abuses multiply greatly."); see also INT'L HELSINKI FED'N FOR HUMAN RIGHTS, ANTI-TERRORISM MEASURES, *supra* note 269, at 178. For more information on the situation in Chechnya, see INT'L HELSINKI FED'N FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE OSCE REGION: THE BALKANS, THE CAUCASUS, EUROPE, CENTRAL ASIA AND NORTH AMERICA (2002).

271. CPT, *supra* note 209, ¶ 15 & n.4 (noting that Article 205 of the Russian Criminal Code deals with terrorism).

272. *Velkhiyev v. Russia*, App. No. 34085/06, Eur. Ct. H.R. (2011), available at <http://hudoc.echr.coe.int>.

investigation into violations of human rights. While it was easy to identify the individual perpetrators in this particular instance, that is not always the case in Ingushetia, especially because human rights violations are often committed by masked law enforcement agents in unmarked vehicles.²⁷³ When the perpetrators are unknown, authorities may be unable to provide a remedy to victims of alleged abuse.²⁷⁴ Furthermore, it is often difficult for victims to seek recourse for these violations, as they fear being subjected to similar treatment again.²⁷⁵ Families are often threatened with torture as well, which further discourages victims from coming forward.²⁷⁶

e. China

China ratified the UN Convention Against Torture (CAT) in 1988.²⁷⁷ Article 15 of the CAT requires that states “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²⁷⁸

Chinese rules of evidence permit evidence resulting from the use of torture to extract confessions.²⁷⁹ Although a conviction may not be based on a confession alone, confessions nevertheless are integral to the investigative process.²⁸⁰ Thus, investigators may extract information using whatever means are at their disposal, including torture.²⁸¹

273. Amnesty Int'l, *The Circle of Injustice: Security Operations and Human Rights Violations in Ingushetia*, 18, 43–48, AI Index EUR 46/012/2012 (2012), available at http://www.amnestyusa.org/sites/default/files/3680_ingushetia_cover__contents_web.pdf (reporting the cases of Zurab Albogachiev and Zelimkhan Chitigov).

274. *See id.* at 47 (“At the time of writing, the outcome of Zelimkhan Chitigov’s case is still uncertain. Only one official . . . is being prosecuted for the crimes relating to his secret detention, while other perpetrators have still not been identified.”).

275. *Id.* at 45 (“[A]s with other human rights violations allegedly committed by members of law enforcement agencies in Ingushetia, cases of secret detention are often difficult to prove for the victim, and insistence on official investigation involves clear risks for the victims themselves and their families.”).

276. *E.g., id.* at 47.

277. *Status of Ratification Interactive Dashboard: China*, *supra* note 163.

278. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85.

279. Comm’n on Human Rights, *Rep. of the Special Rapporteur*, *supra* note 173, ¶ 37 (“Article 43 of the [Criminal Procedure Law (CPL)] stipulates that ‘it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means’. However, the CPL does not explicitly prohibit the use of confessions extracted through torture as evidence before the courts as required by article 15 of CAT. . . . Therefore, while such confessions shall not form the basis for charges and convictions, [a 1999 Supreme People’s Court] decision does not exclude their admissibility in judicial proceedings.”).

280. *Id.*

281. *See id.* ¶¶ 37, 40, 41, 43, 44.

According to the Report of the Special Rapporteur on Torture, eleven percent of the cases referred to that office dealt with Uighur victims.²⁸² The methods of torture used in China do not differ dramatically from accounts in the other P5 states, including hooding, submersion in pits of water or sewage, prolonged exposure to extreme heat or cold, being forced to maintain uncomfortable positions for long periods of time, and sleep deprivation.²⁸³

The Uighurs have a history of being subjected to torture and other ill treatment, especially since their forcible repatriation to China from neighboring states.²⁸⁴ Accounts include that of Hussein Celil, a Uighur who acquired Canadian citizenship as a refugee but was coerced into confession to terrorism charges after China persuaded Uzbekistan to deport him.²⁸⁵ Similar to Russia in the North Caucasus region, China has relied upon the international push to counter terrorism since 9/11 as a way to justify its “long-term cultural, religious, and political repression of Uighurs both in and outside” of China.²⁸⁶

Given the above accounts of how the P5 have violated and continue to restrict human rights in the name of security on an individual state basis, it is not surprising that when their forces combine in the name of “international peace and security” in their roles on the Security Council, that similar counterterrorism measures begin to take shape.

B. The Broad Reach of the UN Security Council: Coercion Turns to Emulation and “Smart” Learning

Although UN Security Council Resolutions concerning terrorism did not begin with 9/11,²⁸⁷ UNSCR 1373 differs from pre-9/11 terrorism resolutions, as the earlier resolutions merely “singl[ed] out a particular state

282. *Id.* ¶ 42 tbl.1.

283. *Id.* ¶ 45.

284. *China: Account for Uighur Refugees Forcibly Repatriated to China*, HUM. RTS. WATCH (Jan. 28, 2010), <http://www.hrw.org/news/2010/01/28/china-account-uighur-refugees-forcibly-repatriated-china>.

285. *Id.*

286. SHIRLEY A. KAN, CONG. RESEARCH SERV., RL33001, U.S.-CHINA COUNTERTERRORISM COOPERATION: ISSUES FOR U.S. POLICY 5 (2010), *available at* <http://www.fas.org/sgp/crs/terror/RL33001.pdf>; *see also* Amnesty Int'l, *People's Republic of China: Uighurs Fleeing Persecution as China Wages Its "War on Terror"*, AI Index ASA 17/021/2004 (2004), *available at* <http://www.amnesty.org/en/library/asset/ASA17/021/2004/en/47e9cf33-d5cd-11dd-bb24-1fb85fe8fa05/asa170212004en.pdf>; UYGHUR HUMAN RIGHTS PROJECT, PERSECUTION OF UYGHURS IN THE ERA OF THE “WAR ON TERROR” (2007), *available at* http://docs.uighuramerican.org/Persecution_of_Uyghurs_in_the_Era_of_the_War_on_Terror.pdf.

287. *See, e.g.*, S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (concerning peace and security for terrorist attacks committed in Kenya and the United Republic of Tanzania); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (concerning the deteriorating situation in Afghanistan); S.C. Res. 1267, *supra* note 119; S.C. Res. 1269, *supra* note 119; S.C. Res. 1333, *supra* note 119 (concerning Afghanistan).

for sanctions and only requir[ed] actions from all member states in order to enforce this narrowly tailored objective.”²⁸⁸ UNSCR 1373 mandated that States incorporate domestic counterterrorism measures, regardless of the existence of a specific threat, since the “crisis of terrorism . . . grant[ed] legitimacy to [such] an extraordinary act of remote governance.”²⁸⁹ This resolution was one of the first TIPS resolutions that became coercive, and it thereby reflected change in the global approach to terrorism.

1. UN Security Council Resolution 1373 — A Coercive Move by the Security Council

a. Aims of the Resolution to Counter Terrorism

After 9/11, the Security Council took matters into its own hands. The Council spent a total of five minutes passing UNSCR 1373 in late September 2001.²⁹⁰ Although we know the United States was a key player in drafting and passing this resolution, the bulk of the negotiations went on behind closed doors, and so we may never know precisely which other states on the Council also played key drafting roles.²⁹¹ However, in a Security Council meeting on September 12, 2001, the Council already had indicated the need to construct a resolution that would be global in reach.²⁹² Presiding over the Security Council, the French President referred

288. Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 86, at 347, 355; see also Edward Grodin, “Making the World Safe for Democracy”: UN Security Council Resolution 1373, the International Imposition of Counterterrorism Policies, and the ‘Arenas of Powers’ Model, *CORNELL POLY REV.*, Fall 2011, <http://www.cornellpolicyreview.com/making-the-world-safe-for-democracy-un-security-council-resolution-1373-the-international-imposition-of-counterterrorism-policies-and-the-arenas-of-power-model/> (“Therefore, these resolutions [1269 and 1368] served more as lofty statements of principle than legal obligations for all UN members, even though they were not directed at a particular state.”).

289. Grodin, *supra* note 288 (drawing this conclusion about the post-9/11 Security Council in general, including as it passes resolutions like 1373).

290. Provisional Record of the U.N. Security Council, 56th Sess., 4385th mtg. at 2, U.N. Doc. S/PV.4385 (Sept. 28, 2001) (meeting running from 9:55–10:00 PM).

291. ROACH, *supra* note 108, at 31–32 (“It was drafted behind closed doors in just over 48 hours. On September 26, 2001, the United States began informal consultations with the four other permanent members of the Security Council and then circulated a draft resolution the next day. On September 28, 2001, all 15 members of the Security Council approved of the momentous resolution in a five-minute evening meeting. No country explained why it voted for the resolution, and no country outside the 15-state Security Council was consulted.”); Grodin, *supra* note 288; Stefan Talmon, *The Security Council as World Legislature*, 99 *AM. J. INT’L L.* 175, 184 (2005).

292. Provisional Record of the U.N. Security Council, 56th Sess., 4370th mtg. at 7, U.N. Doc. S/PV.4370 (Sept. 12, 2001) (quoting the President from France as saying, “All together, we must say that nothing anywhere can ever justify resort to terrorism. All together, we must take the view that the monstrous acts committed yesterday are a challenge to the international community as a whole. . . . A global strategy is needed. The Security Council is the principal organ entrusted with

in his opening speech to the need for a “global strategy” to tackle terrorism, despite the fact that the events of 9/11 took place in the United States.²⁹³ UNSCR 1373 was passed seventeen days later and was binding on the entirety of the international community.

UNSCR 1373 not only created the UN Counter-Terrorism Committee (CTC), which monitors the implementation of substantive provisions of the resolution in all member states, but the resolution mandated that states take steps to “prevent and suppress the financing of terrorist acts” by means of domestically criminalizing such acts.²⁹⁴ This requirement essentially incorporated various parts of the UN Convention Against the Financing of Terrorist Acts, “impos[ing] these select obligations on all states without waiting for states to individually ratify that treaty.”²⁹⁵ States should also “[r]efrain from providing any form of support, active or passive,” to terrorists.²⁹⁶ Unfortunately, this is a rather vague requirement since each state defines terrorism differently and, consequently, has different ways of dealing with the relevant issues.

José Alvarez, a former U.S. State Department legal advisor and current law professor at New York University, noted in his 2003 article, *The UN’s ‘War’ on Terrorism*, that the mere passage of UNSCR 1373 is indicative of “innovative forms of organizational development.”²⁹⁷ The body of Security Council resolutions on terrorism is evidence of the “on-going revolution in [the Security Council’s] interpretation of what constitutes an on-going ‘threat to the international peace.’”²⁹⁸ Prior to 9/11, many states dealt with terrorism without invoking the Security Council, opting instead to address the issue domestically.²⁹⁹ For example, Spain dealt with the Euskadi Ta Askatasuna (ETA) for almost fifty years without a Security Council resolution pertaining to the group. Additionally, the Security Council focused only on sanctions, which were used to discourage terrorist activity.³⁰⁰ The Security Council’s reaction to 9/11 was a game changer for

international peace and security. It should work on this in a spirit of urgency.”).

293. *Id.*

294. S.C. Res. 1373, pmbll., ¶¶ 6–7, U.N. Doc. S/RES/1373 (Sept. 28, 2001); *see also* Counter-Terrorism Comm., Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States, U.N. Doc. S/2011/463 (Sept. 1, 2011).

295. Alvarez, *supra* note 30, at 241.

296. S.C. Res. 1373, *supra* note 294, ¶ 2.

297. Alvarez, *supra* note 30, at 242.

298. *Id.*

299. *See, e.g.*, William B. Messmer & Carlos Yordan, *The Origins of United Nations’ Global Counter-Terrorism System*, HISTORIA ACTUAL ONLINE, Spring 2010, at 173, 173, <http://historia-actual.org/Publicaciones/index.php/haol/article/view/475/384> (“While the Security Council reacted to several terrorist events since its founding, its permanent members did not think of terrorism as a threat to international peace and security. A majority of UN members shared this opinion, emphasizing that it was a problem that could be best addressed at the national level. Many states did not ratify the General Assembly’s conventions dealing with terrorism.”).

300. *See, e.g.*, S.C. Res. 1267, *supra* note 119; DAVID CORTRIGHT & GEORGE LOPEZ, THE

the Council in many ways, especially since it required states to implement anti-terrorism legislation domestically, something that it had never required before. From then on, countering terrorism has been linked with a number of Chapter VII resolutions and became one of the Security Council's primary objectives.³⁰¹

b. Lack of Human Rights Protection

Following 9/11, the Security Council urged states to “redouble their efforts to prevent and suppress terrorist acts,”³⁰² but it failed to give adequate direction on how human rights should be protected while countering terrorism. The only mention of human rights in Resolution 1373 comes in clause 3(f), when discussing refugee status.³⁰³ Additionally, in 2002, the Counter-Terrorism Committee stated that “[m]onitoring performance against other international conventions, including human rights law, is outside the scope of [its] mandate.”³⁰⁴ Without proper guidance from the CTC, UNSCR 1373 actually enabled governments to “launch ambitious new anti-terrorism programs while allowing them to say that international law made them do it.”³⁰⁵

In order to fill the widening gap between security measures and rights protections, however, the Security Council has issued more and more direction on how human rights and counterterrorism should coexist. For example, UNSCR 1535 established the Counter-Terrorism Committee Executive Directorate (CTED), which was required to work closely with

SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S (2000) (noting the efficacy of sanctions imposed on Libya to encourage Qaddafi to abandon terrorism).

301. *See, e.g.*, S.C. Res. 1530, U.N. Doc. S/RES/1530 (Mar. 11, 2004) (condemning the 2004 train bombings in Madrid, urging cooperation among states to pursue justice according to Resolution 1373 obligations, and expressing the Council's “determination to combat all forms of terrorism”); S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (focusing in part on preventing non-state actors from acquiring weapons of mass destruction); S.C. Res. 2082, U.N. Doc. S/RES/2082 (Dec. 17, 2012) (requiring all states to enforce an asset freeze, a travel ban, and an arms embargo in connection with any “individual[], group[], undertaking[] [or] entity[] associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan”); S.C. Res. 2133, U.N. Doc. S/RES/2133 (Jan. 27, 2014) (calling upon states to refrain from ransom payments for hostages and from making political concessions that benefit terrorist organizations in accordance with states' obligations under UNSCR 1373).

302. S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

303. S.C. Res. 1373, *supra* note 294, ¶ 3(f) (urging member states to “[t]ake appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts”).

304. *Protecting Human Rights While Countering Terrorism*, U.N. SEC. COUNCIL COUNTER-TERRORISM COMM., <http://www.un.org/en/sc/ctc/rights.html> (last updated Oct. 17, 2011).

305. Kim Lane Scheppele, *The Global Patriot Act*, AM. PROSPECT, Aug. 2011, *available at* <http://prospect.org/article/global-patriot-act>; *see also* Olivier, *supra* note 27, at 401, 414 (cautioning against the delegation of interpretative powers for UNSCR 1373, which could lead states to invoke the resolution to avoid their human rights obligations).

the UN High Commissioner for Human Rights on matters where both bodies' mandates overlapped.³⁰⁶ UNSCR 1624, a 2005 resolution dealing with incitement of terrorism, calls for states to ensure that the implementation of the resolution complies with international human rights standards.³⁰⁷ Of note, the right to freedom of expression is highlighted in the preamble of the resolution.³⁰⁸ UNSCR 1963, passed in 2010, encourages the CTED itself to develop ways in which human rights can be protected while countering terrorism.³⁰⁹ Despite the recent work in this area, however, this may be too little too late given the incorporation of UNSCR 1373-mandated changes in a number of states.

2. 2011 *Global Survey on the Implementation of UNSCR 1373 — Evidence of Emulation and Learning*

In 2011, the Counter-Terrorism Committee compiled and published a *Global Survey of the Implementation of UNSCR 1373*,³¹⁰ which provides an interesting look at how states have emulated and learned from the P5. Although the CTC urges all states to comply with international human rights standards, including the prohibition of torture and enforced disappearances, it is hard to take this line very seriously. UNSCR 1963 reminded states that human rights obligations and counterterrorism measures should be complementary.³¹¹ Yet, the very states that control and otherwise influence the resolutions passed by the Security Council overwhelmingly violate these rights in the name of security.³¹²

The Committee also advised against “vague or overly broad definitions of terrorist offences” since these definitions “pose a challenge to effective implementation of resolution 1373.”³¹³ The CTC noted as well that many of these statutes permitted states to restrict human rights that are protected by international treaties.³¹⁴ As demonstrated above with the counterterrorism laws in Russia and China, this is a legitimate concern for the CTC.

The CTC finds the war paradigm prevailing in countries such as the United States to be gravely concerning for the protection of human rights

306. S.C. Res. 1535, U.N. Doc. S/RES/1535 (Mar. 26, 2004).

307. S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

308. *Id.* pmb. (“Recalling the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights . . . [and the ICCPR] . . .” (emphasis omitted)).

309. S.C. Res. 1963, U.N. Doc. S/RES/1963 (Dec. 20, 2010).

310. Counter-Terrorism Comm., *supra* note 294.

311. S.C. Res. 1963, *supra* note 309.

312. *See* discussion *supra* Part III.A.

313. Counter-Terrorism Comm., *supra* note 294, at 86.

314. *See id.* (“Terrorism-related accusations or criminal charges have reportedly been directed at times against persons for acts that are protected by international human rights law, such as the exercise of freedom of expression, conscience and assembly.”).

since international humanitarian law applies as the *lex specialis* instead of international human rights law.³¹⁵ The comment appears to be directed at Israel and the United States, as well as allies of the United States fighting in Afghanistan. The use of military tribunals for terrorist suspects continues to pose a threat to human rights as well.³¹⁶ This criticism appears to be too little too late, ten years since the passage of UNSCR 1373. States acting within the war paradigm have firmly entrenched their policies in practice, specifically concerning detention.

Significant steps have been taken by the majority of states towards the development of the legal framework outlined in UNSCR 1373.³¹⁷ However, there are some regions where more work towards a legal framework has yet to be done.³¹⁸ For example, unresolved issues remain regarding the requirement that “all Member States . . . bring terrorists to justice” for their crimes, as this is problematic in conjunction with these states’ domestic criminal procedure.³¹⁹

C. The Influence of the P5 on Other States’ Counterterrorism Measures — A Story of Coercion, Emulation, and “Smart” Learning

The P5 norm entrepreneurs have left a proverbial trail of breadcrumbs for other states to follow as they craft and apply their own counterterrorism laws, learning from their peers. Many states model their behavior after the P5. They do this for a number of reasons — to gain favor politically, to obtain development funding, or perhaps to be accepted into a regional organization. Often, states feel coerced to adopt measures that compromise human rights due to their perceived inferior position in the international community. Sometimes a state takes on a policy because it feels as though it can prioritize security over human rights because everyone else has implemented a similar policy. Zimbabwe is a perfect example since President Mugabe invoked the U.S. PATRIOT Act to justify enacting his own version.³²⁰

315. *See id.* (“Counter-terrorism measures in some States take place in the context of armed conflict, raising questions of compliance with international humanitarian law. The use of deadly force in such situations must respect the principles of distinction and proportionality, and violations should be subject to accountability. It has been alleged that in some States military forces have committed summary or extrajudicial killings, in violation of the laws of war and human rights law.”).

316. *Id.*

317. *Id.* at 71 (“Most States of the Western European, Eastern European, and Central Asian and the Caucasus subregions have introduced comprehensive counter-terrorism legislation.”).

318. *Id.* (“In the regions where progress is still required, the degree to which the offences have been fully codified varies widely and continues to require attention.”).

319. *Id.* at 72 (“[R]esolution 1373 (2001) requires all Member States to bring terrorists to justice. However, country visits and other activities of the Committee have shown that this requirement poses a major challenge for States’ criminal justice systems.”).

320. *See, e.g.,* Clapperton Chakanesta Mavhunga, *A Plundering Tiger with Its Deadly Cubs? The USSR and China as Weapons in the Engineering of a “Zimbabwean Nation,” 1945–2009*, in ENTANGLED

Sometimes the reason simply has to do with the state's location in the world and the state's relationship with allies. For example, Kyrgyzstan is allied with Russia and China in many respects. The definition of terrorism in Kyrgyzstan's Penal Code echoes the same definition in the Russian Criminal Code, and its law combating terrorism resembles the Russian law, which was adopted a year earlier.³²¹

The colonial element also cannot be ignored when investigating the types of laws and practice here. Often, this can be observed because the states share similar legal systems as a result of colonialism. Tunisia, for example, has a law for *apologie du terrorisme* that mirrors the French law and similarly contains a definition of terrorism that is too broad to meet Tunisia's requirements under the ICCPR.³²² Similarly, Trinidad and Tobago, a former British colony, follows the United Kingdom's model for detention for terrorist charges. Trinidad and Tobago's 2005 law mirrors the United Kingdom's 2003 modification allowing up to fourteen days of detention without charge.³²³ A suspect must be charged within forty-eight hours under ordinary criminal law in Trinidad and Tobago.³²⁴

States' reasons for acting the way they do vary. States can learn a norm and emulate that norm at the same time. States can be coerced into a certain behavior, e.g., by favoring arbitrary detention, and yet still emulate, e.g., by detaining in the same fashion as another state. In other words, the ways in which norms diffuse are not mutually exclusive. The case studies provided here are not meant to be exhaustive of every instance of the

GEOGRAPHIES: EMPIRE AND TECHNOLITICS IN THE GLOBAL COLD WAR 231, 258 (Gabrielle Hecht ed., 2011) ("[T]he [U.S.] Congress passed the USA PATRIOT Act[,] and [President] Bush implored countries throughout the world to join him in 'a coalition of the willing' against terrorism. One of the signs of willingness would be to pass a raft of anti-terrorism legislations similar to the PATRIOT Act. Very well, said the Zimbabwean President [Mugabe]. Zimbabwe's amendments to the Public Order and Security Act (Chapter [11:17]) on January 22, 2002[,] used wording similar to that of the PATRIOT Act, but Mugabe's terrorists were not Al-Qaeda but . . . internal [political] enemies.").

321. See Mariya Y. Omelicheva, *Counterterrorism and Human Rights: Explaining Differences in the Scope and Brutality of States' Responses to Terrorism* 178 (Aug. 2007) (unpublished Ph.D. dissertation, Purdue University) (on file with ProQuest Information and Learning Company, UMI Microform 3291087).

322. Human Rights Council, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Addendum, Mission to Tunisia*, ¶ 19, U.N. Doc. A/HRC/16/51/Add.2 (Dec. 28, 2010); see also Loi 2003-75 du 10 décembre 2003, relative au soutien des efforts internationaux de lutte contre le terrorisme et à la répression du blanchiment d'argent [Law 2003-75 of 10 December 2003, in Support of International Efforts to Combat Terrorism and Prevent Money Laundering] (Tun.), available at <http://www.cnudst.rnrt.tn/index.html>.

323. Anti-Terrorism Act, 2005, Act No. 26, art. 23 (Trin. & Tobago).

324. See THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO 1976, art. 5; see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: TRINIDAD AND TOBAGO 4-5 (2012), available at <http://www.state.gov/documents/organization/186756.pdf> (describing recent violations of the country's law against arbitrary detention).

prioritization of security over human rights. The following case studies are meant to demonstrate a wider range of counterterrorism laws and their restriction of rights than has previously been examined in the literature.³²⁵

1. *Bosnia-Herzegovina — Arbitrary Detention*

In a report released by HRW, the organization highlighted the case of Imad Al Husin, who was detained in Bosnia beginning in 2008 as a suspected terrorist.³²⁶ During the entirety of his detention, he was held without charge. The ECtHR blocked an effort to transfer him to Syria, as doing so would violate Article 3 of the Convention.³²⁷ It is this move that drives HRW to contend that Bosnia is “learning [the] wrong counterterrorism lessons” and prioritizes national security over human rights protection.³²⁸ Bosnia has considered both the United States and EU countries to be models for its policy, as the country desires both NATO and EU membership.³²⁹ This could be labeled as coercion and emulation, in that Bosnia felt it necessary to model its actions after those of these states to gain acceptance and also that these actions were the norm. It also appears that Bosnia’s action is an example of diffusion via learning, since other states, namely the United States, have detained terrorist suspects indefinitely. Perhaps Bosnia felt secure in importing and implementing these solutions in its own state.

2. *Macedonia — Complicity in Torture*

Macedonia is an example of how the United States has flexed its muscle in the “War on Terror” and influenced a state to breach its human rights obligations. In the case, *El-Masri v. Macedonia*,³³⁰ the ECtHR found that El-Masri, a German citizen suspected of terrorist ties, was not only subjected to inhumane and degrading treatment, but also unlawful detention, extraordinary rendition, and enforced disappearance when the Macedonian government handed him over to CIA agents. In January 2004, El-Masri was taken to a hotel in Skopje by the Macedonian police and was kept there for twenty-three days, during which he was subjected to acts, in the

325. The states chosen for this Subpart are not meant to be indicative of the only state practice available, but rather to provide evidence of the types of ways in which negative norm diffusion has occurred. Further study in this area remains a priority.

326. Lydia Gall, *Bosnia Is Learning Wrong Counterterrorism Lessons*, HUM. RTS. WATCH (May 16, 2012), <http://www.hrw.org/news/2012/05/16/bosnia-learning-wrong-counterterrorism-lessons>.

327. *Al Husin v. Bosnia and Herzegovina*, App. No. 3727/08, Eur. Ct. H.R., Judgment (2012), available at <http://hudoc.echr.coe.int>.

328. Gall, *supra* note 326.

329. *Id.*

330. *El-Masri v. Macedonia*, App. No. 39630/09, Eur. Ct. H.R., Judgment (2012), available at <http://hudoc.echr.coe.int>.

presence of Macedonian officials, that amounted to inhuman and degrading treatment under the European Convention's Article 3.³³¹ He allegedly came under the custody of U.S. officials and was transferred to Afghanistan where he was held for four months and subjected to further acts of torture and inhumane treatment.³³² Finally, he was released back to Germany in May 2004, with the United States admitting much later that he was wrongly detained.³³³

By permitting another actor to torture on its soil and then allowing that person to be detained without charge for twenty days until he was then transferred to another state for further torture, Macedonia's actions call into question its commitment to human rights. Unfortunately, Macedonia did not "submit any arguments providing a basis for an explanation or justification of the degree of force used."³³⁴ Given the amount of influence and power that the United States, through aid funding, exerts over smaller, developing states like Macedonia,³³⁵ it is no wonder that Macedonia allowed human rights violations in its territory. This is an example of coercion, although there is no evidence to suggest that the United States had to force Macedonia to neglect its obligations. Rather, the United States' influence and pressure on countries to assist in these types of violations is well documented.³³⁶

331. *See id.* ¶¶ 203–05.

332. Press Release, European Court of Human Rights, Macedonian Government Responsible for Torture, Ill-Treatment and Secret Rendition of a Man Suspected of Terrorist Ties, ECHR 453 (2012).

333. *El-Masri*, App. No. 39630/09, ¶ 128; Amrit Singh, *European Court of Human Rights Finds Against CIA Abuse of Khaled El-Masri*, GUARDIAN, Dec. 13, 2012, <http://www.theguardian.com/commentisfree/2012/dec/13/european-court-human-rights-cia-abuse-khaled-elmasri> ("In December 2005, German Chancellor Angela Merkel told a press conference – while then Secretary of State Condoleezza Rice stood by her side – that the United States had admitted it had made a mistake. But the [U.S.] government still refused to acknowledge its shameful conduct in el-Masri's case and waged a successful campaign to prevent other governments from disclosing the truth."); *The CIA in Europe: Secrets Flights Investigation Raises the Veil*, SPIEGEL ONLINE INT'L, Apr. 27, 2006, <http://www.spiegel.de/international/the-cia-in-europe-secrets-flights-investigation-raises-the-veil-a-413279.html> ("The CIA denies torturing el-Masri but admits it rounded up the wrong man.")

334. *El-Masri*, App. No. 39630/09, ¶ 207.

335. *See* U.S. AGENCY FOR INT'L DEV., USAID IN MACEDONIA 1993–2011: A STORY OF PARTNERSHIP AND PROGRESS 10 (2011), available at http://pdf.usaid.gov/pdf_docs/Pdacs595.pdf (noting that the amount of aid provided by the United States for various projects from 1993–2011 totaled \$530 million).

336. *See, e.g.*, OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 182, at 93–95; *see also* Raymond Bonner, *Indonesia Brings New Case Against Cleric Tied to Terror*, N.Y. TIMES, Oct. 29, 2004, http://www.nytimes.com/2004/10/29/international/asia/29indonesia.html?_r=0 (documenting one such instance of U.S. pressure on another country to "detain [a suspected terrorist] while seeking evidence to support the new charges").

3. Somalia — Secret Detention Sites

According to recent reports, there exists an “underground prison” in the headquarters of the Somali National Security Agency, which appears to be a joint operation between the Somali NSA and the CIA.³³⁷ “While the underground prison is officially run by the Somali NSA, [U.S.] intelligence personnel pay the salaries of intelligence agents and also directly interrogate prisoners,” reports one journalist.³³⁸ Additionally, the Somali Minister of State for the Presidency, Abdulkadir Moallin Noor, has confirmed U.S. intelligence collaboration.³³⁹ Regional cooperation, generally, has increased since late 2001, with the establishment of an American military base in Djibouti³⁴⁰ and Transitional National Government military leaders in Somalia delivering terrorist suspects to American authorities.³⁴¹ International Crisis Group interviewed individuals in Somalia who had been wrongly detained, including Abdulmanaf Abdullah, an Iraqi who moved to Modagishu in November 2001. In March 2003, Abdullah was assaulted, detained in a secret location, and interrogated by Somali and American agents for almost a month.³⁴²

There is cooperation between Somalia and the United States in these counterterrorism efforts, and, where there is cooperation, norms will diffuse via learning and emulation. The continued cooperation between the two countries suggests that although the Obama Administration has stated repeatedly that it will protect human rights while countering terrorism,³⁴³ this is perhaps lip service when fighting against Al Qaeda and other terrorist organizations.³⁴⁴ In fact, although he rebranded the “War on

337. Scahill, *supra* note 184; see also OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 182, at 106–07.

338. Scahill, *supra* note 184.

339. *Id.*; see also INT’L CRISIS GRP., AFRICA REPORT NO. 95, COUNTER-TERRORISM IN SOMALIA: LOSING HEARTS AND MINDS? 9–10 (2005), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Counter-Terrorism%20in%20Somalia%20Losing%20Hearts%20and%20Minds.pdf>.

340. INT’L CRISIS GRP., *supra* note 339, at 9.

341. *Id.* at 12.

342. *Id.* at 16–17.

343. See, e.g., President Barack Obama, Remarks by the President at U.N. Security Council Summit on Foreign Terrorist Fighters (Sept. 24, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-un-security-council-summit-foreign-terrorist-fighters> (“[R]especting human rights, fundamental freedoms and the rule of law is not optional -- it is an essential part of successful counterterrorism efforts. Indeed, history teaches us that the failure to uphold these rights and freedoms can actually fuel violent extremism.”); Warren Richey, *Obama Moves to Overhaul ‘War on Terror’ Practices*, CHRISTIAN SCI. MONITOR (Jan. 22, 2009), <http://www.csmonitor.com/USA/Politics/2009/0122/obama-moves-to-overhaul-war-on-terror-practices> (quoting President Obama as saying that “we are going to [prosecute the struggle against terrorism] in a manner that is consistent with our values and our ideals”).

344. See, e.g., Dilanian, *supra* note 183 (“Army Gen. David H. Petraeus, in his confirmation hearings to become CIA director, said in response to questions . . . that he believed the [United States] should find a way to capture and detain militants and hold them someplace other than Guantanamo.”); Craig Whitlock, *Renditions Continue Under Obama, Despite Due Process Concerns*, WASH.

Terror,”³⁴⁵ President Obama has continued to operate under the war paradigm. Although there are legitimate security concerns over al-Shabaab and its link to Al Qaeda, holding individuals in secret detention sites is against international human rights law.³⁴⁶

4. Sweden — Forced Repatriation to Torture

At the request of United States and Egyptian intelligence, asylum seekers Ahmed Agiza and Mohammed Alzery were denied asylum in Sweden and were forcibly sent back to Egypt.³⁴⁷ Upon allegations that they were tortured and mistreated in the Bromma airport in Stockholm³⁴⁸ as well as in Egypt,³⁴⁹ both the UN Human Rights Committee³⁵⁰ and the Committee Against Torture (CAT)³⁵¹ investigated to determine the veracity of these claims and Sweden’s potential responsibility in this matter.

The Human Rights Committee determined that although Sweden admitted “there was a real risk of ill-treatment[] . . . [its] reliance on diplomatic assurances” was not sufficient to overcome concerns for mistreatment to “a level consistent with its obligations under Article 7 of the ICCPR.”³⁵² The CAT found similarly that the government of Sweden “[knew] or should have known . . . that Egypt resorted to consistent and

POST, Jan. 1, 2013, http://articles.washingtonpost.com/2013-01-01/world/36323571_1_obama-administration-interrogation-drone-strikes (“Renditions are taking on renewed significance because the administration and Congress have not reached agreement on a consistent legal pathway for apprehending terrorism suspects overseas and bringing them to justice.”).

345. See Scott Wilson & Al Kamen, ‘Global War On Terror’ Is Given New Name, WASH. POST (Mar. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

346. Somalia acceded to the ICCPR in 1990. *Status of Ratification Interactive Dashboard: Somalia*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, available at <http://indicators.ohchr.org/> (last visited Jan. 30, 2015). See Human Rights Council, Promotion and Protection, *supra* note 188, at 2 (“The legal assessment concludes that secret detention is irreconcilably in violation of international human rights law, including during states of emergency and armed conflict. Likewise, it is in violation of international humanitarian law during any form of armed conflict.”).

347. Amnesty Int’l, *Sweden: The Case of Mohammed El Zari and Ahmed Agiza: Violations of Fundamental Human Rights by Sweden Confirmed*, 2–3, AI Index EUR 42/001/2006 (2006) [hereinafter Amnesty Int’l, *Sweden*], available at <http://www.amnesty.org/en/library/asset/EUR42/001/2006/en/97edf527-d3d2-11dd-8743-d305bea2b2c7/eur420012006en.pdf>; see also OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 182, at 24–25; Int’l Comm’n of Jurists, United Nations Human Rights Committee Consideration of the 6th Periodic Report of Sweden: Submission of the International Commission of Jurists, 4–6 (2009), available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Sweden_HRC95.pdf.

348. Amnesty Int’l, *Sweden*, *supra* note 347, at 4.

349. *Id.* at 4–5.

350. Human Rights Comm., Views, Commc’n No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

351. Comm. Against Torture, Decision, Commc’n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005) [hereinafter Comm. Against Torture, Decision].

352. Amnesty Int’l, *Sweden*, *supra* note 347, at 6.

widespread use of torture” and, therefore, the forcible removal from Sweden to such an environment “was in breach of [A]rticle 3 of the Convention [Against Torture].”³⁵³ It also held that Sweden should not have allowed U.S. security forces to perform their own security check on Swedish soil.³⁵⁴

According to the CAT, the Swedish security police at the airport “remained passive” and then “lost control,” as the “American security personnel took charge and were allowed to perform the security check on their own,” which violates Swedish law.³⁵⁵ The degree of United States involvement in this incident shows the amount of influence that the United States had over other states in the days immediately following 9/11. Even those states with a strong stance on protecting human rights were not beyond influence. It appears that Sweden was either coerced into remaining passive or emulated the U.S. standard in this particular instance. The fact that Sweden failed to uphold its obligations under both the CAT and the ECHR implies a favoring of security over human rights, which continues to diffuse this norm.

5. Turkey — *Restricting Speech and Expression*

Turkey has a higher conviction rate for those arrested under its counterterrorism measures than any other state.³⁵⁶ The 1991 Anti-Terrorism Law enabled prosecutors and judges to order a temporary suspension of any newspaper or magazines accused of publishing “terrorist propaganda.”³⁵⁷ This particular provision was later repealed in July 2012,³⁵⁸ but other infringing laws remain. For example, the Anti-Terrorism Law is often used to directly connect those who speak on behalf of or in sympathy with alleged terrorist group to the alleged terrorists themselves, regardless of whether or not the individuals are actually a member of the terrorist group.³⁵⁹

353. Comm. Against Torture, Decision, *supra* note 351, ¶ 13.4.

354. *See id.*

355. *Id.* ¶¶ 12.29, 12.30.

356. *See* Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted for Terror Offenses Since September 11 Attacks*, WORLD POST (Sept. 3, 2011, 2:52 PM), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html (reporting findings of broad survey and describing methods).

357. Wendy Zeldin, *Turkey; United Nations: Criticism of Anti-Terrorism Laws*, LIBRARY OF CONG., http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403397_text (last updated Nov. 8, 2012); Terörle Mücadele Kanunu [Anti-Terror Law], 1991, No. 3713, art. 6(5) (repealed 2012) (Turk.).

358. Zeldin, *supra* note 357.

359. OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS, TURKEY: HUMAN RIGHTS DEFENDERS, GUILTY UNTIL PROVEN INNOCENT 11 (2012), *available at* http://www.ccprcentre.org/wp-content/uploads/2012/09/OMCT_FIDH_Turkey106.pdf (“The application of the [Anti-Terrorism Law] mainly targets Turkish citizens of Kurdish origin or those who express sympathy with the Kurds.”).

Furthermore, in July 2006, Turkey extended the scope of its 1991 Anti-Terror Law Article 7(2), prohibiting “making propaganda for a terrorist organization,” to cover demonstrators and dissenters in support of the Kurdistan Workers’ Party (PKK), and authorities cite this provision to stifle speech supporting the Kurdish liberation movement in Turkey.³⁶⁰ The amended law has also been used to justify the detention of human rights lawyers working on issues related to the PKK.³⁶¹ The application of this law in such a way mirrors the way in which the P5 have applied counterterrorism legislation, state practice under the U.S. PATRIOT Act, Russian Federal Law on Mass Media, and French law against *apologie du terrorisme*.

Despite its revisions, Turkey still came under fire from the UN Human Rights Committee in 2012 for using a “vague[] . . . definition of a terrorist act, for “far-reaching restrictions imposed on the right to due process,” and for the large number of charges brought under the Anti-Terrorism Law for what should be protected free speech.³⁶² Notwithstanding the criticism, Turkey has continued to apply these laws to activists and to restrict rights in the name of security. In January 2013, Turkish police took fifteen human rights lawyers into custody.³⁶³ Eventually nine were charged with membership in the People’s Liberation Party-Front (RPLP) and with opposing the government.³⁶⁴ As of March 2014, they were still awaiting trial, with five remaining in pre-trial detention.³⁶⁵ Furthermore, Turkey has

360. HUMAN RIGHTS WATCH, PROTESTING AS A TERRORIST OFFENSE: THE ARBITRARY USE OF TERRORISM LAWS TO PROSECUTE AND INCARCERATE DEMONSTRATORS IN TURKEY 22 (2010) [hereinafter HUMAN RIGHTS WATCH, PROTESTING AS A TERRORIST OFFENSE], available at <http://www.hrw.org/sites/default/files/reports/turkey1110webwcover.pdf>; see also OBSERVATORY FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS, *supra* note 359, at 20 (explaining that another 2006 amendment, to Article 2, “paved the way for the targeting under the anti-terrorism law of individuals advocating for the respect of [the] Kurdish minority’s rights or denouncing abuses committed in the framework of the fight against terrorism”).

361. See HUMAN RIGHTS WATCH, PROTESTING AS A TERRORIST OFFENSE, *supra* note 360; Turkey: *Muharrem Erbey Released After 1570 Days in Pre-Trial Detention*, INT’L FED’N FOR HUM. RTS. (Apr. 14, 2014), <https://www.fidh.org/International-Federation-for-Human-Rights/europe/turkey/15132-turkey-muharrem-erbey-released-after-1-570-days-in-pre-trial-detention>.

362. Human Rights Comm., Concluding Observations on the Initial Report of Turkey Adopted by the Committee at Its 106th Session (15 October - 2 November 2012), ¶ 16, U.N. Doc. CCPR/C/TUR/CO/1 (Nov. 13, 2012); see also Zeldin, *supra* note 357.

363. Marjorie Cohn, *The Turkish Spring: Lawyers Rounded Up*, JURIST (June 13, 2013, 9:30 AM), <http://jurist.org/forum/2013/06/marjorie-cohn-turkey-protests.php>.

364. Turkey: *Nine Human Rights Lawyers Imprisoned*, HUM. RTS. WATCH (Jan. 22, 2013), <http://www.hrw.org/news/2013/01/22/turkey-nine-human-rights-lawyers-imprisoned>; see also Daniel Mullen, *Turkish Court Charges Nine Lawyers Under Anti-Terrorism Law*, JURIST (Jan. 22, 2013, 12:17 PM), <http://jurist.org/paperchase/2013/01/turkish-court-charges-nine-lawyers-under-anti-terrorism-law.php>.

365. Turkey: *Provisional Releases and Continued Judicial Harassment of 47 Lawyers, One Journalist, One Legal Secretary and Two Drivers*, INT’L FED’N FOR HUM. RTS., <http://www.fidh.org/en/europe/turkey/14993-turkey-provisional-release-and-continued-judicial>

detained and prosecuted more journalists than any other state, in the name of security.³⁶⁶

In a way that mirrors the rest of the P5, Turkey's laws have ambiguous definitions of what qualifies as terrorism. Turkey also restricts the speech of those deemed as a separatist movement and other individuals or groups that are critical of the government. Although both Turkey and Russia have ratified the European Convention of Human Rights, it appears that Turkey has learned and emulated Russia's restriction of freedom of speech in a post-9/11 world. Turkey's laws also could be viewed as similar to France's *apologie du terrorisme* law since anyone speaking out who sympathizes with a terrorist group could be seen as promoting terrorism. Based on the similarities between these laws, Turkey appears to perceive that the P5 laws are the models for national security.³⁶⁷

6. Zimbabwe — Using Anti-Terrorism Legislation to Silence Political Opposition

In Zimbabwe, terrorism is vaguely defined, which leaves room for oppression, as discussed above. According to Zimbabwe's Suppression of Foreign and International Terrorism Act, a person who "solicits, invites or encourages moral or material support" to a terrorist organization can be charged and punished with imprisonment for up to five years.³⁶⁸ This Act, passed by the Zimbabwean Parliament in 2007, defines terrorists and terrorist groups as those who wish to overthrow the government "by unlawful means or usurping [its] functions," anyone who "conduct[s] a campaign or assist[s] any campaign" in achieving this, or anyone who "engag[es] in foreign or international terrorist activity."³⁶⁹

harassment-of-47-lawyers (last updated Mar. 20, 2014).

366. *Number of Jailed Journalists Sets Global Record*, COMM. TO PROTECT JOURNALISTS (Dec. 11, 2012, 12:01 AM), <http://www.cpj.org/reports/2012/12/imprisoned-journalists-world-record.php>.

367. *See, e.g., Ipek Demirsu, Britain, Turkey and Trading Human Rights for 'Counter-Terrorism'*, OPENSEcurity (Jan. 27, 2014), <http://www.opendemocracy.net/opensecurity/ipek-demirsu/britain-turkey-and-trading-human-rights-for-counter-terrorism> (providing a side-by-side comparative approach to the U.K. and Turkey counterterrorism laws); VÉRONIQUE DUDOUET, BERGHOF CONFLICT RESOLUTION & BERGHOF PEACE SUPPORT, POLICY BRIEF 02, ANTI-TERRORISM LEGISLATION: IMPEDIMENTS TO CONFLICT TRANSFORMATION 6 (2011), *available at* <http://www.berghof-conflictresearch.org/documents/publications/PolicyBrief02.pdf> ("The impact of anti-terrorist legislations in Europe and North America on the course of armed conflicts around the globe is all the more important as they often provide a source of inspiration for local governments to adopt similar legal measures in order to legitimise their conflicts with proscribed actors as part of a globalised fight against terrorism. Such tendencies can be observed for instance in Colombia, Turkey, Sri Lanka, Ethiopia and Uganda, where national counter-terrorism laws are largely inspired by [U.S.] or EU legislations.")

368. Suppression of Foreign and International Terrorism Act, Act 5/2007, § 10 (Zim.), *available at* <http://rbz.co.zw/Website%20materials%2019.08.13/3.%20Legal%20Framework/4.%20Suppression%20of%20Foreign%20and%20International%20Terrorism%20Act.pdf>.

369. *Id.* § 2.

The charge of terrorism is often brought against the political opposition. In December 2008, Jestina Mukoko, a human rights activist who documented human rights abuses committed by the Mugabe government, was abducted, held without charge in an undisclosed location, and beaten before finally being deposited at the police station and charged with terrorism offenses.³⁷⁰ The charges were later dropped in September 2009 by the Zimbabwe Supreme Court.³⁷¹ In 2010, Roy Bennett, a leader of the Movement for Democratic Change (MDC), the key opposition party to President Robert Mugabe, was acquitted of plotting to violently overthrow the President in 2009.³⁷² Bennett had been arrested on terrorism charges under Zimbabwe's Public Order and Security Act, interestingly, on the day in which his new government was to take over.³⁷³

Furthermore, there has been documented violence against other newly elected MPs and senators.³⁷⁴ Although not charged with terrorism like Bennett, MP Ian Kay, for example, was charged with "inciting political violence," and his home was searched for "allegedly taking pictures of a political nature and sending them outside the country."³⁷⁵ Presumably Kay was thought to be "causing or furthering an insurrection in Zimbabwe" under the Public Order and Security Act,³⁷⁶ although the HRW report does not say as much. The report does document mistreatment by both the police and the Zimbabwe African National Union – Patriotic Front (ZANU-PF), and it indicates that many of the victims interviewed were currently in hiding, as police sought them for "inciting political violence."³⁷⁷ These examples show that counterterrorism laws are being used in Zimbabwe to stifle political opposition and not to counter terrorism itself.

Evidence suggests that President Mugabe has both learned from and emulated members of the P5. The wording of President Mugabe's policies on incitement of political violence and inciting an insurrection closely

370. Affidavit of Jestina Mungarehwa Mukoko (2008), available at http://graphics8.nytimes.com/packages/pdf/world/2009/JM_Affidavit.pdf; see also Barry Bearak, *Court Ends Terrorism Case Against Zimbabwe Activist*, N.Y. TIMES, Sept. 28, 2009, <http://www.nytimes.com/2009/09/29/world/africa/29zimbabwe.html>.

371. Bearak, *supra* note 370.

372. Celia W. Dugger, *Zimbabwe Court Acquits Mugabe Opponent of Terrorism Charges*, INT'L N.Y. TIMES, May 10, 2010, http://www.nytimes.com/2010/05/11/world/africa/11zimbabwe.html?_r=0.

373. *Id.*; PUBLIC ORDER AND SECURITY ACT, pt. II, art. 6, Jan. 22, 2002 (Zim.), available at http://www.kubatana.net/html/archive/legisl/020122posab.asp?sector=LEGISL&year=0&range_start=1&range_end=1#6.

374. HUMAN RIGHTS WATCH, "THEY BEAT ME LIKE A DOG": POLITICAL PERSECUTION OF OPPOSITION ACTIVISTS AND SUPPORTERS IN ZIMBABWE (2008) [hereinafter HUMAN RIGHTS WATCH, "THEY BEAT ME LIKE A DOG"], available at <http://www.hrw.org/reports/2008/zimbabwe0808/zimbabwe0808webwcover.pdf>.

375. *Id.* at 14 (quoting police statement) (internal quotation marks omitted).

376. PUBLIC ORDER AND SECURITY ACT, *supra* note 373.

377. HUMAN RIGHTS WATCH, "THEY BEAT ME LIKE A DOG", *supra* note 374, at 13–18.

mirror similar policies in Russia and China, demonstrating key aspects of both learning and emulation. As previously discussed, President Mugabe has also taken wording directly from the U.S. PATRIOT Act and applied it to Zimbabwe's counterterrorism legislation.³⁷⁸ This is evidence of emulation and even more so learning, since Zimbabwe observed how the United States has used the PATRIOT Act domestically and tweaked the application to suit its own aims.

7. Yemen — Coercion to Arbitrary Detention

The influence of the United States in Yemen is evident, especially as the United States has been allowed to carry out drone strikes within Yemen. While this is not necessarily evidence of any of the modes of diffusion, it is indicative of the nature of the relationship that exists between the two states.³⁷⁹ This close relationship in the "War on Terror" creates an opportunity for norms to diffuse, whether via coercion, learning, or emulation.

In 2002, the Yemeni government acknowledged in an interview with Amnesty International that the country was violating both its human rights obligations and domestic law.³⁸⁰ However, officials attributed this lapse in adherence to the need to "fight terrorism" and avert the risks of military action against Yemen by the [United States] in the wake of [September 11]."³⁸¹ This telling admission marks a clear indicator of the coercion that resulted in human rights being sacrificed for security, especially when the threat of U.S. military action loomed.

378. See Mavhunga, *supra* note 320; PUBLIC ORDER AND SECURITY ACT, *supra* note 373.

379. See Amnesty Int'l, *Yemen: The Rule of Law Sidelined in the Name of Security*, 19, AI Index MDE 31/006/2003 (Sept. 2003) [hereinafter Amnesty Int'l, *Rule of Law Sidelined*], available at <http://www.amnesty.org/en/library/asset/MDE31/006/2003/en/1201e721-d6a7-11dd-ab95-a13b602c0642/mde310062003en.pdf> ("Yemen-[United States] relations bear direct relevance to the deterioration of the human rights situation in Yemen since the 11 September 2001 events. In the wake of these events the two countries forged a special military and security cooperation. The impact of such cooperation on human rights is manifested in the practice of detention, training of Yemen security forces, and the possible extra-judicial killing of six men in November 2002 . . ."); see also Amnesty Int'l, *Yemen: Cracking Down Under Pressure*, AI Index MDE 31/010/2010 (2010) [hereinafter Amnesty Int'l, *Cracking Down*], available at <http://www.amnesty.org/en/library/asset/MDE31/010/2010/en/da8bd0cc-37ab-4472-80b3-bcf8a48fc827/mde310102010en.pdf>.

380. Amnesty Int'l, *Rule of Law Sidelined*, *supra* note 379, at 3; see also *id.* at 17 ("The Government of Yemen informed Amnesty International that it had 'no option' but to continue the practice of detention without charge or trial of those held and to offer them no opportunity of access to lawyers or the judiciary to challenge the legality of their detention. The authorities argued that the primary reason for the arrests and detentions was the priority of security, not justice."); Amnesty Int'l, *Cracking Down*, *supra* note 379, at 6; Lynn Welchman, *Rocks, Hard Places and Human Rights: Anti-Terrorism Law and Policy in Arab States*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 621, 652-53 (Victor V. Ramraj et al. eds., 2d ed. 2012).

381. Amnesty Int'l, *Rule of Law Sidelined*, *supra* note 379, at 3; see also *id.* at 17, 19-20 (describing the threat of U.S. military invasion and more evidence of cooperation between the countries).

This pattern has not changed. In 2011, in response to a phone call from President Obama, Yemeni President Ali Abdullah Saleh revoked his pardon of Abdulelah Haider Shaye, a journalist who was charged with being an Al Qaeda operative after reporting on a U.S. attack on an Al Qaeda training camp.³⁸² Shaye was released from prison in July 2013 after successor President Abed Rabbo Mansour Hadi issued a new pardon in May 2013.³⁸³ Furthermore, according to a 2012 Amnesty International report, alleged Al Qaeda members and supporters held at the Political Security prison “were reported to have been beaten by guards . . . after going on [a] hunger strike to protest against their prolonged detention . . . [and] ill treatment.”³⁸⁴ These beatings resulted in hospitalization for at least ten of the detainees,³⁸⁵ raising questions of cruel and inhumane treatment and whether their continued living conditions amounted to torture. Yemen’s response to the hunger strike parallels the U.S. policy on hunger strikes in Guantanamo.³⁸⁶ The U.S. influence here remains strong, and Yemen is learning from its Western allies in the “War on Terror.”

D. The Far-Reaching Influence of the P5 on Post-1373 States and Non-Member States

As previously discussed, UNSCR 1373 had a unique effect on UN member states, requiring them to implement counterterrorism legislation. The preceding Subparts dealt with states that were already UN member states at the time of 9/11 and described how a restriction of rights has spread globally in favor of national security. In turn, we might ask whether states that are not UN member states, or states that joined the United Nations after 9/11, have nevertheless learned from and emulated the P5.

In an effort to complete the analysis of the spread of a counterterrorism norm that negatively affects human rights, the following states were chosen on the basis that they either became UN member states after the passage of 1373 or are not UN members: Switzerland, South Sudan, Montenegro, and Kosovo. These states are, therefore, out of the

382. Tom McCarthy, *Yemeni Journalist Who Reported US Missile Strike Is Released from Jail*, GUARDIAN, July 23, 2013, <http://www.theguardian.com/world/2013/jul/23/yemen-journalist-us-drone-strike-released>.

383. *Id.*

384. Amnesty Int’l, *Amnesty International Report 2012: The State of the World’s Human Rights*, 367, 370, AI Index POL 10/001/2012 (2012), available at http://files.amnesty.org/air12/air_2012_full_en.pdf.

385. *Id.*

386. See Comm. Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 14, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) (“[T]he Committee considers that force-feeding of prisoners on hunger strike constitutes ill-treatment in violation of the Convention. Furthermore, it notes that lawyers of detainees have argued in court that force-feedings are allegedly administered in an unnecessarily brutal and painful manner.”).

sphere of diffusion via coercion related to UNSCR 1373 for at least a portion of the time under study. These states emulate the practice that the P5 demonstrate or learn from the P5's success with counterterrorism measures. These examples will further demonstrate that restricting human rights while countering terrorism has become the new norm.

1. *Switzerland*

Switzerland has ratified the UN anti-terrorism conventions since becoming a UN member state in 2002.³⁸⁷ Even beforehand, however, Switzerland implemented its own terrorist sanctions along with the UN Al-Qaeda Sanctions Lists, created in 1999 with the passage of UNSCR 1267.³⁸⁸ Switzerland's own sanctions list contains approximately forty-four individuals or entities suspected of being connected with Al Qaeda or the financing of its operations.³⁸⁹ Although these measures were not binding on Switzerland in 1999 because the Swiss were not yet a UN member state, Switzerland chose to take steps to combat the financing of terrorism anyway. This could indicate norm diffusion via learning, since the Swiss were not subject to any coercive measure mandating sanctions.

Evidence from the Committee for the Prevention of Torture has surfaced recently suggesting that the Swiss authorities were guilty of violating their international human rights obligations. Among alleged violations were excessive force by police and the lack of a complaints procedure in many administrative districts for victims of this violence.³⁹⁰ The Committee also noted that the administrative detention used for foreigners was problematic.³⁹¹ Similar violations of rights are seen elsewhere in Europe, especially in the detention practices of the United Kingdom and France.

The fact that Switzerland implemented its own version of the sanctions list, which included the UN list as well, suggests learning from the United Nations. Although the above discussion does not definitively prove that Switzerland has learned from or emulated its European neighbors'

387. CODEXTER, *Profiles on Counter-Terrorist Capacity: Switzerland*, 6 (2014), available at http://www.coe.int/t/dlapil/codexter/Country%20Profiles/Profiles-2014-Switzerland_EN.pdf; Press Release, General Assembly, With Admission of Switzerland, United Nations Family Now Numbers 190 Member States, U.N. Press Release GA/10041 (Sept. 10, 2002); *US Embassy Cables: Switzerland and Counter-Terrorism*, GUARDIAN, Jan. 11, 2011, <http://www.guardian.co.uk/world/us-embassy-cables-documents/50264>.

388. *US Embassy Cables: Switzerland and Counter-Terrorism*, *supra* note 387; see S.C. Res. 1267, *supra* note 119.

389. *US Embassy Cables: Switzerland and Counter-Terrorism*, *supra* note 387.

390. *Reports Raise Concerns over Practices in Switzerland*, ASS'N FOR THE PREVENTION OF TORTURE (Oct. 31, 2012), http://www.apt.ch/en/news_on_prevention/reports-raise-concerns-over-practices-in-switzerland/#.VNLPK2B0yM (citing report providing these details).

391. *Id.*

detention practices and ill treatment, the reports of the CPT are highly suggestive.

2. South Sudan

South Sudan, as the newest state in the world, is struggling to meet its Security Council-imposed obligations due to the ongoing conflict in the region and the presence of the Lord's Resistance Army (LRA).³⁹² Such struggles to meet its international obligations are arguably attributable to the lack of stability, resources, and infrastructure.³⁹³

There are mixed interpretations of counterterrorism legislative efforts in South Sudan. The U.S. Department of State found, in 2012, that the new state had yet to pass any such legislation,³⁹⁴ whereas the Center on Global Counterterrorism Cooperation noted at about the same time that Sections 67 through 73 of South Sudan's Penal Code cover terrorism,³⁹⁵ and South Sudan has been slow to accede to international counterterrorism conventions.³⁹⁶ South Sudan only recently passed counterterrorism finance legislation, but the country lacks the infrastructure to properly implement it.³⁹⁷ The Anti-Money Laundering and Counter Terrorist Act defines terrorism as the "use of organized intimidation or extreme fear to coerce a government or community,"³⁹⁸ yet this definition mirrors similarly vague provisions in other states' laws.³⁹⁹ This broad definition leaves open the possibility of abuse by the government to deem legitimate acts of expression as "terrorism."

392. See U.N. News Centre, UN Maintains Efforts Against Lord's Resistance Army – Senior Officials (Mar. 9, 2012), http://www.un.org/apps/news/story.asp?NewsID=41507#_VMG2F75YXww.

393. BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013, at 49 (2014) [hereinafter U.S. DEP'T OF STATE, 2013 COUNTRY REPORTS], available at <http://www.state.gov/documents/organization/225886.pdf> ("South Sudan expressed a commitment to countering terrorism, but [it] suffered from multiple institutional weaknesses that impeded any counterterrorism efforts.").

394. BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2011, at 33 (2012) [hereinafter U.S. DEP'T OF STATE, 2011 COUNTRY REPORTS], available at <http://www.state.gov/documents/organization/195768.pdf>.

395. The Penal Code Act, 2008, no. 9, §§ 67–73 (South Sudan), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=250684; CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, FIGHTING TERROR THROUGH JUSTICE: IMPLEMENTING THE IGAD FRAMEWORK FOR LEGAL COOPERATION AGAINST TERRORISM 9–10 (2012), available at http://globalcenter.org/wp-content/uploads/2012/06/TaskForce_Report_May20121.pdf.

396. CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, *supra* note 395, at 10.

397. U.S. DEP'T OF STATE, 2013 COUNTRY REPORTS, *supra* note 393, at 50.

398. Anti-Money Laundering and Counter Terrorist Act, 2012, no. 51, § 5 (South Sudan), available at <http://www.icnl.org/research/library/files/South%20Sudan/AntiMoneyLaundering.pdf>.

399. See *supra* Part III.A & C (describing vague definitions of "terrorism" or "extremism" in such countries as Russia, China, Turkey, and Zimbabwe).

Although currently South Sudan lacks the infrastructure to sufficiently combat terrorism,⁴⁰⁰ this may be changing as the state matures.

The Draft National Security Service Bill, introduced in 2014, has caused great concern for the protection of human rights while protecting national security. A coalition of human rights NGOs released a statement in October 2014 on the status of the bill, warning that the bill's provisions interfered with a number of protected rights, including freedom of speech and the prohibition of arbitrary detention and torture.⁴⁰¹ This coalition points to states — some of which this Commentary has described as being influenced by the P5 — that have similar structures in place and have questionable human rights records.⁴⁰² Although the bill initially passed Parliament in October 2014, the President refused to sign it.⁴⁰³ Despite this, members of Parliament have indicated that they may pass the bill without the President's consent.⁴⁰⁴ If enacted, this particular law would replicate existing counterterrorism legislation elsewhere and could be evidence of emulation and learning from the P5.

Any human rights abuses related to counterterrorism may not be due to norm diffusion, but, rather, the lack of rule of law in the state. Human Rights Watch has documented violations of the freedom of speech and the prohibition of arbitrary detention and torture, even outside the context of counterterrorism.⁴⁰⁵ As South Sudan matures and stabilizes, its

400. U.S. STATE DEP'T, 2011 COUNTRY REPORTS, *supra* note 394, at 33 (“[South Sudan] suffers from multiple institutional weaknesses that included insufficient policing and intelligence gathering, inadequate border controls, and deficient aviation security and screening at the country’s two international airports in Juba and Malakal.”); CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, *supra* note 395, at 10 (“[South Sudan’s] nascent infrastructure means that it struggles simply to control its territory and borders, let alone engage in complex multijurisdictional investigations and prosecutions.”).

401. AMNESTY INT’L ET AL., COMMENTS ON THE 8 OCTOBER 2014 DRAFT NATIONAL SECURITY SERVICE BILL OF THE REPUBLIC OF SOUTH SUDAN 1 (2014), available at http://www.hrw.org/sites/default/files/related_material/Commentary%20on%20the%20NSS%20Bill%20-%20October%2014%2C%202014.pdf.

402. *Id.* at 2 (“While vesting national security agencies with police powers is not in itself a violation of international law, a review of state practice, namely in Sudan, Algeria, Egypt, Jordan, Morocco, Tunisia and Yemen, points at a clear correlation between the exercise of powers of arrest and detention on the one hand, and allegations of violations such as arbitrary arrest and detention as well as of torture at the hands of the respective security services on the other.”).

403. *South Sudan President Sends National Security Bill Back to Parliament*, SOUTH SUDAN TODAY, Dec. 21, 2014, <http://southsudantoday.net/default/2014/12/21/south-sudan-president-sends-national-security-bill-back-to-parliament/>.

404. *S. Sudan MPs Hint on Passing Security Bill Without Presidential Assent*, TALK OF SUDAN (Jan. 10, 2015), <http://talkofsudan.com/s-sudan-mps-hint-on-passing-security-bill-without-presidential-assent/>.

405. See, e.g., *South Sudan: 'Rough Justice' in Lakes State*, HUM. RTS. WATCH (June 24, 2013), <http://www.hrw.org/news/2013/06/24/south-sudan-rough-justice-lakes-state>; *South Sudan: Stop Harassing, Detaining Journalists*, HUM. RTS. WATCH (May 3, 2013), <http://www.hrw.org/news/2013/05/03/south-sudan-stop-harassing-detaining-journalists>; *South Sudan: Arbitrary Detentions, Dire Prison Conditions*, HUM. RTS. WATCH (June 21, 2012),

adoption and implementation of counterterrorism law will further test this Commentary's claim that there has been a global shift in the type of norm diffused.

3. *Montenegro*

After Montenegro joined the United Nations in 2006,⁴⁰⁶ the country brought its terrorist legislation into partial alignment with EU law, Council of Europe law and jurisprudence, and relevant UN conventions.⁴⁰⁷ These standards are enshrined in Montenegro's Criminal Code. Article 365 defines a terrorist as follows:

Anyone who, with the intention of endangering the constitutional order and security of Montenegro . . . causes explosion or fire or undertakes other dangerous measures or kidnaps a person, or commits another act of violence or threats [sic] to undertake some dangerous action or to use nuclear, chemical, bacteriological or other dangerous substance and whereby may cause fear or feeling of insecurity of citizens⁴⁰⁸

This definition, which focuses specifically on the “endanger[ment] [of] the constitutional order,” and its application mirror that in other states, particularly Russia and China. The circumstances are particularly pronounced as applied to ethnic minorities.

In September 2006, Montenegrin officials arrested fourteen ethnic Albanians in an anti-terrorist raid called “Eagles’ Flight.”⁴⁰⁹ Those apprehended claimed that they were subjected to physical and verbal abuse during their arrest and subsequent police custody.⁴¹⁰ Ill treatment designed to extract information included “slap[ping], punch[ing], and [being] kept in a painful position” while awaiting court appearances in holding cells at the Higher Court of Podgorica.⁴¹¹ Amnesty International reports that, in the

<http://www.hrw.org/news/2012/06/21/south-sudan-arbitrary-detentions-dire-prison-conditions>.

406. G.A. Res. 60/264, U.N. Doc. A/RES/60/264 (July 12, 2006).

407. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2009, at 92 (2010), available at <http://www.state.gov/documents/organization/141114.pdf>; European Commission, *Screening Report: Montenegro, Chapter 24 – Justice, Freedom and Security*, at 13, MD 282/12 (2012), available at http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch24.pdf.

408. Criminal Code, 2003, no. 70/2003, art. 265, amended by Correction, 2004, no. 13/2004 (Montenegro); OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 407, at 92 n.10.

409. CPT, Council of Eur., *Report to the Government of Montenegro on the Visit to Montenegro Carried out by the European Committee for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008*, ¶24, Doc. No. CPT/Inf (2010) 3 (2010), available at <http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.pdf>.

410. *Id.*

411. *Id.* While the report initially notes that this treatment “alleged[ly]” occurred, it goes on to

subsequent trials, evidence entered against the individuals had been “extracted under duress or unlawfully obtained,” presumably through torture.⁴¹² Furthermore, when more than 100 people were arrested in 2009 for protesting Montenegro’s recognition of Kosovo statehood, at least one detainee claimed he was beaten by police officers.⁴¹³

The CPT traveled to Montenegro in 2013 to monitor the situation of detainees. The Committee found similar instances of torture and ill-treatment, citing “allegations of deliberate physical [mis]treatment of persons deprived of their liberty by the police,” and indicating that the majority of such allegations arose out of interrogation.”⁴¹⁴ Some instances were so severe that they could amount to torture.

This behavior indicates a willingness to prioritize security over human rights. Montenegro probably learned from, and emulates, its EU allies and the United States, partly in an attempt to gain approval and admission to the EU and NATO.⁴¹⁵ As additional evidence, the Special Anti-Terrorism Unit of Montenegro was trained by both U.S. and international forces on counterterrorism techniques in 2009.⁴¹⁶ Perhaps Montenegro is learning the wrong lessons from such training.

4. Kosovo

Although the majority of the P5 recognize Kosovo as a state, Russia and China do not.⁴¹⁷ Currently Kosovo is not a member state of the

state that these allegations were consistent with the physical evidence of abuse introduced in court. *Id.*

412. *Montenegro: Human Rights in the Republic of Montenegro, Annual Reports: 2009*, AMNESTY INT’L, <http://www.amnesty.org/en/region/montenegro/report-2009>.

413. *Id.*

414. CPT, Council of Eur., *Report to the Government of Montenegro on the Visit to Montenegro Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, ¶ 14, Doc. No. CPT/Inf (2014) 16 (2014), available at <http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.pdf>.

415. See Ivana Jovanovic, *OSCE Project Aims to Increase Regional Terrorism-Fighting Capacities*, SOUTHEASTERN EUR. TIMES (Dec. 12, 2014), http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/12/12/feature-01 (noting that a police capacity building project in Montenegro and neighboring countries is managed by the OSCE and funded by a Swiss government agency); Drazen Remikovic, *NATO Praises Montenegro Military Reforms*, SOUTHEASTERN EUR. TIMES (Nov. 20, 2014), http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/11/20/feature-01 (referencing Montenegro’s desire to join NATO and the country’s cooperation with NATO).

416. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 407, at 93.

417. See Press Release, Ministry of Foreign Affairs, Statement by Russia’s Ministry of Foreign Affairs on Kosovo (Feb. 17, 2008) (Russ.), available at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/041c5af46913d38ac32573f30027b380!OpenDocument; Liu Jianchao, Foreign Ministry Spokesperson, Foreign Ministry Spokesperson Liu Jianchao’s Regular Press Conference on February 19, 2008 (Feb. 20, 2008) (China), available at <http://www.china-un.org/eng/fyrth/t408646.htm>. Russia’s position generally remains

United Nations, although it has aspirations.⁴¹⁸ In consultation with the U.S. Department of Justice, Kosovo has taken steps to improve its counterterrorism legislation, including by implementing a new Criminal Code.⁴¹⁹ The Department of Counterterrorism (DCT) was formed out of the police department's counterterrorism unit and became operational for intelligence-gathering purposes by 2011.⁴²⁰ The DCT is working with the Kosovo Intelligence Agency, the United States, the Organization for Security and Co-Operation in Europe (OSCE), and other states to improve the Department's capacity and to combat terrorism through interagency information sharing.⁴²¹

It is important to note the influence of NATO and its members — including P5 members the United States, the United Kingdom, and France — on Kosovo's counterterrorism strategy. Although NATO's influence is substantial in the counterterrorism laws that have been passed, both the United States and the United Kingdom have been individually involved as well by providing counterterrorism training and advice.⁴²²

One cause for concern is that under the new Criminal Procedure Code, it is easier to introduce evidence from other states into courts in Kosovo.⁴²³ While this innovation could strengthen the prosecution of international counterterrorism cases,⁴²⁴ special care must be taken so that Kosovo does not join China or France in admitting evidence that was extracted through torture.

unchanged, although it used Kosovo's independence to support its recent argument that Crimea should be independent. China's position has remained unchanged.

418. See Kosovo Declaration of Independence arts. 8, 9, Feb. 17, 2008, available at <http://www.assembly-kosova.org/?cid=2,128,1635> (“With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter We intend to seek membership in international organisations . . .”).

419. U.S. DEPT OF STATE, 2011 COUNTRY REPORTS, *supra* note 394, at 70–71.

420. *Id.* at 70.

421. *Id.* at 70–72.

422. See *supra* text accompanying notes 419 & 421; HOME DEPARTMENT, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY, 2006, Cm. 6888, at 15 (U.K.), available *at*

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272320/6888.pdf

(“The [United Kingdom], as a part of NATO, played a leading role in the intervention in Kosovo . . . and has played a significant role in the subsequent reconstruction programme.”); Linda Karadaku, *Kosovo Co-Operates with EU, US in Fight Against Terrorism*, SOUTHEASTERN EUR. TIMES (Dec. 22, 2014),

http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2014/12/22/feature-01 (“Both the [United States] and the EU have helped Kosovo align its legislation with international standards on the fight against terrorism,” Fisinik Korenica of the Kosovo Institute for Legal Studies in Pristina told *SETimes*. “In addition, both the EU and [United States] have helped the police and the prosecution with different programs to make [Kosovo] more capable of dealing with serious crimes including terrorism.”).

423. U.S. DEPT OF STATE, 2013 COUNTRY REPORTS, *supra* note 393, at 103.

424. *Id.*

CONCLUSIONS

There is a new “normalization of deviance,”⁴²⁵ whereby, over time, the restriction of human rights in the name of security has become the norm rather than the exception. With UNSCR 1373 as the driver of change in counterterrorism laws worldwide and the P5 as a model for other states, states across the globe adopted this norm. As this Commentary discussed, the prioritization of security over human rights is observable not only in states with repressive regimes, such as Zimbabwe or Egypt, but also in rights-promoting states, such as the signatories of the ECHR, which are typically viewed as bolstering human rights instead of restricting them.

While states can enact laws that retain or protect human rights, for those states examined in this Commentary, compliance with international human rights standards has been severely lacking since September 11. The P5 have set the standard of non-compliance for the rest of the world, enabling diffusion via learning. States have also been coerced, via some combination of UNSCR 1373 and aid funding, into a similar prioritization. Also, states have emulated the practice of the P5 in hopes of gaining access to regional organizations or acceptance of their actions by the international community.

Therefore, given the now preponderance of state practice, a new norm can be said to have emerged — the norm of compromising human rights in the name of security, diffused by the very powers that should be protecting these rights. The human rights norm, as Rosemary Foot put it, is barely surviving in the fight against terrorism.⁴²⁶ The accumulation of state practice in direct contravention of these rights in favor of national security has significantly curtailed the human rights norm where terrorism is involved. As states have been coerced, emulated practice, and learned from the P5, a negative norm has diffused globally and changed the game for norm diffusion.

425. VAUGHAN, *supra* note 90.

426. *See* Foot, *supra* note 2, at 490.