

## Counter-Terrorism and Human Rights: Uneasy Marriage, Uncertain Future

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### INTRODUCTION

In the spring of 2013, an American named Edward Snowden leaked classified secrets to journalists<sup>1</sup> disclosing allegedly illegal information gathering operations of the U.S. counter-terrorism initiatives in the National Security Administration. Many contend that these actions were a violation of privacy rights guaranteed under the U.S. Constitution and general human rights instruments. Snowden was charged with espionage and theft of government property<sup>2</sup> and a long extradition campaign was waged involving Hong Kong, Ecuador and Russia.<sup>3</sup> The U.S. government has been accused of attempting to silence this “whistle-blower” who many contend is a hero, though others consider him a traitor.

Shortly thereafter, Army intelligence analyst Bradley Manning was convicted of 19 criminal counts (including six counts of espionage) for disclosing, *inter alia*, violations of humanitarian law in the Global War on Terrorism.<sup>4</sup>

In both situations, human rights violations were tied to counter-terrorism efforts. Indeed, since the terrorist attacks of 9-11 large scale human rights violations have been reported as a by-product of counter-terrorism initiatives such as torture or inhumane practices in Iraq/Afghanistan and Guantanamo Bay and rendition of suspects to other states for torture.<sup>5</sup> An early observation by Human Rights Watch (World Report 2003)

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<sup>1</sup> Snowden's information primarily was leaked to The Guardian journalist, Glen Greenwald.

<sup>2</sup> Peter Finn and Sari Horwitz, 'U.S. Charges Snowden with Espionage', *The Washington Post*, 21 June 2013 <[http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc\\_story.html](http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html)>.

<sup>3</sup> Russia eventually granted asylum to Snowden (for one-year) on condition that he cease leaking information. See Timothy Heritage and Steve Holland, 'Russia Gives Snowden Asylum, Obama-Putin Summit in Doubt', *Reuters*, 1 August 2013 <<http://www.reuters.com/article/2013/08/01/us-usa-security-snowden-russia-idUSBRE9700N120130801>>.

<sup>4</sup> Matt Sledge, 'Bradley Manning Found Guilty of 19 Counts, Not Guilty of Aiding the Enemy', *Huffington Post Politics*, 30 July 2013 <[http://www.huffingtonpost.com/2013/07/30/bradley-manning-guilty\\_n\\_3677096.html](http://www.huffingtonpost.com/2013/07/30/bradley-manning-guilty_n_3677096.html)>.

<sup>5</sup> Mark Kielsgard, 'A Human Rights Approach to Counter-Terrorism' (2006) 36(2) *California Western International Law Journal* 249, 259-267.

found:

Government policies adopted after the terrorist attacks of September 11, 2001 profoundly altered the human rights landscape ... The arbitrary detention of non-citizens, secret deportation hearings for persons suspected of connections to terrorism, the authorization of military commissions to try non-citizen terrorist [suspects], the failure to abide by the Geneva Conventions in the treatment of detainees held ... [M]ilitary detention without charge or access to counsel ... indicated the failure ... to respect human rights ....<sup>6</sup>

Yet, the history of counter-terrorism and the modern human rights regime have been inextricably linked.<sup>7</sup> They share common features, modalities and goals and have charted parallel courses for nearly half a century. They often build on each other for enforcement or legitimacy and have become arguably stronger because of the union.

However, in the post 9-11 era, this alliance has become increasingly strained and threatens the stability of both. If the future of human rights is, in part, grounded in the same prerequisites as counter-terrorism, can it nonetheless remain faithful to its mandate within that partnership? As government action in the post-911 era becomes ever more opaque (with increasing violence, the trampling of privacy interests and new generations regarding such drastic actions as a state of normalcy), is it time to acknowledge that the cure is more threatening than the disease? Is the international human rights regime complicit in greater rights deprivations by justifying impossible nuances of culpability and Machiavellian principles by making determinations of which is the worst; irrational and ultra-violent terrorist groups or the cynical governments who use this threat as an opportunity to fulfil domestic or international strategic goals and to silence dissent? If so, what does this bode for the future of human rights?

This essay will first discuss the historic links between human rights and counter-terrorism and identify the overlap of methodology, goals and functions. It will then analyse how in the post 9-11 environment that overlap has subtly changed and currently threatens to subsume the overarching human rights *raison d'être* of promoting human dignity. Thereafter, it will consider other developments in international law, particularly, the doctrine of pre-emption, and investigate how it impacts counter-terrorism, the continued legitimacy of the modern human rights regime and the future union of these two initiatives.

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<sup>6</sup> Human Rights Watch, *World Report 2003: United States* (14 January 2003) Human Rights Watch <<http://www.hrw.org/wr2k3/us.html>>.

<sup>7</sup> *Ibid* 267-280.

## LINKS BETWEEN HUMAN RIGHTS AND COUNTER-TERRORISM

The links between counter-terrorism and human rights can be seen in a common historical methodology of treaty-based norm-making, the use of international institutions as enforcement and interpretative policy-making bodies, a common evolutionary development, and a set of prohibited substantive offenses common to both. Human rights and counter-terrorism have collectively grown and become more effective by virtue of common changes in customary international law and evolving social changes. Such changes include a declining reliance on or legitimacy of state sovereignty, the growing influence and authority of international institutions, efforts to force states into compliance with international norm consensus and an expanded vision of UN Charter Article 51 regarding national or collective right to self-defence.<sup>8</sup> The link has also been expressly identified in such high-level international and UN documents as the 1993 Vienna Declaration,<sup>9</sup> the 2004 High-Level Panel on Threats (commissioned by then-UN Secretary General Kofi Annan)<sup>10</sup> and UN General Assembly Resolution 60/288 (the UN Global Counter-Terrorism Strategy).<sup>11</sup>

Human rights have depended on a treaty regime calling for states to humanely treat their nationals in accordance with general principles common to most nations. It has taken a thematic approach with various treaties conveying protections from different types of conduct and protecting different vulnerable groups. Starting in the late 1940's, this regime spawned such instruments as the Genocide Convention,<sup>12</sup> the Convention for

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<sup>8</sup> *Charter of United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 51, provides that:

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

<sup>9</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) ('*Vienna Declaration*').

<sup>10</sup> United Nations Report of the Secretary-General's High-Level Panel on Threats, *Challenges and Change, A More Secure World: Our Shared Responsibility* (2004) <<http://www.un.org/secureworld/report2.pdf>> ('*Report of the Secretary-General's High-Level Panel on Threats*'); see also Horst Rutsch, 'A More Secure World: Our Shared Responsibility; High-Level Panel Presents New Vision of Collective Security' (2004) 41(4) *United Nations Chronicle* <<http://www.un.org/Pubs/Chronicle/2004/issue4/0404p77.html>>.

<sup>11</sup> *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UN GAOR, 60<sup>th</sup> sess, 99<sup>th</sup> plen mtg, Agenda Item 46 & 120, UN Doc A/RES/60/288 (20 September 2006) ('*Resolution 60/288*').

<sup>12</sup> Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

the Elimination of Racial Discrimination,<sup>13</sup> the International Covenant of Civil and Political Rights,<sup>14</sup> the International Convention of Economic, Cultural and Social Rights,<sup>15</sup> the Convention Against Torture,<sup>16</sup> the Convention on the Rights of the Child<sup>17</sup> and the Convention for the Elimination of Discrimination Against Women.<sup>18</sup> Many of the norms expressed in these conventions now reflect customary international law or even *jus cogens* principles.<sup>19</sup>

Efforts at eradicating counter-terrorism had also included a treaty regime which began in earnest in the early 1960's.<sup>20</sup> These treaties also took on the character of thematic agreements, each addressing different types of acts of terrorism and calling for a domestic state response to police against this conduct and to avoid sponsoring or harbouring those who would violate these norms. The early counter-terrorism treaties were largely concerned with aviation safety and preventing aircraft from being hijacked.<sup>21</sup> These efforts met with measured success as airports began using metal detectors and tightening-up security. Later, additional thematic treaties were

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<sup>13</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>14</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>15</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>16</sup> Convention against Torture, Inhumane or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>17</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>18</sup> Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>19</sup> For genocide, see Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6<sup>th</sup> ed, 2003) 488-490. For elimination of racial discrimination, see David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International, 1<sup>st</sup> ed, 2002) 147. For torture, see Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War* (Cambridge University Press, 2009) 86. For certain non-derogable provisions under ICCPR, see UN Human Rights Committee, *General Comment No.29: State of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001). For the rights of the child, see Curtis Doebbler, *Introduction to International Human Rights Law* (CD Publishing, 2006) 154.

<sup>20</sup> Earlier abortive efforts at counter-terrorism treaty-making can be traced to 1937 with the League of Nations. However, in the wake of other international exigencies such as international fascism and looming continental War these efforts failed and the treaty never came into force. See League of Nations Convention for the Prevention and Punishment of Terrorism, opened for signature 16 November 1937, 19 LNTS 23 (not yet in force).

<sup>21</sup> Convention on Offenses and Certain Other Acts Committed on Board Aircraft, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

promulgated. These included treaties to protect diplomats,<sup>22</sup> the physical protection of nuclear materials,<sup>23</sup> prohibiting the taking of hostages,<sup>24</sup> maritime safety,<sup>25</sup> regulation of plastic explosives,<sup>26</sup> the suppression of bombing attacks,<sup>27</sup> and the prohibition against financing terrorist groups.<sup>28</sup>

The key similarity between human rights and counter-terrorism treaties, aside from their general thematic approach, is the call for states to engage in self-policing, albeit with a presumed degree of international oversight. The human rights treaties actually provide more explicit provisions for supra-national supervision with the creation of treaty committees and even some quasi-judicial international or regional tribunals.<sup>29</sup> Though the supervision in the case of counter-terrorism treaties is more limited, to the extent states violate such treaties, there is the implication that the United Nations Security Council (UNSC) could become seized of the matter if it posed a credible threat to international peace and security<sup>30</sup> and the International Court of Justice could also assume jurisdiction.<sup>31</sup> However, in the pre-9-11 era, action expressly authorizing

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<sup>22</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

<sup>23</sup> Convention on the Physical Protection of Nuclear Material, opened for signature 26 October 1979, 1456 UNTS 101 (entered into force 8 February 1987).

<sup>24</sup> International Convention Against the Taking of Hostages, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

<sup>25</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

<sup>26</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection, opened for signature 1 March 1991, 30 ILM 721 (entered into force 21 June 1998).

<sup>27</sup> International Convention for the Suppression of Terrorists Bombings, opened for signature 15 December 1997, 37 ILM 249 (entered into force 23 May 2001).

<sup>28</sup> International Convention for the Suppression of Financing of Terrorism, opened for signature 9 December 1999, 39 ILM 270 (entered into force 10 April 2002).

<sup>29</sup> For treaty committees, see e.g., Committee on the Elimination of Racial Discrimination, Committee against Torture, United Nations Human Rights Committee, Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, Committee on Economic, Social and Cultural Rights, etc. For regional international human rights courts, see e.g., the Court of Justice of the African Union, Inter-American Court of Human Rights, European Court of Human Rights, International Criminal Tribunal for the Former Yugoslavia, International Tribunal for Rwanda, Special Court for Sierra Leone, Special Tribunal for Lebanon, Extraordinary Chambers in the Courts of Cambodia, etc.

<sup>30</sup> *Charter of United Nations* ch VII. Article 39 provides that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

<sup>31</sup> *Statute of the International Court of Justice* art 36 provides that:

international intervention was highly unusual for violations of either type of treaty.<sup>32</sup>

This methodology changed for counter-terrorism after 9-11 as military authorization by the UNSC was provided for the invasion of Afghanistan in 2001<sup>33</sup> and the Global War on Terrorism began. Moreover, while human rights treaty violations may not currently garner the same type of swift action as counter-terrorism violations, human rights have been used as justification for swift military action/intervention<sup>34</sup> and there are factions within the human rights community advocating military action as a response to massive human rights transgressions.<sup>35</sup> It is suggestive that the Responsibility to Protect (R2P)

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1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

<sup>32</sup> Prior to 9-11 UNSC resolutions called for diplomatic and economic sanctions pursuant to Charter art. 41 for States believed to be harbouring terrorist groups, particularly Afghanistan, though peacekeepers were used in several jurisdictions to protect against massive human rights violations, particularly in Eastern Europe and in many hotspots in continental Africa.

<sup>33</sup> SC Res 1386, UN SCOR, 56<sup>th</sup> sess, 4443<sup>rd</sup> mtg, UN Doc S/RES/1386 (20 December 2001).

<sup>34</sup> Ella Shohat and Evelyn Alsultany (eds), *Between the Middle East and the Americas: The Cultural Politics of Diaspora* (University of Michigan Press, 2013) 148.

<sup>35</sup> At the time of the Rwandan genocide, Susan Rice (now U.S. National Security Advisor) was Assistant Secretary of State for African Affairs. Rice has been described as a pragmatist who favours military intervention, in situations involving massive human rights violations and called for US military intervention into Darfur. See Spencer Ackerman, 'A Window into Obama's Foreign Policy' *The Washington Independent* (Washington 14 November 2008) <<http://washingtonindependent.com/18516/susan-rice>> accessed 14 July 2013. Additionally, Samantha Powers, who currently serves as the United States Ambassador to the United Nations, has sharply criticized the United States' failure to use force to protect civilians from society-wide killing in Cambodia, Iraq, Bosnia, Rwanda, and Sudan, etc. See Mark Amstutz, *International Ethics: Concepts, Theories, and Cases in Global Politics* (Rowman & Littlefield Publishers, 4<sup>th</sup> ed, 2013) 108; see also Samantha Powers, *A Problem from Hell: America and the Age of Genocide* (Harper Perennial, 2007).

doctrine, calling for the use of (military) force in response to massive human rights violations, has gained increasing momentum in the post 9-11 era.<sup>36</sup> Thus, as counter-terrorism methodology has shifted from voluntary national self-policing to greater international oversight to international intervention, so too has human rights methodology shifted to a more interventionist approach including, *inter alia*, use of military force.

This reflects a common evolutionary path consistent with both human rights and counter-terrorism. Indeed, even in the beginning of the 21<sup>st</sup> century, some states continue to subscribe to the traditional definition of human rights, which postulates that only states can violate human rights, not non-state actors. Argentina, in 2003, stated ‘that it does not accept the argument that the acts of international terrorism constitute a human rights violation, since, by definition, only States are capable of violating human rights’.<sup>37</sup> Obviously, if only states can violate human rights, then terrorists, as non-state actors, cannot be guilty of human rights violations and the link between the two is broken. But, this view is out of step with the evolution of human rights which charges governments to *ensure and protect* rights from third parties.<sup>38</sup> This includes violations from corporations, organized crime and domestic and international terrorist groups.<sup>39</sup>

But the earlier view was steeped in a 1950’s-style definition of human rights calling for States to agree to fulfil their individual policing obligations without meaningful oversight, whether for counter-terrorism or human rights. Initially, both initiatives were aspirational, not binding “hard law”. This lukewarm approach to these international concerns was partially the result of the vitality of traditional state sovereignty as provided in the UN Charter Chapter 1.<sup>40</sup> Additionally, the “soft law” character of human rights and counter-terrorism was due to the elusive possibility of achieving consensus in the UNSC during the Cold War era. During this time, human rights relied on a patient methodology of publicize, shame, help build infrastructure through aid,

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<sup>36</sup> Gentian Zyberi, *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press, 2013) 137-138.

<sup>37</sup> UNECOSOC Sub-Committee on Prevention of Discrimination and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism* (prepared by Kalliopi K. Koufa), UN Doc E/CN.4/Sub.2/2003/WP.1/Add.2 (8 August 2003) 2.

<sup>38</sup> Bertrand Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff, 2011) 135.

<sup>39</sup> Christina Eckes, *EU Counter-Terrorism Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2010) 187. In *Kilic v Turkey* (2001) III Eur Court HR 75, the European Court of Human Rights held that there is a positive duty imposed on states to provide protection to their citizens against interference from third parties.

<sup>40</sup> *Charter of United Nations* art 2(4), provides that ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

impose economic and diplomatic sanctions, etc. Indeed, the lack of hard law methodology (and lack of international consensus) is poignantly shown by the failure of international criminal law to prosecute offenders during the Cold War, after the Nuremberg and Tokyo tribunals were dismantled.

However, both human rights and counter-terrorism experienced changes in the post-Cold War era. With a new international political environment in the UN, more pragmatic efforts were possible. The UNSC began to expand the concept of threats to international peace and security. The framers of the UN Charter, at the close of World War II, understood threats as country-on-country aggression with traditional warfare tactics: customary battle lines, conventional weapons and identifiable (uniformed) combatants. Increasingly, in modern times, threats to international peace and security stem from non-state actors, weapons of mass destruction and no discernible enemy encampment. Moreover, in contemporary globalized society, with local regional and international interdependence, threats to peace and security may also stem from dramatic domestic disturbances such as massive human rights violations. Thus, the UNSC definition of “threat” began to include threats from non-state actors<sup>41</sup> (e.g., terrorist groups) and threats from extensive internal strife<sup>42</sup> such as the Rwandan genocide (which quickly spread outside its borders).

Additionally it was during this post-Cold War period at the close of the twentieth century that both counter-terrorism and human rights faced crisis points, with heightened terrorist activity in Europe, the Middle East and Northern Africa as well as human rights disasters in Rwanda, the former Yugoslavia, the Democratic Republic of Congo and generally throughout the Great Lakes region of sub-Saharan Africa. These arguably constituted the greatest human rights emergencies since World War II and they occurred at a time when international consensus on remedies was possible. Moreover, during this time, terrorist activity was also heightened and some of the most successful and boldest of the international groups began to operate. The rise of terrorism can be traced by a review of UNSC action and resolutions during the 90’s and early 2000’s.<sup>43</sup>

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<sup>41</sup> SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001) (*Resolution 1373*); SC Res 1566, UN SCOR, 59<sup>th</sup> sess, 5053<sup>rd</sup> mtg, UN Doc S/RES/1566 (8 October 2004); see also Dominika Svarc, ‘Military Response to Terrorism and International Law on the Use of Force’ in Centre of Excellence Defence Against Terrorism (eds), *Legal Aspects of Combating Terrorism* (IOS Press, 2008) 131, 133.

<sup>42</sup> SC Res 929, SCOR, 49<sup>th</sup> sess, 3392<sup>nd</sup> mtg, UN Doc S/RES/929 (22 June 1994); see also Michael Bothe, ‘Security in International Law since 1990’ in Hans Brauch et al (eds), *Globalization and Environmental Challenges: Reconceptualising Security in the 21<sup>st</sup> Century* (Springer, 2008) 475, 479.

<sup>43</sup> See SC Res 1189, UN SCOR, 52<sup>th</sup> sess, 3915<sup>th</sup> mtg, UN Doc S/RES/1189 (13 August 1989); SC Res 1267, UN SCOR, 52<sup>th</sup> sess, 4051<sup>th</sup> mtg, UN Doc S/RES/1267 (15 October 1999); SC Res 1368, UN SCOR, 56<sup>th</sup> sess, 4370<sup>th</sup> mtg, UN Doc S/RES/1368 (12 September 2001); *Resolution 1373*, UN Doc S/RES/1373; SC Res 1540, UN SCOR, 59<sup>th</sup> sess, 4956<sup>th</sup> mtg, UN Doc S/RES/1540 (28 April 2004).



Terrorist activity culminated in the 9-11 attacks. Thus, a perfect storm of events occurred in the 1990's with the end of the Cold War, the expansion of the UNSC conceptual model of threats to international peace and security and both counter-terrorism and human rights reaching crisis points. These developments resulted in a completely new evolutionary paradigm for both initiatives.

The commonalities between human rights and counter-terrorism are also reflected in a shared international arbiter, namely the UNSC. The UNSC is tasked with preserving international peace and security<sup>44</sup> and therefore among its competencies is subverting terrorism. Indeed, the council also sits as the Counter-Terrorism Committee (CTC).<sup>45</sup> The UNSC has adopted numerous important resolutions specifically dealing with terrorist activity and implemented specific responsive policies.<sup>46</sup> Additionally, the UN Charter calls for the promotion of human rights and fundamental fairness<sup>47</sup> and, as the principal executive body of the UN,<sup>48</sup> the UNSC assumes the duty to see the Charter is faithfully carried out. Thus, it is also tasked with protecting human rights.<sup>49</sup> The UNSC

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<sup>44</sup> *Charter of United Nations* art 39, provides that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'.

<sup>45</sup> *Resolution 1373*, UN Doc S/RES/1373; SC Res 1624, UN SCOR, 60<sup>th</sup> sess, 5261<sup>st</sup> mtg, UN Doc S/RES/1624 (14 September 2005); see also Security Council Counter-Terrorism Committee, *About the Counter-Terrorism Committee* (29 June 2013) <<http://www.un.org/en/sc/ctc/aboutus.html>>.

<sup>46</sup> *Resolution 1373*, UN Doc S/Res/1373.

<sup>47</sup> *Charter of United Nations* art 1(3) states that its purpose is '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

<sup>48</sup> *Charter of United Nations* arts 24-26. Article 24 provides that:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25 provides that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Article 26 provides that:

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

<sup>49</sup> Nico Shrijver, 'Sovereignty Versus Human Rights? A Tale of UN Security Council Resolution 688 (2013) J. JURIS 171

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has concluded that certain situations involving massive human rights violations sufficiently threaten international peace and security to justify international intervention (even when confined completely within one state). Thus, under Charter Article 42,<sup>50</sup> the UNSC has authorized intervention for both terrorist attacks and large-scale human rights violations.<sup>51</sup> This is an increasing use of common international police action and oversight.

Additionally, counter-terrorism and human rights are linked on a more basic level - a substantive overlap. Terrorist-related violence impacts human rights on several levels. Obviously, those who are victimized are either directly deprived of their right to life<sup>52</sup> or a plethora of other human rights norms.<sup>53</sup> Indirectly, rights deprivation consists of denial of democratic principles as militant minorities seek to assume political control or influence through coercive means, thereby, subverting popular consensus.<sup>54</sup> Therefore, terrorist acts are human rights violations and the eradication of the former is partially the fulfilment of the latter.

Finally, the link between counter-terrorism and human rights has been articulated and documented in several high-level international reports and instruments. These include the 1993 Vienna Declaration and Programme of Action, which stipulates in Article 17:

The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening

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(1991) on the Protection of the Kurdish People' in Peter Baehr et al (eds), *The Role of the Nation-State in the 21<sup>st</sup> Century: Human Rights, International Organizations and Foreign Policy* (Springer, 1<sup>st</sup> ed, 1998) 347, 347; see also Bertrand Ramcharan, *The Security Council and the Protection of Human Rights* (Martinus Nijhoff, 2002).

<sup>50</sup> *Charter of United Nations* art 42, provides that:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

<sup>51</sup> For authorization of intervention against terrorist attacks, see *Resolution 1373*, UN Doc S/RES/1373. For large-scale human rights violations, see Mats Berdal and Spyros Economides, *United Nations Interventionism, 1991-2004* (Cambridge University Press, 2007) 231.

<sup>52</sup> ICCPR art 14; see also African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 21 ILM 58 (entered into force 21 October 1986) art 4(1) ('ACHR'). The right to life is non-derogable under ICCPR art 4 and ACHR art 27; see also Francisco Martin et al, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press, 1<sup>st</sup> ed, 2011) 35.

<sup>53</sup> For a discussion of other direct human rights violations caused by terrorism see UNECOSOC Sub-Committee on Prevention of Discrimination and Protection of Minorities, *Terrorism and Human Rights: Preliminary Report (prepared by Kalliopi K. Koufa)*, UN Doc E/CN/.4/Sub.2/1999/27 (7 June 1999) 53.

<sup>54</sup> *Ibid* 24, 32-3, 36.

territorial integrity, security of States and destabilizing legitimately constituted governments.<sup>55</sup>

The connection can also be seen in the 2005 Secretary-General High-Level Panel on Threats, Challenges and Change which observes:

Terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.<sup>56</sup>

The General Assembly is also sensitive to the linkage as expressed in GA Resolution 60/288, which states ‘... that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights....’<sup>57</sup>

## RECENT TRENDS IN INTERNATIONAL LAW

Recent trends in public international law have fueled the evolution of human rights and counter-terrorism. These include the development of the doctrine of pre-emption, the shifting definition of Charter Article 51 by allowing for national or collective self-defence against non-state actors, changing assumptions under the law of armed conflict and greater acceptance of R2P principles. Each of these developments contributes to the legal legitimacy of the Global War on Terrorism and a greater interventionist approach for counter-terrorism and human rights alike.

The doctrine of pre-emption or anticipatory self-defence can be traced to the Israeli bombing raid on the Osirak facility in Iraq in 1981.<sup>58</sup> It was thought that the facility was producing nuclear arms and Israel should not have to wait to be attacked before destroying the bomb-making capacity of their enemy.<sup>59</sup> Essentially, this doctrine calls for the pre-emptive attack upon those with weapons of mass destruction before they launch and is justified by the instantaneous and lethal character of modern weapons.<sup>60</sup> Many

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<sup>55</sup> *Vienna Declaration* art 17.

<sup>56</sup> *Report of the Secretary-General's High-Level Panel on Threats*, 47.

<sup>57</sup> *Resolution 60/288*, UN Doc A/RES/60/288; see also *Charter of United Nations* preamble para [7], provides that the United Nations is designed ‘to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ...’.

<sup>58</sup> SC Res 487, UN SCOR, 36<sup>th</sup> sess, 2288<sup>th</sup> mtg, UN Doc S/RES/487 (19 June 1981).

<sup>59</sup> *Ibid.*

<sup>60</sup> See Christine Grey, ‘The Use of Force and the International Legal Order’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2010) 615, 628.

support this doctrine as a modern necessity<sup>61</sup> while others argue that it is an unacceptable denuding of the protections accorded for pacific resolution of disputes in UN Charter Article 2.<sup>62</sup> Either way, it is clearly an expansion of the original aims of UN Charter Article 51 which provides for 'individual or collective self-defence if an armed attack occurs against a member state.'<sup>63</sup> It allows for easier resort to military options.

On a parallel course, trends in international law have evolved to allow for UN Article 51 self-defence against non-state actors. In the 1986 ICJ *Nicaragua* case, the Court found that military action could not be authorized against non-state actors, absent state attribution,<sup>64</sup> (though this decision featured spirited dissent).<sup>65</sup> Recently, this position has arguably been reversed. The late Antonio Cassese observed in 2005 that '... contrary to what the ICJ states in *Nicaragua* ... the aggression need not come from a State; it can also emanate from a terrorist organization ...'.<sup>66</sup>

Thus, with the acceptance of pre-emption and the ability to invoke Article 51 self-defence against non-state actors, states are provided far wider latitude to launch attacks against nearly any target. These were the conditions prerequisite to the inauguration of the Global War on Terrorism including the U.S. War against Iraq. These principles have also served to provide a basis for the Russian bombing missions in Georgia against the Chechens,<sup>67</sup> Colombia's attacks against the FARC group in Ecuador,<sup>68</sup> and the attacks by Turkey against the PKK in Iraq.<sup>69</sup>

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<sup>61</sup> *Ibid.*

<sup>62</sup> See Mark Kielsgard, 'National Self-Defense in the Age of Terrorism: Immediacy and State Attribution', in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer Press, 2012) 315.

<sup>63</sup> *Charter of United Nations* art 51, provides that:

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

<sup>64</sup> *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Judgment)* [1986] ICJ Rep 14 [195] ('*The Nicaragua Case*'); see also Antonio Cassese, 'The International Legal Community's Legal Response to Terrorism' (1989) 38 *International and Comparative Law Quarterly* 589.

<sup>65</sup> *The Nicaragua Case* [231]-[232].

<sup>66</sup> Antonio Cassese, *International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 354-355.

<sup>67</sup> *Letter from the Representative of the Russian Federation to the Secretary-General*, UN GAOR, UN Doc. S/2002/1012 (11 September 2002); see also Teresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defence Post 9-11' (2011) 105(2) *American Journal of International Law* 244.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

Pre-emptive attack against non-state parties usually relies on intelligence conclusions, which are often inaccurate if not contrived.<sup>70</sup> It was on such evidence (the supposed existence of weapons of mass destruction) that the War in Iraq was waged.<sup>71</sup> The consequences of allowing non-state parties as military targets is tantamount to allowing extra-judicial killing of any individual wherever in the world they may be. Coupled with pre-emption, states are allowed to kill any target wherever they happen to be based on a suspicion that they may pose a threat at some time in the future. In justification of the assassination of Osama bin Laden, Harold Koh, Legal Advisor to the US Department of State and renowned international law scholar, stated that ‘a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force’.<sup>72</sup> Bin Laden was unarmed and located in Pakistan at the time he was killed by an American military commando team.<sup>73</sup> Thus, these two international law developments helped to create a legal pathway for the Global War on Terrorism, arguably, making the entire world a battlefield and authorizing the lethal targeting of persons (including civilians) based on non-legal, some may say, inherently unreliable, grounds. Suspects may be killed on sight, often by unmanned drones.<sup>74</sup>

In the human rights arena, initiatives calling for military intervention to forestall pending disaster may rely on similarly disingenuous footings. These efforts have an equal potential to cause great destruction and human rights deprivations. The doctrine of R2P provides for the obligation of presumably elite states to intercede militarily to prevent massive human rights atrocities.<sup>75</sup> Though this doctrine anticipates intercession only as a last resort, the protocols for making such determinations are vague. In Libya, the UNSC

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<sup>70</sup> See e.g., L Fletcher Prouty, *The Secret Team: The CIA and Its Allies in Control of the United States and the World* (Skyhorse Publishing, 2008); see also Greg Cashman and Leonard Robinson, *Introduction to the Causes of War: Patterns of Interstate Conflict from World War I to Iraq* (Rowman & Littlefield Publishers, 2007) 318; see also Richard Russell, *Sharpening Strategic Intelligence: Why the CIA Gets Its Wrong and What Needs and What Needs to Be Done to Get It Right* (Cambridge University Press, 1<sup>st</sup> ed, 2007) 60.

<sup>71</sup> Nick Ritchie and Paul Rogers, *The Political Road to War with Iraq: Bush, 9/11 and the Drive to Overthrow Saddam* (Routledge, 2006) 131.

<sup>72</sup> Harold Hongju Koh, *The Lawfulness of the US Operation Against Osama bin Laden* (19 May 2011) Opinio Juris <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>.

<sup>73</sup> Adrian Brown, ‘Osama Bin Laden’s Death: How It Happened’, *BBC News South Asia*, 10 September 2012 <<http://www.bbc.co.uk/news/world-south-asia-13257330>>.

<sup>74</sup> ‘According to Pakistani authorities, there were more than 60 predator or reaper strikes in Pakistan between January 14, 2006 and April 8, 2009. Only ten were able to hit their actual targets, killing 14 al-Qaeda leaders. The other 50 attacks went wrong because of faulty intelligence information, and thus killed 687 innocent civilians, including women and children’. James White, *Contemporary Moral Problems: War, Terrorism, Torture and Assassinations* (Cengage Learning, 4<sup>th</sup> ed, 2011) 98.

<sup>75</sup> Wiktor Osiatynski, *Human Rights and Their Limits* (Cambridge University Press, 1<sup>st</sup> ed, 2009) 54.

ordered intervention into a national civil war based solely on human rights grounds – in order to avoid catastrophic human tragedy. Yet, is it really possible to say with certainty that disaster was averted? Some scholars contend that the intervention into Libya may not have been a model operation.<sup>76</sup> Such decisions run the risk of applying military responses based on speculation and therefore risk matching the misconduct of the Global War on Terrorism. Thus, evolving international norms which allow for less restrained use of Charter Article 51; pre-emption and self-defence against non-state actors - and the increasing application of these principles to human rights – are driving toward an ever-greater interventionist methodology.

## CONCLUSION

As the Global War on Terrorism has made claims of legal legitimacy under shifting international legal norms, it has altered the character of counter-terrorism activities. Because of long established linkages between counter-terrorism and human rights, it also threatens to alter how human rights are done.

If human rights are to retain legitimacy, it must distance itself from counter-terrorism initiatives. This includes a blanket refusal to follow this precedent and a denial of an “ends justify the means” rationalization. Human rights need to retain its methodological template without recourse to easy (though eventually self-defeating) military solutions. Beyond being complicit with the unavoidable human rights violations inherent in a military model, it is an ineffective methodology. Forcing compliance at gun point has seldom brought about the kind of social change aimed at by human rights or even by counter-terrorism. Indeed, force typically has the opposite effect of building and coalescing resistance.<sup>77</sup> Recently, the al-Qaeda terrorist group has been enjoying a resurgence of power in spite of a dozen years of the Global War on Terror. They have orchestrated the prison breaks of thousands of terrorist detainees from several countries in a matter of weeks.<sup>78</sup> The lack of discernible progress further supports the contention that the Global War on Terrorism has created a ‘state of permanent legal emergency’.<sup>79</sup>

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<sup>76</sup> See Alan Kuperman, ‘A Model Humanitarian Intervention? Reassessing NATO’s Libya Campaign’ (2013) 38(1) *International Security* 105, 105-136.

<sup>77</sup> Kielsgard, above n 5, fn 188.

<sup>78</sup> Saad Abedine, Mohammed Tawfeeq and Joe Sterling, ‘Militant Group Claims Responsibility for Iraq Prison Attacks’, *CNN*, 24 July 2013 <<http://edition.cnn.com/2013/07/23/world/meast/iraq-violence>>; see also AAP, ‘Interpol Suspects al-Qaeda Jailbreak Link’, *The Australian News*, 4 August 2013 <<http://www.theaustralian.com.au/news/breaking-news/interpol-suspects-al-qaeda-jailbreak-link/story-fn3dxux6-1226690814559>>.

<sup>79</sup> See Masferrer, above n 62.

By following this model, human rights is building a foundation in quicksand as there is no future for human rights in an age of indefinite war. Despite the pragmatic allure of using force to compel compliance, this approach comes at the cost of legitimacy and ultimately is fated to fail.