

WHAT'S IN A NAME? HOW NATIONS DEFINE TERRORISM
TEN YEARS AFTER 9/11

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ABSTRACT

Ten years after the attacks of September 11, 2001, it almost goes without saying that the acts of grotesque violence committed on that day have had enormous effects on national security law and policy worldwide. To be labeled a terrorist, or to be accused of involvement in an act of terrorism, carries far more severe repercussions now than it did ten years ago. This is true under international law and under domestic law in nations that have dealt with serious national security concerns for many years.

Given the U.N.'s global mandate to combat terrorism and that being defined as a terrorist can have widespread legal implications, this Article seeks to address how legal definitions are shaped and analyzes the lack of a globally accepted definition of terrorism in the context of domestic counterterrorism obligations. This Article addresses a significant historical gap in examining the interplay between international obligations and domestic definitions, the previously overlooked history and evolution of those definitions, and the potential rule of law issues arising from the definitions in their current form.

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In examining counterterrorism law in the United States, the United Kingdom, and India, it is clear that definitions of terrorism under various domestic laws have been repurposed from one legislative context to another and broadened in application, particularly since September 11. This has led to the arguably unintended consequences of disparate impact on outsider groups and the unmooring from rule of law principles. Since neither international norms nor domestic courts provide a significant check against creeping definitions, legislatures must take proactive steps to combat potential overreaching in applying the label of terrorism.

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1. INTRODUCTION

As we reflect on the ten-year anniversary of the terrorist attacks of September 11, 2001, it is clear that the last decade witnessed a transformation of the landscape of national security law and policy, both domestically and internationally. Soon after the September 11 attacks, the United Nations Security Council took a bold, novel step in mandating worldwide domestic lawmaking to combat terrorism,¹ despite the seemingly central problem that the United Nations has not adopted a comprehensive definition of terrorism.²

In the United States and other nations, being labeled a terrorist carries different consequences—ranging from trial in a specialized court³ to a delay in or denial of access to counsel and other pretrial constitutional protections,⁴ restrictions on freedom of expression,⁵

¹ See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) [hereinafter S.C. Res. 1373] (mandating that all U.N. member nations take proactive steps to combat terrorism, including increasing criminalization and implementing harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists). See generally Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 91-92 (2004) (detailing U.N. Security Council Resolution 1373 which mandated that countries institute laws combating terrorism and noting the lack of consensus on the scope of the definition of terrorism).

² See S.C. Res. 1566, ¶ 3 U.N. Doc. S/RES/1566 (Oct. 8, 2004) (attempting to more clearly set forth the parameters of terrorism in light of the lack of a comprehensive United Nations definition).

³ See generally Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131 (2010) (detailing the uses and limitations of specialized trials for terrorism, as well as comparative perspectives from the United Kingdom, Israel, and India).

⁴ For example, in May 2010, U.S. Attorney General Eric Holder suggested that Congress consider legislation to expand and define the public safety exception articulated in *N.Y. v. Quarles*, 467 U.S. 649 (1984). *Quarles* held that the obligation of law enforcement officers to inform arrestees of their right to counsel, among other Miranda rights, was subject to a public safety exception under certain circumstances. Holder's proposed legislation would provide for a "broad new exception to the Miranda rights" which would permit "investigators to interrogate terrorism suspects without informing them of their rights." Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1.

⁵ See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (holding constitutional under the First Amendment a Patriot Act provision which made it unlawful to provide material support and assistance to organizations deemed terrorists, even where such support was nonviolent).

or weakened constitutional protections of privacy rights in the home.⁶ In countries facing serious national security threats, the label of terrorism can have a deep and meaningful effect on those deemed to be “terrorists” and on counterterrorism law and policy as a whole.

Given the U.N.’s global mandate to combat terrorism and that defining an individual as a terrorist has widespread legal implications, this Article seeks to address numerous questions. How do definitions of terrorism differ among nations dealing with serious national security threats? How are these legal definitions shaped and how does the labeling of a person or entity as a terrorist affect them differently than if they were treated as an “ordinary” criminal suspect? What is the impact of the lack of a globally accepted definition of terrorism at the U.N. level combined with worldwide mandates that are predicated on a working definition of terrorism?

Countries facing serious national security threats face the same threshold questions of how to define terrorism and the implications of those definitions. After the adoption of United Nations Security Council Resolution 1373,⁷ even countries that generally treated acts of terrorism as ordinary criminal matters⁸ were moved to define terrorism, if only to comply with Resolution 1373’s mandate that countries provide details of their

⁶ See, e.g., discussion *infra* Section 3.2.2 (discussing control orders in the United Kingdom, which restrict suspected terrorist’s movements to and from the home).

⁷ See S.C. Res 1373, *supra* note 1, ¶ 3 (calling upon states to cooperate with one another to suppress terrorist acts).

⁸ See e.g., Nicholas Kulish, *Suspects Plan Guilty Pleas in Terror Case in Germany*, N.Y. TIMES, June 9, 2009, <http://www.nytimes.com/2009/06/10/world/europe/10germany.html?src=tw&tw=nytimes> (reporting that four suspects, accused of membership in terrorist organizations and of plotting bombings in Germany, planned to plead guilty to terrorism charges); 14 *Terror Suspects to Go Straight to Trial*, CTV NEWS, Sept. 24, 2007, http://www.ctv.ca/CTVNews/Canada/20070924/terror_trial_070924 (reporting on the upcoming trial of fourteen “terror suspects accused of plotting to storm Parliament and behead Prime Minister Stephen Harper”); *Turkey: Life in Prison for 6 Al-Qaida Suspects*, SEATTLE TIMES, June 10, 2009, http://seattletimes.nwsourc.com/html/nationworld/2009321775_apeuturkeyal_qaidatrial.html (reporting that a Turkey appellate court upheld life sentences of six “al-Qaida militants” and lesser sentences of 33 for their 2003 involvement in fatal bombings of synagogues, a bank, and a British consular office).

counterterrorism programs.⁹ Nations facing serious national security issues, including the United States, United Kingdom, and India, increased the robustness of their counterterrorism efforts in the wake of Resolution 1373.¹⁰ These nations faced mixed results in terms of efficacy, preservation of rights, benefits to national security, adherence to the rule of law, and public confidence in institutional legitimacy.

The United Kingdom and India, nations with different structural systems and histories of dealing with internal and external violence than the United States, are nonetheless particularly useful comparators in this analysis. All three nations share a legal heritage and the burden of serious national security threats. Beyond that, however, these nations enjoy relatively strong and stable governance structures, a separation of powers and political process that has supported challenges to security-related decision-making, and a relatively high level of transparency with regard to the operation of legal mechanisms. As such, the experiences of the United Kingdom and India offer useful insight as to how legal definitions of terrorism have undergone remarkably similar evolutions despite different historical contexts, thereby making this comparative analysis all the more relevant for consideration of potential domestic reforms.¹¹

⁹ See S.C. Res. 1373, *supra* note 1, ¶ 6 (calling upon states to disclose the steps they have taken to implement Resolution 1373).

¹⁰ It is widely understood that the adoption of Resolution 1373 was largely due to U.S. pressure on the members of the United Nations Security Council. See Kim Lane Scheppelle, *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space*, 28 PENN ST. INT'L L. REV. 451, 455 (2010) ("It is no coincidence that UN Security Council Resolution 1373, passed on 28 September 2001, mirrors almost exactly the strategy for fighting terrorism that one sees in the USA PATRIOT Act, which the US was drafting at the same time as it was urging the Security Council to act.").

¹¹ In recent years, the U.S. government has been willing to consider and possibly adopt counterterrorism laws and policies from other countries when those tactics are perceived to be successful. See, e.g., *Catching Terrorists: the British System Versus the U.S. System: Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 109th Cong. 2-29 (2006) (statements of Hon. Richard A. Posner, Fed. J., Court of Appeals for the Seventh Circuit; John Yoo, Professor of Law, Boalt Hall Sch. of Law, Univ. of Cal. at Berkeley; Tom Parker, CEO, Halo Partnership Consulting, Former British counterterrorism official (commenting on the measures Britain has taken in combating terrorism). Judge Posner noted his enthusiasm for engaging in comparative national security policy analysis:

We must not be too proud to learn from nations such as the United Kingdom that have a much longer history of dealing with serious

Section 2 of this Article considers the challenges of relying on an incomplete and piecemeal definition of terrorism at the United Nations level in conjunction with the mandate for robust counterterrorism measures in United Nations member states.

Section 3 examines from a comparative perspective how the United States, United Kingdom, and India have developed their current legal definitions of terrorism and how those definitions are applied by the government and law enforcement in each nation. By examining the history and application of these definitions, we can understand the value judgments and policies each of these nations promote as they combat terrorism domestically and comply with international obligations.

Section 4 analyzes the interplay between domestic definition-building and the policies and values promoted both by the various legal definitions of terrorism and the obligations under United Nations Resolution 1373. This Part also considers what lessons can be drawn from the experience of these nations grappling with similar foundational questions of defining terrorism and creating bases for national security law and policy.

2. THE INTERNATIONAL PROBLEM OF DEFINING TERRORISM

The quest to establish a universal definition of terrorism is entangled in questions of law, history, philosophy, morality, and religion.¹² Many scholars believe that the definitional question is,

terrorist threats than the United States has. . . . The United Kingdom is a particularly apt model for us to consider in crafting our counterterrorist policies because our political and legal culture is derivative from England's.

Id. at 4. I suggest that such engagement in comparative national security policy analysis can be quite useful when contextualized in the historical and legal experiences of each nation.

¹² In this Article I do not attempt to offer a new, different, or comprehensive definition of terrorism, as that task has been undertaken with great effort by many other scholars. See, e.g., BRUCE HOFFMAN, *INSIDE TERRORISM* 13–44 (Columbia Univ. Press, 1998) (describing the fluidity of terrorism's definition throughout history and concluding by defining terrorism in contemporary terms as "the deliberate creation and exploitation of fear through violence or the threat of violence in pursuit of political change"); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249–50 (2004) (examining "twenty-two definitions or descriptions of terrorism and related terms in federal law" and advocating an alternative, all-inclusive legal definition of terrorism); Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE

by nature, a subjective one that eludes large-scale consensus.¹³ Indeed, one scholar has opined: “tell me what you think about terrorism, and I tell you who you are.”¹⁴ This may be true—it may ultimately be a futile project to define terrorism from a moral or philosophical perspective. However, by nature, counterterrorism law and policy depends on definition. If the international community or any individual state is to address the problem of terrorist activity, it must first define terrorism’s parameters. This foundational question is of the utmost importance in determining who a state or international body will consider a terrorist and, therefore, who will be subject to the stricter laws, diminished rights protections, and harsher penalties that are concomitant with the designation of “terrorism.”

2.1. *The United Nations’ Inability to Define Terrorism Comprehensively*

The lack of a comprehensive and universally accepted definition of terrorism has been an ongoing obstacle to constructing a unified global stance against terrorism and, on a more practical level, in concretizing the meaning, implementation, and effect of United Nations resolutions and international treaties involving counterterrorism issues.¹⁵ Some scholars have suggested that the absence of a universal definition has hindered counterterrorism operations and limits the effectiveness of both international and domestic lawmaking efforts to counter terrorist activity while maintaining the rule of law and fulfilling human rights obligations.¹⁶

W. RES. J. INT’L L. 375 (2004) (emphasizing the importance of developing a common international definition of terrorism and attempting to provide for an operative definition).

¹³ See e.g., Perry, *supra* note 12, at 252 (positing that terrorism’s “lack of definitional consensus” most likely stems from the word’s negative judgmental associations); Schmid, *supra* note 12, at 396 (indicating that it would be difficult to reach a universal consensus on the definition of terrorism because any definition would shaped by one’s ideological biases or political preferences).

¹⁴ See Schmid, *supra* note 12, at 396 (quoting U.S. historian J. Bowyer Bell).

¹⁵ See *id.* at 378–80 (discussing the international challenges of fighting terrorism absent an agreed-upon definition).

¹⁶ See U.N. Econ. & Soc. Council, Comm’n on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism [hereinafter U.N. Promotion and Protection of Human Rights], ¶¶ 26–27, U.N. Doc. E/CN.4/2006/98 (Sept. 28,

To some extent, the international community has managed to work around the lack of a comprehensive definition through the adoption of various international treaties, Security Council resolutions, and United Nations protocols addressing international terrorism and the obligation of states to use robust counterterrorism measures.¹⁷ However, lack of a uniform and universally accepted definition, coupled with a mandate for strong counterterrorism laws and policies, has opened the door for potential abuse by member states in those areas in which the piecemeal international definition does not provide clarity. This potential for abuse has only been partially ameliorated by recent efforts of the Security Council to ensure member states' adherence to human rights obligations and to increase transparency in the process of designating terrorist organizations.¹⁸

The United Nations has attempted to establish an internationally accepted definition of terrorism numerous times

2005) (Martin Scheinin) (proposing that the lack of a concrete definition of terrorism results in unaddressed terrorist acts and may sometimes encourage states to commit unjustifiable abuses under the pretext of combating terrorism); *see also* Schmid, *supra* note 12, at 379 (describing ways in which the lack of a definition of terrorism renders it difficult to carry out effective counterterrorist policies in the international realm). Others have suggested that certain countries, including the United States, have leveraged the ambiguity of the definition of terrorism to promote hegemonic foreign policy objectives by setting up an objective of defeating "terrorism" without being limited by a particular definition of what they are opposing. *See generally* Alexander J. Marcopoulos, *Terrorizing Rhetoric: The Advancement of U.S. Hegemony Through the Lack of a Definition of 'Terror'*, (Jan. 2009) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=alexander_marcopoulos (arguing that the United States has taken liberty with the ambiguity inherent in terrorism's definition in order to advance its own hegemonic objectives).

¹⁷ *See* Schmid, *supra* note 12, at 391-92 (remarking that interpreting the existing body of universal conventions and protocols together as an aggregate whole might provide a useful framework for loosely defining terrorism).

¹⁸ The Special Rapporteur noted that:

Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term. Besides situations where some States resort to the deliberate misuse of the term, the Special Rapporteur is also concerned about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to the countering of terrorism.

U.N. Promotion and Protection of Human Rights, *supra* note 16, ¶ 27.

since the 1960s.¹⁹ The General Assembly repeatedly resolved to create a universally agreed upon definition. In this vein, a 1987 resolution noted that “the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism.”²⁰ Each effort, however, failed based on the perceived subjectivity of any such definition,²¹ as certain elements of a proposed definition were rejected by various nations whose interests were not served.²²

Some nations emphasized the need to except freedom fighting, anti-colonial uprisings, or other related violence from the definition of terrorism.²³ Other nations focused on the desire to

¹⁹ The search for a supranational definition of terrorism dates at least back to 1937, when the League of Nations considered the Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1938, 19 League of Nations O. J. 23. Article 1(2) of the proposed Convention defined terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” *Id.* art. 1(2). See also Schmid, *supra* note 12, at 385 (noting that the proposed definition for terrorism was neither adopted by the League of Nations nor later considered for adoption by the U.N. at its founding). In a similar vein to Resolution 1373, many of the remaining Articles of the proposed League of Nations Convention called for Member States to criminalize various acts that constitute or support terrorism and to share information with other Member States to strengthen counterterrorism operations.

²⁰ G.A. Res. 42/159, U.N. Doc. A/RES/42/159 (Dec. 17, 1987). This resolution emphasized the importance of combating terrorism, but also recognized the need to do so in a manner that protects human rights and recognizes the right to self-determination for oppressed peoples. *Id.* ¶¶ 8, 14.

²¹ See HOFFMAN, *supra* note 12, at 31 (noting that “the decision to call someone or label some organization ‘terrorist’ becomes almost unavoidably subjective, depending largely on whether one sympathizes with or opposes the person/group/cause concerned”).

²² The General Assembly created an ad hoc committee to create an international convention on the prevention of terrorist violence. See G.A. Res. 51/210, ¶ 9, U.N. Doc. A/RES/51/210 (Dec. 17, 1996) (establishing an ad hoc group to address terrorist bombings, “and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”). Although the ad hoc committee has made significant progress in developing a comprehensive convention, efforts at the foundational question of defining terrorism have stalled the process. See U.N. Promotion and Protection of Human Rights, *supra* note 16, ¶ 29 (reporting that disagreement over the definition of “terrorist offenses” within the ad hoc group remained as the primary issue preventing a final draft convention on terrorism).

²³ See Schmid, *supra* note 12, at 386 (noting disagreement at the U.N. ad hoc committee between member nations negotiating the definition of terrorism, with some members arguing for a distinction between freedom-fighting and terrorism). Political actors have argued that this type of anti-occupation violence—

exclude state-sponsored actions from definitions of terrorism.²⁴ On one hand, inability to reach consensus on the definition of terrorism reflects an ideological split and a reluctance of certain states to conform to the outlook and agenda of politically powerful nations.²⁵ On the other hand, because most definitions include common core elements, such as a condemnation of the purposeful

particularly when considered in the historical perspective of revolutionary movements—should be treated by law and international policy as distinct from terrorism. Yasser Arafat for instance, has advanced this argument:

The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists cannot possibly be called terrorist, otherwise the American people in their struggle for liberation from the British colonialists would have been terrorists; the European resistance against the Nazis would be terrorism, the struggle of the Asian, African and Latin American peoples would also be terrorism, and many of you who are in this Assembly hall were considered terrorists. This is actually a just and proper struggle consecrated by the United Nations Charter and by the Universal Declaration of Human Rights. As to those who fight against the just causes, those who wage war to occupy, colonize and oppress other people, those are the terrorists. Those are the people whose actions should be condemned, who should be called war criminals: for the justice of the cause determines the right to struggle.

Yasser Arafat, Chairman, Exec. Comm. Palestinian Liberation Org., Speech before the General Assembly of the United Nations, U.N. GAOR, 29th Sess., 2282nd plen. mtg. at 861, ¶ 48, U.N. Doc. A/PV.2282 and Corr. 1 (Nov. 13, 1974). *But see* HOFFMAN, *supra* note 12, at 20 (describing the Armenian nationalist movement's tactics against the ruling Turkish power in the 1880s and 1890s as a "terrorist strategy" of "repeated attacks on its colonial administration and security forces, in order to rally indigenous support, as well as to attract international attention, sympathy and support").

²⁴ See HOFFMAN, *supra* note 12, at 35 (arguing that state-sponsored actions may be distinguished from terrorism because such actions can be deemed violations of international law or military rules of engagement and prosecuted accordingly as war crimes). *But see* *Syria Hits Out at 'Terrorist' US*, BBC NEWS (Oct. 28, 2008, 00:38 AM), http://news.bbc.co.uk/2/hi/middle_east/7693583.stm (noting that Syria's foreign minister described a U.S. military helicopter bombing of a Syrian town as a "terrorist" attack).

²⁵ That some post-colonial nations have resisted the imposition of international norms of the United States and European nations in the context of counterterrorism law and policy is unsurprising given the perceptions of differentiated (and lesser) legitimacy accorded to post-colonial nations in discourses surrounding international rule-making. See Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending War Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 10-15 (2010) (describing the history of the relationship between colonialism and modern international law and its negative effects on "colonized and dominated polities").

killing of civilians, the lack of international consensus can be viewed primarily as reflecting concern not over just the parameters of the definition, but the legal effects of falling within that definition.²⁶

2.2. *How 1373 Demands a Definition that Does Not Fully Exist*

In the last twenty years, numerous international treaties and United Nations resolutions have addressed the need for counterterrorism measures without fully answering the fundamental and ultimately frustrating question of how to define terrorism.²⁷

Perhaps the most striking of those measures is Security Council Resolution 1373,²⁸ adopted in the weeks after the September 11 attacks under great pressure from the United States government.²⁹

²⁶ See Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, 213, 213–14 (Andrea Bianchi ed., 2004) (describing the traditional notion that terrorism cannot carry a universal definition and can only be characterized by certain discrete acts). Given the concerns of moral relativism that pervade any debate about the definition of terrorism, some believe that defining terrorism may neither be possible nor useful. See, e.g., Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987, 1988–92 (2006) (analyzing arguments that consider whether terrorism cannot, and should not be, defined).

²⁷ See, e.g., International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, art. 17, U.N. Doc. A/RES/52/164 (Jan. 9, 1998) (requesting that obligations be carried out with consideration for “principles of sovereign equality and territorial integrity”); see also S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sep. 12, 2001) (condemning the attacks of September 11, 2001, and emphasizing a zero tolerance approach to international terrorism without expressly defining terrorism); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (reaffirming the obligation of all Member States to take counterterrorism measures against those who organize or prepare terrorist acts but providing no definition of terrorism); S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (condemning embassy bombings in Nairobi and Dar-es-Salaam and, without defining terrorism, reaffirming Member States’ duty to take measures against international terrorism).

²⁸ S.C. Res. 1373, *supra* note 1.

²⁹ See Scheppele, *supra* note 10, at 455 (“It is no coincidence that UN Security Council Resolution 1373, passed on 28 September 2001, mirrors almost exactly the strategy for fighting terrorism that one sees in the USA PATRIOT Act, which the US was drafting at the same time as it was urging the Security Council to act.”); see also Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 284 (“A U.S. initiative, the unanimous passage of Resolution 1373 was remarkably smooth.”). Johnstone notes that some were skeptical of the measures passed by the Security Council in the immediate aftermath of September 11, describing them as the imposition of

Resolution 1373, in an arguably unprecedented step for the Security Council,³⁰ mandates that member states combat terrorism in numerous ways, work cooperatively with other member states to share information related to security issues, and report to the Counter-Terrorism Committee—established for the purpose of overseeing progress in fulfilling the mandate of Resolution 1373.³¹

Two serious shortcomings are immediately apparent in the framework established by Resolution 1373, though. First, although Resolution 1373 mandates that member states take serious action to counter terrorism, it lacks a definition of terrorism that would establish the parameters for the implementation of counterterrorism efforts. Second, although Resolution 1373 established the Counter-Terrorism Committee (CTC) to oversee implementation of Resolution 1373 requirements by member states, there is no textual obligation in the resolution for the CTC to safeguard human rights and the rule of law.³² The lack of initial focus on rights protection was only later remedied after pressure from interests concerned with human rights.³³ Such pressure led to

“hegemonic international law.” See *id.* at 275 (citing Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L. L. 843 (2001)).

³⁰ Scheppelle, *supra* note 1, at 91-93 (detailing both the sweeping powers given to the Counter-Terrorism Committee and the worrying gaps in human rights it leaves unanswered).

³¹ See *About the Counter-Terrorism Committee*, U.N. SECURITY COUNCIL COUNTER-TERRORISM COMM., <http://www.un.org/sc/ctc/aboutus.html> (last updated May 10, 2011, 12:31 pm) (describing The Counter-Terrorism Committee’s responsibility for monitoring the implementation of Resolution 1373).

³² See S.C. Res. 1373, *supra* note 1, ¶ 6 (establishing The Counter-Terrorism Committee and its power to implement Resolution 1373); see also E.J. Flynn, *The Security Council’s Counter-Terrorism Committee and Human Rights*, 7 HUM. RTS. L. REV. 371, 377 (2007) (noting that Resolution 1373 “made scant express reference to human rights”). Flynn notes that the first Chair of the Counter-Terrorism Committee, Sir Jeremy Greenstock, opined in 2002 that dealing with human rights concerns was not within the purview of the Committee:

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States’ reports and take up their content in other forums.

Id. at 377 (quoting Sir Jeremy Greenstock).

³³ See Flynn, *supra* note 32, at 376-77 (noting that lobbying of the CTC by the

passage of additional resolutions³⁴ that served to remind both the CTC and member states of their obligations under the International Covenant on Civil and Political Rights³⁵ as well as other protocols.

Despite subsequent remedial efforts to counter the initial inattention to human rights and rule of law concerns, the effect of Resolution 1373 was immediate and profound.³⁶ In the wake of the passage of Resolution 1373, numerous countries with no working or legal definition of terrorism sought to define terrorism as a predicate to comply with the counterterrorism obligations of Resolution 1373. Some nations simply indicated that they were implementing Resolution 1373 with no definitional parameters.³⁷

U.N. High Commissioner for Human Rights and other groups led the Committee to adopt “a line by which it would ‘remain aware’ of human rights concerns”); *see also* U.N. S.C. Comm. Established Pursuant to Resolution 1373 Concerning Counter-Terrorism, Conclusions for Policy Guidance Regarding Human Rights and the CTC, U.N. Doc. S/AC.40/2006/PG.2 (May 25, 2006) (setting forth the CTC’s framework for addressing human rights concerns in conjunction with the Office of the High Commissioner for Human Rights).

³⁴ *See, e.g.*, S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sep. 14, 2005) (stating that the U.N. Security Council “[s]tresses that States must ensure that any measures taken to implement [counterterrorism obligations] comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law”); S.C. Res. 1456, ¶¶ 4(iii), 6, 8, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (emphasizing the importance of combating terrorism using best practices and in conjunction with protection of human rights); *see also* U.N. Promotion and Protection of Human Rights, *supra* note 16, ¶¶ 53–54. (emphasizing Security Council resolutions requiring the CTC to account for human rights in carrying out its objectives in years following Resolution 1373’s passage).

³⁵ International Covenant on Civil and Political Rights, part III, 19 December, 1966, 999 U.N.T.S. 171 (listing the substantive and procedural rights guaranteed under the Convention).

³⁶ The governance of supranational bodies, such as the European Union, was profoundly affected by the passage of Resolution 1373. *E.g.*, EU AT UN, REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SECURITY STRATEGY, S407/08, at 2 (2008) available at http://www.eu-un.europa.eu/documents/en/081211_EU%20Security%20Strategy.pdf (“Everything the EU has done in the field of security has been linked to UN objectives.”); *see* Case C-266/05 P, Sison v. Council, 2007 E.C.R. I-1270, ¶¶ 78–79 (denying a citizen request for government documents and finding support in Resolution 1373’s call for international collaboration in fighting terrorism).

³⁷ *See, e.g.*, HOME DEP’T, THE DEFINITION OF TERRORISM: A REPORT BY LORD CARLILE OF BERRIEW Q.C. INDEPENDENT REVIEWER OF TERRORISM LEGISLATION, 2007, Cm. 7052, ¶ 18, tbl. 1 (U.K.) [hereinafter CARLILE] (listing countries’ individual definitions of terrorism, including those countries which have not provided their own individual definitions).

Other nations declined to define terrorism but indicated that they were complying with international treaties and other obligations that mandated counterterrorism efforts.³⁸

Other countries, such as the United States, relied upon the definitions of terrorism under domestic law to submit reports back to the Counter-Terrorism Committee—these reports do not actually offer a definition of terrorism, but detail the robust counterterrorism efforts being made by the government. In late 2001, the twenty-five page U.S. report highlighted the legal frameworks put in place to combat terrorism and terrorism financing³⁹ and underscored the seriousness of the punishments for crimes of terrorism,⁴⁰ but offered no discussion of human rights concerns⁴¹ and little explication of the domestic definition of terrorism on which these efforts were predicated.⁴²

³⁸ See, e.g., *id.* (identifying nations such as Albania and Estonia that rely upon parameters of international treaties to serve as a proxy for a legal definition of terrorism).

³⁹ U.N. Chairman of the Counter-Terrorism Committee, Letter dated Dec. 19, 2001, from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2001/1220 (Sep. 28, 2001) [hereinafter U.S. 2001 CTC submission].

⁴⁰ U.S. 2001 CTC submission, *supra* note 39, at 17 (noting that “[t]errorist acts are among the most serious offenses under U.S. law. Violent, terrorist-related crimes generally carry substantially higher criminal penalties and can lead to imposition of the death penalty, or life imprisonment.”) (citing 18 U.S.C. §§ 2332(a), 2332(b)).

⁴¹ See S.C. Res. 1373, *supra* note 1, ¶ 3(f) (calling upon member states to “[t]ake appropriate measures in conformity with . . . national and international law, including international standards of human rights, before granting refugee status”); see also *id.* ¶ 3(g) (calling upon member states to “[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts”).

⁴² Parts of the report include discussion of specific acts contained within the definition of terrorism or “terrorist activity.” *E.g.*, U.S. 2001 CTC submission, *supra* note 39, at 7 (noting that under Executive Order 12947, the President designated sixteen organizations as Foreign Terrorist Organizations based on the commission, or risk of commission, of “acts of violence with the purpose or effect of disrupting the Middle East peace process”); see also, e.g., *id.* at 15 (for the purposes of immigration law, terrorist activity includes:

[H]ijacking; sabotage; detention under threat for the purpose of coercion . . . ; violent attack on an internationally protected person; assassination; the use of biological, chemical or nuclear weapons; or the use of explosives, firearms, or any other weapon or dangerous device with the intent to cause harm to individuals or damage to property).

2.3. Resolution 1566: Working Around a Lack of Definition

Without an official definition of terrorism to work with, the United Nations Security Council has established partial measures: either by enacting resolutions that condemn acts of terrorism without defining the parameters of terrorism,⁴³ or by including general descriptions of acts that fall within the rubric of terrorist activity without purporting to fully define terrorism. Security Council Resolution 1566, passed in 2004, clearly falls into the latter category.⁴⁴ It reaffirms its condemnation of the terrorist activity of the Afghan Taliban,⁴⁵ reminds Member States of their counterterrorism obligations under previous Security Council resolutions,⁴⁶ notes the requirement to comply with international humanitarian law in combating terrorism,⁴⁷ and reminds Member States of the supranational counterterrorism committees and

⁴³ E.g., S.C. Res. 1368, *supra* note 27 (condemning the attacks of September 11, 2001, but not defining terrorism); see also S.C. Res. 1267, U.N. Doc. S/Res/1267 (Oct. 15, 1999) (condemning the actions of the Taliban and reaffirming the obligation of all Member States to take counterterrorism measures without defining what constitutes terrorist activity).

⁴⁴ See Schmid, *supra* note 12, at 393 (noting that S.C. Res. 1566 came about because of the lack of agreement on a definition of terrorism by the Ad Hoc Committee on Terrorism within the General Assembly).

⁴⁵ See S.C. Res. 1566, ¶ 1, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (condemning all forms of terrorism, regardless of its motivations).

⁴⁶ See *id.* ¶ 2 (urging states to combat terrorism and adhere to international law). Resolution 1566 does not speak to the question of whether national governments can be considered to have committed terrorist acts, but adopts a zero-tolerance stance that rules out an exception for freedom fighters or other anti-colonial or anti-occupation violence, noting that terrorist violence is “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature” *Id.* ¶ 3. This same view is echoed in other Security Council resolutions that condemn terrorist acts. See, e.g., S.C. Res. 1624, U.N. Doc. S/RES/1624, at 1 (Sept. 14, 2005) (condemning terrorism “irrespective of [its] motivation, whenever and by whomsoever committed”); S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (emphasizing the need to intensify the fight against terrorism). The Council of Europe also adopted this view in its 2005 Convention on the Prevention of Terrorism. See Council of Europe Convention on the Prevention of Terrorism, pmbl., May 16, 2005, C.E.T.S. no. 196 (noting that “terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”).

⁴⁷ See S.C. Res. 1566, *supra* note 45, at 1 (urging states to adopt measures to fight terrorism in accordance with international human rights, refugee, and humanitarian law).

structures that have been established pursuant to previous Security Council Resolutions.⁴⁸ Then Resolution 1566 goes further, offering a partial explanation of a terrorist act as:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism⁴⁹

Although seemingly expansive, Resolution 1566 limits the use of the label of “terrorism” to offenses that are recognized in previously agreed upon international conventions and protocols, thereby tethering the implementation of Resolution 1566 to offenses commonly understood to fall under the umbrella of terrorism.⁵⁰ Further, the language of the resolution limits its application to acts that are intended to provoke terror and/or compel a political response from a government.⁵¹ In framing the parameters of terrorism in such a way, the Security Council appears to have—at least for the purposes of Resolution 1566 and the other United Nations’ measures that are referenced in Resolution 1566—worked around the lack of consensus on this issue in the General Assembly.

In terms of rights protection, in addition to the Counter-Terrorism Committee taking into account the obligation of Member States to adhere to human rights standards⁵² and the

⁴⁸ See *id.* (calling on states to cooperate with the Counter-Terrorism Committee established pursuant to Security Council Resolution 1373 (2001), the Counter-Terrorism Committee Executive Directorate, and the Al-Qaida/Taliban Sanctions Committee established pursuant to Security Council Resolution 1267, in the fight against terrorism).

⁴⁹ *Id.* ¶ 3.

⁵⁰ See *id.* (noting that the resolution applies to “offences within the scope of and as defined in the international conventions and protocols relating to terrorism”).

⁵¹ See *id.* (including the condemnation of threats to international organizations).

⁵² The Counter-Terrorism Committee initially disclaimed any responsibility for dealing with the human rights concerns that resulted from the implementation

limiting language within Resolution 1566, the Security Council has also designated an Ombudsperson to field petitions from individuals and organizations seeking to be delisted from being subject to international sanctions as terrorists.⁵³ Concerned about the severe repercussions of being designated as a terrorist, various Member States moved for a process by which the designation process could be made more fair and transparent, allow for a delisting process for individuals and organizations, and strengthen international security by improving the perceived legitimacy of the United Nations as an international regulator of security matters.⁵⁴

What do the partial definition and the ameliorating measures mean in terms of the trajectory of post-September 11 counterterrorism initiatives being undertaken by the United Nations? First, a number of Security Council resolutions make clear that those defined as terrorists will be (or should be) dealt with severely by Member States who are obligated by resolution or protocol to adopt and implement robust counterterrorism measures.

Second, although the Security Council has set some parameters for terrorism, resolutions such as 1373 necessarily rely on domestic legal definitions of terrorism to support counterterrorism efforts in each Member State. Again, because of this reliance on domestic law, which may ignore or circumvent consideration of human rights issues, the Counter-Terrorism Committee has taken on the role of mandating that member states adhere to their human rights obligations in the implementation of Resolution 1373.

Finally, because of the harsh measures that result from terrorist designation, the General Assembly has taken steps in recent years

of Resolution 1373. See, e.g., Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AM. J. INT'L L. 333, 340 (2003) (addressing the challenge of combating terrorism while still protecting human rights).

⁵³ See S.C. Res. 1904, ¶ 20, U.N. Doc. S/RES/1904 (Dec. 17, 2009) (mandating that "when considering delisting requests, the Committee shall be assisted by an Office of the Ombudsperson").

⁵⁴ E.g., Press Release, Security Council, Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson to Handle Delisting Issues, ¶ 14, U.N. Press Release SC/9825 (Dec. 17, 2009), available at <http://www.un.org/News/Press/docs/2009/sc9825.doc.htm> (noting the concern of delegations from various nations that the process of designating terrorists be made more accessible, transparent, and equitable).

to ensure some transparency and due process to delist individuals and organizations that are inappropriately designated as terrorists.

Each post-September 11th counterterrorism measure taken by the United Nations has, at a later point, been moderated using measures that lessen the potential for abuse. Nonetheless, because Member States' international obligations depend on domestic definitions of terrorism, the potential for abuse that concerned the United Nations continues to exist at the domestic level.

3. COMPARATIVE PERSPECTIVES: TRACKING THE DEVELOPMENT OF LEGAL DEFINITIONS OF TERRORISM

The lack of certainty surrounding the definition of terrorism and the Security Council mandate for counterterrorism measures on both an international and domestic basis compels consideration of how individual nations facing severe national security threats define terrorism, where those definitions come from, and how they are applied.

In each of the countries examined in this section, the lack of a comprehensive definition on the global level has given rise to the potential for abuse of human rights and deviation from the rule of law as by-products of the effort to fight terrorism.⁵⁵

3.1. *United States*

In the United States, federal law and agencies utilize dozens of different definitions of terrorism,⁵⁶ largely based on the agenda and

⁵⁵ As noted previously, this concern has been discussed at some length by various United Nations Special Rapporteurs. See U.N. Promotion and Protection of Human Rights, *supra* note 16, ¶ 27 (“[R]epeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.”); Econ. & Soc. Council, Sub-Comm. on the Promotion and Protect. of Human Rights, Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism, U.N. Doc. E/CN.4/Sub.2/2004/40 (June 25, 2004) (noting the difficulty of distinguishing terrorists and terrorist activity from legitimate actors and actions in instances of armed conflict generally).

⁵⁶ See Perry, *supra* note 12, at 249–50 (examining twenty-two definitions of terrorism under U.S. federal law). This plethora of federal definitions has led government officials over the decades to note that the United States lacks an official definition of terrorism, and that terrorism is “a phenomenon that is easier to describe than define.” GEORGE H. W. BUSH, PUBLIC REPORT OF THE VICE PRESIDENT’S TASK FORCE ON COMBATTING TERRORISM 1 (1986).

focus of the drafter of the definition.⁵⁷ In this section, I consider two definitions⁵⁸—each used for different but related purposes by the U.S. government—to evaluate the history and the application of the definition. In the post-September 11 era, the political pressure to combat terrorism and to accommodate the undermining of civil liberties as a by-product of a robust counterterrorism program has influenced the definitions of terrorism as well as the scope of their application.⁵⁹

⁵⁷ See HOFFMAN, *supra* note 12, at 38 (discussing how the U.S. State Department's and U.S. Defense Department's definitions of terrorism suit each agency's needs to fulfill its mission); Perry, *supra* note 12, at 270 (noting that "[i]t is logical that different standards are used for making determinations relating to vastly different public-policy objectives" in the immigration, surveillance and insurance coverage contexts). Notably, the use of the label of "terrorism" in the immigration and deportation context has been inappropriate, unjust, and overly harsh in many situations. See generally CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE & ASIAN AM. LEGAL DEF. AND EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 2 (2011) (remarking that "religious, cultural, and political affiliation . . . of Muslims are being construed as dangerous terrorism-related factors to justify detention, deportation, and denial of immigration benefits").

⁵⁸ A third definition that is relevant to international efforts of counterterrorism is that contained in 22 U.S.C. § 2656f(d)(2) (2006). See 22 U.S.C. § 2656f(d)(2) (2006) (defining terrorism as "premeditated, politically motivated violence perpetuated against noncombatant targets"). This definition is used by the State Department for reporting purposes in response to the requirements of Resolution 1373 and other international obligations. The definition in 22 U.S.C. § 2656f(d)(2) is narrower in scope than the other definitions of terrorism that are considered in this Article in several ways. First, the definition limits the label of "terrorism" to violent acts which are premeditated and politically motivated, and which are "perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2). It also does not include military targets and appears to exclude most state actors, even those that commit acts that are considered to be criminal by the international community, such as the mass killings in the Darfur region of Sudan. See generally Matthew H. Charity, *The Criminalized State: The International Criminal Court, the Responsibility to Protect, and Darfur, Republic of Sudan*, 37 OHIO N.U.L. REV. 67 (2011) (treating the situation in Darfur as an example of a State failing its responsibility to protect its population, a recognized expectation of the United Nations). Although the narrow construction of the definition of terrorism in 22 U.S.C. § 2656f(d)(2) is of interest, it is beyond the scope of this Article's analysis of how such definitions are used by the government in the domestic context where potential criminal sanctions may apply.

⁵⁹ The label of "terrorism" has been applied by government officials in numerous contexts that are far removed from the violent acts that are at the heart of the legal definitions of terrorism. See, e.g., Letter from New York City Bar Association, to Sen. Patrick Leahy et al. (July 22, 2009), available at http://www.nycbar.org/pdf/report/AETA_Animal&CivilRights_Letter072109.p

3.1.1. *The Anti-Terrorism and Effective Death Penalty Act of 1996*

Relative to post-September 11 legislative definitions, the definition of terrorism contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)⁶⁰ is limited in scope and application, and contains important due process protections for individuals and designated groups. Under the AEDPA, terrorism is defined as:

An activity that involves a violent act or an act dangerous to human life, property, or infrastructure, and appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of government by mass destruction, assassination, kidnapping, or hostage-taking.⁶¹

This definition is more limited than that of the Patriot Act, but its application is broader than that of the 1995 Executive Order

df (noting that the Animal Enterprise Terrorism Act should be repealed in part due to the misapplication of the label of "terrorism" to acts which destroy mink-farming equipment); Timothy Williams, *New York's Post-9/11 Terrorism Law is Used to Convict a Bronx Gang Member in a Killing*, N.Y. TIMES, Nov. 1, 2007, at B1 (discussing the conviction of St. James Boys gang member Edgar Morales under New York terrorism laws aimed at international terrorism organizations).

⁶⁰ See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217 (codified in scatter sections of 8, 18, and 28 U.S.C.) (authorizing the Secretary to designate foreign organizations as terrorists if they engage in terrorist activity as defined by the statute). The AEDPA was enacted in response to the 1993 World Trade Center bombings and the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City as part of a broader plan to prevent material support to terrorists that was seen as essential to those bombings. See JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* 25 (2007) (describing the effects of the World Trade Center bombings, the Oklahoma City bombings, and the congressional investigation into federal law enforcement actions in Waco on the passage of AEDPA). Congress also passed the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.) in conjunction with the AEDPA as part of a larger counterterrorism effort. Notably, however, the Oklahoma City bombing was committed by a white U.S. citizen, prompting some scholars to question whether the passage of the IIRIRA was a thinly veiled racialization of terrorism. See Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 725-26 (noting that George W. Bush accused the Clinton administration of racial profiling in conjunction with counter-terrorism efforts in the 1990s).

⁶¹ See Exec. Order No. 13224, 31 C.F.R. 594 (explaining Congressional findings and purpose).

which preceded it and which applied specifically to the context of the Middle East peace process being negotiated at the time.⁶² The AEDPA, in contrast, is a wide-reaching statute, defining terrorism for the purpose of designating Foreign Terrorist Organizations (FTOs)—regardless of whether such organizations were related to the peace process in the Middle East—and freezing the assets of such organizations.⁶³

Under the AEDPA, a specific process must be undertaken to designate an organization as an FTO. It is a process that is open to critique as being insufficiently rights-protective, but also incorporates some important safeguards against abuse.⁶⁴ Once the FTO designation has been made by the State Department, limited

⁶² See Exec. Order No. 12,947, 3 C.F.R. 319 (1995) (finding that foreign terrorist activities threaten peace of the Middle East and United States). Section 1 of this Executive Order empowers the Secretary of State, in conjunction with the Secretary of the Treasury and the Attorney General, to designate foreign persons who intend to disrupt the Middle East peace process as individuals with whom all financial transactions are to be blocked. See *supra* § 1 (prohibiting any contribution of funds, goods, or services to such persons).

⁶³ See, e.g., AEDPA §§ 219(a)(1)(A)-(C), 219(a)(2)(C) (codified in 8 USC §1189(a)) (finding that anyone who interacts with FTOs is violating the statute, and authorizing the Secretary of the Treasury to freeze the assets of entities designated as FTOs). President Clinton signed Executive Order 12,947 in January 1995, which was geared toward facilitating a peace agreement in the Middle East, but gave broad authority to cabinet departments to designate Foreign Terrorist Organizations (FTOs) with the purpose of disrupting their financial and operational capabilities, thereby laying the foundation for the authority granted under the AEDPA and Executive Order 13,224. See Exec. Order No. 12,947, *supra* note 62 (establishing authority for the Secretary of State and the Secretary of the Treasury to limit property rights of designated terrorists). Executive Order 13,224, signed by President George W. Bush in the weeks after the September 11 attacks, reinforces the authority of the President and the Secretary of State, and authorizes the Secretary of the Treasury to designate and isolate Foreign Terrorist Organizations. See Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (finding it necessary to utilize financial sanctions against foreign terrorists). The Executive Order also adds various organizations to the list of FTOs. See *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited October 15, 2011) (listing forty-nine organizations designated as FTOs by the State Department).

⁶⁴ See AEDPA § 219(a) (codified as 8 U.S.C. § 1189(a)) (establishing both the procedure used for designation as a terrorist organization as well as congressional and judicial means available to pursue designations review and revocation); see also Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547, 556-58 (2008) (arguing that the designation process contravenes due process guarantees).

procedural safeguards are available, after which the designation is finalized.⁶⁵

Because the consequences of FTO designation can be severe⁶⁶—for example, financial intuitions may block or freeze assets of an FTO,⁶⁷ individuals may be barred from entry into the United States,⁶⁸ and material support to such an organization is a criminal offense carrying potentially lengthy prison sentences⁶⁹—the procedural safeguards, however limited, are crucial.

One such safeguard in the FTO designation process is the opportunity to contest the designation proposed by the State Department. This layer of judicial review protects against arbitrariness in the designation,⁷⁰ and requires some disclosure of the basis upon which the State Department made its determination.⁷¹

⁶⁵ Under AEDPA, the Secretary of State notifies leaders in Congress and gives notice to designees in the Federal Register. AEDPA § 302(a)(2)(A) (codified as 8 U.S.C. § 1189(a)(2)(A)). FTOs then have 30 days to challenge their designation in the U.S. Court of Appeals for the District of Columbia Court. § 302(b). Such cases, usually based on allegations of an abuse of discretion by the State Department or a lack of substantial support for the FTO designation, are largely unsuccessful. *E.g.*, *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (upholding FTO designation based on classified evidence and emphasizing deference to the State Department in the FTO designation process); *See also* *United States v. Afshari*, 446 F.3d 915 (9th Cir. 2006) (Kozinski, A., dissenting) (arguing against the majority's denial of a petition of a defendant who convicted of contributing funds to an FTO, and noting that individual defendants are statutorily barred from contesting the designation of an FTO).

⁶⁶ *See* *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001) (discussing the severe impact of FTO designation).

⁶⁷ 18 U.S.C. § 2339B(a)(2) (2006).

⁶⁸ 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)-(V) (2006).

⁶⁹ 18 U.S.C. § 2339B(a)(1) (2006). The constitutionality of the FTO designation process authorized by Executive Order No. 13,224 and various statutes was upheld by the U.S. Supreme Court in *Humanitarian Law Project v. Holder*. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

⁷⁰ Under the AEDPA, courts have the power to set aside the State Department designation of an FTO if it is arbitrary, capricious, and an abuse of discretion, or if it is not based on substantial evidence. AEDPA § 302(b)(3) (codified as 8 U.S.C. § 1189(c)(3)). Courts have, however, been extremely deferential to the State Department, choosing not to review classified evidence in some instances, but relying instead on State Department affirmations of substantial evidence to support its designation decision. *E.g.*, *People's Mojahedin Org. of Iran*, 327 F.3d at 1244.

⁷¹ *E.g.*, *People's Mojahedin Org. of Iran v. United States Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010) (holding that the government had violated due

A second important safeguard is the mandatory review and renewal process for the Secretary of State.⁷² If no State Department review has been made of an FTO designation for five years, the Secretary of State must review the listing to determine whether it should be revoked due to a change in the organization's mission and actions, or a change in the national security assessment by the United States.⁷³ These safeguards echo the review and delisting process that the United Nations adopted in order to ensure that terrorists are being appropriately identified and that the ramifications of being designated a terrorist, however severe, are applied appropriately and with due consideration.⁷⁴

3.1.2. Patriot Act

The USA PATRIOT Act,⁷⁵ passed in the weeks immediately following the September 11 attacks, offered a panoply of counterterrorism resources to the government, including an increase in surveillance powers⁷⁶ and government authority to conduct intelligence-gathering operations in matters of suspected terrorism,⁷⁷ as well as allowing for the civil seizure of assets based

process by failing to give an FTO the opportunity to view unclassified evidence prior to making a final decision denying petition to revoke designation as an FTO).

⁷² 8 U.S.C. § 1189(a)(4)(C), (a)(6) (2006).

⁷³ *Id.*

⁷⁴ In some respects, the FTO designation process and the opportunity for organizations to be delisted are an early example of the current, more rights-protective procedural safeguards now being mandated by the United Nations. In the landmark European Court of Justice decision of *Kadi*, the court found that the fundamental right to due process related to the determination that an individual or organization was subject to sanctions under U.N. Security Council Resolution 1267 could not be contravened. See *Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakat v. Council*, 2008 E.C.R. I-6411 (2008). This decision made clear that the determination that sanctions must be accompanied—like the U.S. FTO designation process—by a meaningful opportunity to contest the designation. See *id.* ¶ 318 (noting that due process is a fundamental right under European Community standards and it cannot be stripped by a regulation or court).

⁷⁵ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.) [hereinafter *Patriot Act*].

⁷⁶ See *id.* § 218 (amending the Foreign Intelligence Surveillance Act of 1978 such that electronic surveillance and physical searches need only be justified in "significant" part by the goal of obtaining foreign intelligence).

⁷⁷ *Id.* § 901.

only on probable cause,⁷⁸ and heightened punishments for any of the underlying crimes related to the newly broadened understanding of “domestic terrorism,” which includes:

[A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.⁷⁹

Notably, this definition of domestic terrorism was not created ad hoc in the weeks after the September 11 attacks. Instead, under intense pressure to amend various existing criminal statutes to broaden and strengthen the government’s resources before another attack potentially took place, Congress moved quickly⁸⁰ to revamp the existing counterterrorism framework.⁸¹

The definition of terrorism used in the Patriot Act was imported from the Foreign Intelligence Surveillance Act of 1978

⁷⁸ *Id.* § 806.

⁷⁹ *Id.* § 802. Critics of this broad definition have noted that such language could encompass numerous activist groups, including Greenpeace, protestors of the World Trade Organization, Operation Rescue, and protestors of bomb-testing facilities on the island of Vieques. See *How the USA PATRIOT Act redefines “Domestic Terrorism,”* AM. CIV. LIBERTIES UNION (Dec. 6, 2002), <http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism> (analyzing the effect of the Patriot Act definition of terrorism if the government applied the act to Vieques protestors).

⁸⁰ See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS AND LIBERTY 11* (2008) (arguing that the legislative role in safeguarding civil liberties is hampered by the political reality that legislators must be seen as reacting quickly to a terrorist attack).

⁸¹ See Robert O’Harrow, Jr., *Six Weeks in Autumn*, WASHINGTON POST MAGAZINE, Oct. 27, 2002, at 6, 10 (describing the pressured deliberations of Congress and the executive branch in drafting the Patriot Act); See also 147 CONG. REC. 20,700–02 (2001) (statement of Senator Russell Feingold) (noting that Congress had been under “relentless” pressure from the administration to pass the Patriot Act legislation “without deliberation or debate”). Unlike deliberations on most bills, the Senate did not conduct committee hearings by the Senate and the House of Representatives held only one hearing at which the sole witness was Attorney General John Ashcroft. See DONOHUE, *supra* note 80, at 1–2 (describing rushed legislative effort to pass Patriot Act in the aftermath of the attacks on September 11, 2001).

(FISA).⁸² The FISA definition of terrorism requires, among other elements, that the perpetrators intend the intimidation of a civilian population or political coercion,⁸³ which naturally limits the application of the provision to certain types of acts. Likewise, the government purpose at issue in FISA is limited. The text of the statute⁸⁴ and its legislative history make clear that FISA is meant to be a limited and relatively narrow statute focused only on the intelligence-gathering operations of the government, not for criminal investigations and prosecutions.⁸⁵

⁸² See Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(c) (2006).

⁸³ The definition of international terrorism in FISA includes several elements: that it “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;” that it “appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping” and occur totally outside the United States, or transcend national boundaries. *Id.*

⁸⁴ Title I of FISA, “Electronic Surveillance within the United States for Foreign Intelligence Purposes,” makes clear the scope of the statute’s application. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in 50 U.S.C.). Provisions within the statute limit the use of any intelligence gathered pursuant to the authorized surveillance. See 50 U.S.C. § 1806(b) (“No information acquired pursuant to this title shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information . . . may only be used in a criminal proceeding with the advance authorization of the Attorney General.”).

⁸⁵ FISA’s legislative history contains numerous statements that make clear members of Congress considering the bill were concerned about individual privacy rights and limited the focus of the statute to intelligence-gathering. For example, part of the legislative history states:

It is important to note that the committee’s favorable recommendation of [FISA] in no way reflects any judgment that it would also be appropriate to depart from the standard of criminal activity as the basis for using other intrusive investigative techniques. The bill does not impliedly authorize departure from the standard of criminality in other aspects of national security investigations or intelligence collection directed at Americans without the safeguards of judicial review and probable cause.

S. REP. NO. 95-604, pt. 1, at 18 (1977). Likewise, senators expressed a clear intent that the definition of terrorism is intended to be limited to acts or support of “serious violence—for example, purchase or surreptitious importation into the United States of explosives, planning for assassinations, or financing of or training for such activities.” S. REP. NO. 95-701, at 26 (1978). The range of actions considered to be “terrorism” under FISA is broader than a single criminal act, but not as broad as current understandings, as recently demonstrated by the Supreme Court in *Holder v. Humanitarian Law Project*, which upheld criminalization of material support to humanitarian and non-violent activities of a designated

Given the far-reaching consequences of being suspected of terrorism and the broad powers for surveillance authorized under FISA at the time of its enactment, Congress expressed significant concern over the implications of FISA on civil liberties, and the potential for government overreach.⁸⁶ This concern led to numerous safeguards beyond the limited scope of application of the legislation, including the reporting requirements of the Attorney General to Congress regarding the nature and extent of FISA-based surveillance conducted,⁸⁷ the mandated minimization procedures to ensure that individual privacy rights are safeguarded to some extent,⁸⁸ and the penalties available to punish those who conduct unlawful and overreaching surveillance.⁸⁹

Despite the concern expressed in FISA's legislative history about the spillover of FISA into the criminal investigation and prosecution arena, key provisions including the definition of terrorism itself were repurposed for insertion into criminal statutes with no substantial debate by Congress. For example, 18 U.S.C. § 2331, enacted in 1992⁹⁰ as the predicate for contemporaneously

Foreign Terrorist Organization. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); see also Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 200-07 (2003) (detailing the difficulty in separating terrorist activities from non-terrorist activities of FTOs).

⁸⁶ See, e.g., S. REP. NO. 95-701, at 26 (1978) (noting that “[c]oncern . . . has been expressed that [parts of FISA] could permit surveillance solely on the basis of information that someone might commit acts of terrorism or sabotage in the distant future. This is clearly not the intent of the committee”). In his remarks, Senator Malcolm Wallop noted that the purpose of FISA was for Congress to try to strike a balance between civil liberties and the intelligence community's need for heightened surveillance. *Id.* at 91-96 (Remarks of Sen. Wallop).

⁸⁷ See 50 U.S.C. §§ 1807, 1808 (2006) (describing the reports required by the Attorney General and other congressional oversight measures).

⁸⁸ See, e.g., 50 U.S.C. § 1801(h) (2006) (directing the use of minimization procedures to “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons”); 50 U.S.C. § 1802(a)(1)(C) (2006) (describing the way in which minimization requirements should be met); see also S. REP. NO. 95-604, at 23 (1977) (noting the importance of protecting liberty interests by not conducting surveillance on an entire group if probable cause only extends to certain individuals within the group).

⁸⁹ E.g., 50 U.S.C. §§ 1809, 1810 (2006) (describing civil liability and criminal sanctions for breaches of FISA).

⁹⁰ See 18 U.S.C. § 2331 (2006) (adopting a definition of terrorism similar to the one found in FISA).

passed criminal measures seeking to combat terrorism, adopts the FISA language defining terrorism.⁹¹

The Patriot Act amended the definition of terrorism from 18 U.S.C. § 2331 slightly, only to broaden its scope and application further.⁹² However, the 2001 Patriot Act amendments included an important sunset provision—added in part because of the haste with which the legislation was passed—that forced Congress to reexamine the wisdom of the legislation at intervals of several years.⁹³ Although Congress debated the renewal of certain parts of the Patriot Act in 2005—none of which involved the definition of terrorism—in March 2006, Congress renewed most provisions, removed the safeguard of a sunset provision, and made the provisions permanent.⁹⁴

The Patriot Act definition of terrorism now has an extraordinarily far reach, especially in light of the limited original application of the FISA definition to the non-criminal purpose of intelligence-gathering. This repurposing and re-contextualization of the FISA definition of terrorism has gone unexamined by

⁹¹ See H.R. REP. NO. 102-242, at 179-80 (1991) (noting that the definition of terrorism stems from FISA and noting the need to significantly expand U.S. counterterrorism efforts in light of numerous acts of international terrorism during the 1980s, including the hijacking of the Achille Lauro).

⁹² See 18 U.S.C. § 2331 (including “mass destruction” as a means by which terrorists operate).

⁹³ See *id.* § 2510 (commenting that Section 801 of Pub. L 90-351 provided a sunset provision for various counterterrorism tools, including those related to wiretapping and surveillance); see also 147 CONG. REC. 20,695-96 (2001) (statement of Sen. Patrick Leahy) (noting the importance of the sunset provision in terms of both discouraging an abuse of power by the administration and increasing the incentive for Congressional oversight). *But see* DONOHUE, *supra* note 80, at 14-15 (arguing that provisions subject to sunset provisions are almost always renewed, making their efficacy as a procedural protection questionable).

⁹⁴ See JAMES BECKMAN, COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM 31 (2007) (describing how sunset provisions were adopted, extended, and then removed). Only three provisions not dealing with the definition of terrorism were still kept subject to the sunset provisions. *Id.* Those provisions were extended in May 2011 until 2015. See Paul Kane & Felicia Somnez, *Patriot Act Amendments Signed into Law Despite Bipartisan Resistance from Congress*, WASHPOST.COM, May 27, 2011, http://www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-in-congress/2011/05/27/AGbVIsCH_story.html (describing the extension of surveillance provisions of the Patriot Act).

Congress, yet has a profound impact as the definition triggers numerous effects for those caught within its scope.⁹⁵

The lack of parallel due process protections in the application of the Patriot Act exacerbates the problems inherent in applying conflicting definitions of terrorism, including the potential lack of notice to individuals as to whether they will be categorized as a terrorist and exactly what kind of conduct is prohibited.⁹⁶

⁹⁵ Although in a different context, this repurposing and re-contextualization of a definition is reminiscent of the post-September 11th decision by John Yoo and others within the Office of Legal Counsel in the Department of Justice to cobble together a definition of "torture" for the purpose of setting the parameters of detainee treatment from non-legal dictionaries, health care statutes, and other sources. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 5-6 (Aug. 1, 2002) (defining torture to mean severe discomfort or pain). Such distorted legal reasoning later came under much criticism, both from within the George W. Bush administration and the scholarly community. *But see* Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. LAW & POL'Y 455, 464-66 (2005) (describing the shortcomings of the OLC memorandum, stating that "[w]hen a lawyer gives legal advice . . . she has a professional obligation of candor toward her client [T]he lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible" (citing Model Rules of Prof'l Conduct R. 2.1 (2003))); Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAGAZINE, Sept. 9, 2007, at 42 (noting that when he started at the OLC in 2003, Jack Goldsmith reviewed the Bybee and Yoo Memoranda and found them to be "tendentious, overly broad and legally flawed").

To some extent, the Office of Legal Counsel memoranda reflect a *Youngstown* dilemma in that they are a product of insular, unilateralist thinking, whereas the definitions underpinning counterterrorism legislation are congressionally sanctioned. However, the practical effect of Congress's imprimatur is that the definitions are extreme; the definitional repurposing in legislation is less extreme, public, and largely ignored, yet still problematic.

⁹⁶ See, e.g., Perry, *supra* note 12, at 270 (arguing that conflicting definitions of terrorism could result in confusion and ambiguity); see also SUBCOMM. ON TERRORISM AND HOMELAND SEC. & HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, 107TH CONG., COUNTERTERRORISM CAPABILITIES AND PERFORMANCE PRIOR TO 9-11: A REPORT TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE MINORITY LEADER (2002), available at http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html (reviewing alternative ways to combat terrorism in order to prevent future attacks). The Subcommittee's recommendation that a single definition of terrorism be agreed upon by all U.S. agencies was predicated on a concern that a lack of uniform definition would lead to terrorist acts being treated identically under the law as ordinary criminal acts. *Id.*

The Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), adds further uncertainty to the question of what individuals and organizations will be prosecuted under the material support statute, and on what basis. See Wadie E. Said, *The Material Support Prosecution and Foreign Policy*,

Further, critics of the Patriot Act and the FTO designation process note that the post-September 11th racialized application of the label of terrorism to those perceived to be Muslim or Arab,⁹⁷ which only serves to foment distrust among domestic and international Muslim and Arab communities.⁹⁸ Other critics accuse the government of subjectivity in the application of terrorism label on various actors, claiming that the designation process depends more on the political sympathies of politicians and targeted groups and individuals than objectively applied criteria.⁹⁹

86 IND. L.J. 543, 577-78 (2011) (describing the role of specific intent in statutes relating to material support of terrorists); see also Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech* 33 (Roger Williams Univ. Legal Studies Research Series, Working Paper No. 101, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777371 (arguing that the majority opinion failed to specify how much coordination with a foreign terrorist organization would lead to a violation of the federal statute prohibiting material support to these organizations); cf. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 12-18 (2005) (discussing the enactment of the material support statute).

⁹⁷ See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-76 (2002) (discussing the racialization of Arab and Muslim Americans after the September 11th attacks); Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 725-32 (2003) (arguing that U.S. counterterrorism law and policy has intentionally singled out those perceived as Muslim or Arab to bear the brunt of the curtailing of civil liberties and human rights); see also Sheryl Gay Stolberg, *White House Extends a Hand to Muslims Wary of Hearings*, N.Y. TIMES, Mar. 7, 2011, at A1 (reporting on how hearings to be held by the House Committee on Homeland Security are controversial based on the perception that the government is equating domestic terrorism with Islam).

⁹⁸ See Tom Tyler, et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 368, 369-70 (2010) (finding a "robust correlation between perceptions of procedural justice and both perceived legitimacy and willingness to cooperate among Muslim American communities in the context of anti-terrorism policing," and noting that, under a normative model of anti-terrorism measures, "people obey the law and cooperate with legal authorities when they view government as legitimate and thus entitled to be obeyed"); see also GABRIELLA BLUM & PHILIP B. HEYMANN, *LAW, OUTLAWS, & TERRORISTS: LESSONS FROM THE WAR ON TERRORISM* 162-63, 168-69, 174-75 (2010) (discussing people's perceptions in predominantly Muslim countries that U.S. foreign policy is hegemonic and anti-Islamic).

⁹⁹ See, e.g., James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 398-99 (1992) (arguing that the U.S. government acted inconsistently with regard to the imprisonment of Irish Republican Army "terrorist" Joe Doherty and the White House reception for South African "freedom-fighter" Nelson Mandela); see also Perry, *supra* note 12, at 270 (stating that "different standards are used for making determinations relating to vastly different public policy objectives").

Given the subjective application of the label of terrorism¹⁰⁰ and its far-reaching implications, some scholars have suggested that the most just resolution may be for governments to forego separate definitions of terrorism and rely instead on the criminalization of the underlying substantive acts.¹⁰¹ Such an overhaul of domestic legislation is unrealistic given the current political climate that militates toward the increase in legal measures taken specifically in the name of counterterrorism. However, the experiences of other nations in defining terrorism and identifying potential abuses in the application of such definitions can offer insight into and guidance for potential improvements in the use of such definitions in the domestic context.

3.2. United Kingdom

The United Kingdom, although dealing with numerous internal and external threats to national security and emergency situations over many decades,¹⁰² did not attempt to define

The subjectivity in applying the definition of terrorism is clear in the 2007 conviction and sentencing of gang member, Edgar Morales, under the New York state anti-terrorism statute—a conviction that was overturned in 2011 based on the appellate court's finding of a lack of nexus between Morales' reckless killing of a girl during a gang-related altercation and the legislature's intended definition of terrorism. *See* *People v. Morales*, 924 N.Y.S.2d 62 (N.Y. App. Div. 2011) (vacating the terrorism charges of Morales' prior conviction and sentencing, decreasing Morales' murder sentence, and opining that New York's definition of terrorism mirrors that of FISA); *see also* N.Y. PENAL LAW § 490.25(1) (McKinney 2001) (defining terrorism, in part, as committing a specific offense with "the intent to intimidate or coerce a civilian population").

¹⁰⁰ *See* Perry, *supra* note 12, at 271–72 (noting that the lack of precision of the definition of terrorism stems from political considerations, which should be kept separate from the legal categorizations).

¹⁰¹ *See id.* (raising the question of necessity of a definition of terrorism and ultimately concluding that a lack of legal definition is unworkable and undesirable). Critics of government approaches to defining terrorism note that, historically, the United States has designated the types of violent acts, delineated in the Patriot Act and the AEDPA, as criminal acts for the purpose of delegitimizing the actors and not giving them the cache that may be associated with being called a "terrorist" or "combatant." *See* HOFFMAN, *supra* note 12, at 15 (describing the different and evolving meaning of "terrorism"); *see also* Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 355–56 (2004) (describing dangers associated with an overly broad definition of "terrorist").

¹⁰² *See* HOUSE OF COMMONS, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2005–06 (2005) H.C. 1087, at 2 (U.K.), available at <http://www.official-documents.gov.uk/document/hc0506/hc10>

terrorism comprehensively until relatively recently. The definition is of serious practical importance as the label triggers governmental powers such as the right to arrest terrorism suspects without a warrant,¹⁰³ the ability to hold an arrestee in pre-charge detention for up to 28 days when he is suspected of a terrorism-related activity,¹⁰⁴ the issuance of a control order,¹⁰⁵ the prohibition against publishing statements that encourage terrorism,¹⁰⁶ and the proscription of terrorist organizations.¹⁰⁷

The Prevention of Terrorism Acts of both 1974¹⁰⁸ and 1989¹⁰⁹ attempted to define terrorism for the limited purpose of fighting against Catholic nationalist forces in Northern Ireland associated with the Troubles.¹¹⁰ In this context, terrorism was defined broadly as “the use of violence for political ends and includes any use of violence for the purpose of putting the public . . . in fear.”¹¹¹ Arguably, such a broad definition can encompass almost any act of

/1087/1087.pdf (detailing the multiple bombings that killed dozens of people in Britain); see, e.g., CONFLICT ARCHIVE ON THE INTERNET, <http://cain.ulst.ac.uk> (last visited Oct. 15, 2011) (describing the history of the Troubles in Northern Ireland);

¹⁰³ See Terrorism Act, 2000, c. 11, § 41 (U.K.) (outlining that a constable has the power to arrest a person he reasonably suspects to be a terrorist without a warrant).

¹⁰⁴ See, e.g., Terrorism Act, 2006, c. 11, § 23(7) (U.K.) (outlining the period in which warrants can be extended).

¹⁰⁵ See, e.g., Prevention of Terrorism Act, 2005, c. 2, § 1(1) (U.K.) (defining a control order as “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism”).

¹⁰⁶ See Terrorism Act, 2006, c. 11, § 1 (U.K.) (delineating what constitutes an encouragement of terrorism and outlining punishments for the offense).

¹⁰⁷ See Terrorism Act, 2000, c. 11, § 3 (U.K.) (allowing the Secretary of State to add an organization to the proscribed list if it has any activities concerning terrorism); see also Alexander Horne, *The Terrorism Act 2000: Proscribed Organizations*, SN/HA/00815 House of Commons Library, Home Affairs Section (Aug. 9, 2011), available at www.parliament.uk/briefing-papers/SN00815.pdf (describing the recent history and present status of “proscribed organizations” under the anti-terrorism legislation).

¹⁰⁸ See Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, § 13, sch. 1 (U.K.) (defining the Irish Republican Army as a proscribed organization).

¹⁰⁹ See Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, § 24 (U.K.) (making further provisions to hinder the establishment of more explosives factories in Northern Ireland).

¹¹⁰ See CONFLICT ARCHIVE ON THE INTERNET, *supra* note 102 (outlining past and current conflicts and politics affecting Northern Ireland).

¹¹¹ See Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, § 9(1) (defining terrorism and other provisions in the Act).

violence that occurs in public, but little opposition was raised regarding such a definition, perhaps given the limited scope of its application—to a specific region and a specific context—and the fact that many British citizens viewed the Catholic separatists in Northern Ireland as an outsider group.¹¹² To these citizens, the separatists did not deserve the more robust legal protections that would accompany a narrower definition of terrorist activity.

3.2.1. *Prevention of Terrorism Act 2000*

The Prevention of Terrorism Act 2000 marks a turning point in British counterterrorism law and policy, as it reflects an effort to create a uniform counterterrorism law to apply to all parts of the United Kingdom, and not specifically created to deal with Northern Ireland¹¹³ or other specific conflict situations.¹¹⁴

The definition of terrorism that Parliament adopted in the statute was debated at length,¹¹⁵ and ultimately included several key elements, including an ideological basis for the terrorist action or threat of action, a high level of seriousness of the action, and an element of violence broadly defined to include physical violence, risks to public safety and disruption of electronic systems.¹¹⁶

¹¹² See Setty, *supra* note 3, at 172 (describing the use of specialized trials for only particular terrorist groups).

¹¹³ For a general discussion of the history of the Troubles, see *Conflict and Politics in Northern Ireland*, CAIN WEB SERVICE, <http://cain.ulst.ac.uk/ni/index.html> (last visited Oct. 15, 2011) (chronicling the background, key issues and key events of the conflict).

¹¹⁴ Parliament passed this legislation, in part, to comply with European Union requirements that anti-terrorism legislation be codified in one statute and that human rights concerns be addressed within comprehensive anti-terrorism legislation. See The European Convention on Human Rights, 1 E.T.S. 5 (1968); see also BECKMAN, *supra* note 94, at 55 (describing the UK's terrorism policy prior to the 2000 codification as a "hodgepodge of different laws, and different police and intelligence organizations").

¹¹⁵ See United Nations, Econ. & Soc. Council, Sub-Comm. on the Promotion and Protection of Human Rights, *supra* note 55 (noting through example the length of time devoted to the definition included in the Terrorism Act of 2000).

¹¹⁶ Terrorism is defined as (1) the use or threat of action where the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause, and (2) it involves serious violence against a person, involves serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to

At first glance, such restrictive language appears to narrow the definition of terrorism from that of the 1989 legislation. However, additional catch-all language at the end of the definition, including the characterization of terrorism as any use or threat of serious violence against a person, serious damage to property, serious risk to the health and safety of the public, or disruption of an electronic system, so long as a firearm or explosive is involved and regardless of motivation of the actor,¹¹⁷ broadens the scope of the legislation enormously by removing the requirement of a politically motivated intent. The text of the definition suggests that any violent act committed against another person where a firearm is involved may be considered terrorism by the government and treated as such.

Given its open-ended construction, the definition of terrorism has come under considerable criticism from academics and the British parliamentarians for its potential for abuse of individuals affiliated with politically unpopular causes who oppose the government.¹¹⁸ Compounding the effect of the broad definition of

disrupt an electronic system. Terrorism Act, 2000, c.11, §1(1)–(2) (U.K.).

Finally, under subsection (3), any use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism qualifies as terrorism, regardless of the purpose of the action is to influence the government or intimidate the public. Terrorism Act, 2000, c. 11, §1(2)–(3) (U.K.).

¹¹⁷ See Terrorism Act, 2000, c. 11, Part I (U.K.) (describing situation where subsection two of the act need not be satisfied).

¹¹⁸ See JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, THIRD REPORT, 2005–06, H.L. 75–I, H.C. 561–I, para. 12 (U.K.). The report states that:

The main problem to which [the definition of terrorism in the Terrorism Act 2000] gives rise, is that the counter-terrorism measures are capable of application to speech or actions concerning resistance to an oppressive regime overseas The Home Secretary does not deny that this is the effect of the offence but defends its scope on the basis that there is nowhere in the world today where violence can be justified as a means of bringing about political change.

Id. See also ANDREW BLICK, TUFYAL CHOUDHURY AND STUART WEIR, THE RULES OF THE GAME: TERRORISM, COMMUNITY AND HUMAN RIGHTS 44 (2005) (arguing that the 2000 Act's broad definition leaves room for the persecution of legitimate political activities). The authors note further that the vagueness and breadth of the Terrorism Act 2000 definition of terrorism could be incompatible with Article 10 of the European Convention on Human Rights, which guarantees freedom of expression. See also The European Convention on Human Rights, *supra* note 114, art. 10(1) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions . . . without interference by public authority and

terrorism is the fact that the Act expands the list of substantive crimes related to terrorism to include material support¹¹⁹ and incitement,¹²⁰ and shifts the burden onto defendants to disprove their affiliation with terrorist organizations.¹²¹ Further, the Prevention of Terrorism Act, 2000 also allows for the stop and search of any individuals whom police “reasonably suspect” of being involved in terrorism.¹²² This provision has led to the disproportionate targeting of South Asian men by police, often leading to periods of pre-arrest detention, and then release when the police decided not to charge the suspects with a crime.¹²³ In fact, the police have stated that the value of the stop and search power was not to gather intelligence or to capture individuals who have plotted or executed attacks, but as a tool to disrupt and deter potential terrorist activity, further noting that the stop and search powers were sometimes applied “in a pretty random way.”¹²⁴

Since subsequent antiterrorism legislation continued the trend, established by the Prevention of Terrorism Act 2000, of increasing police powers and curtailing civil liberties, the effects of the broad definition of terrorism in the 2000 Act and the potential abuse of human rights continue to be significant.

These effects were exacerbated by the perception after September 11, 2001 that a fundamental change had occurred in the

regardless of frontiers.”).

¹¹⁹ See Terrorism Act, 2000, c. 11, §§ 15–16, 18 (U.K.).

¹²⁰ *Id.* §§ 59–61.

¹²¹ *Id.* § 41(1). This burden-shifting provision was diluted to some extent by the House of Lords in *Sheldrake v. DPP*, [2003] EWCA Crim 762, [2004] UKHL 43, [2005] 1 A.C. (H.L.) [264] (appeal taken from Eng.).

¹²² Terrorism Act, 2000, c.11, §43 (U.K.).

¹²³ See U.K. HOME OFFICE, STATISTICS ON RACE AND THE CRIMINAL JUSTICE SYSTEM 21–34 (2006), available at <http://www.statewatch.org/news/2006/mar/s95race05.pdf> (describing disparities in stop and search rates between groups); see also BLICK, *supra* note 118, at 49–50 (noting the percentage of British Muslims surveyed who describe being stopped and searched).

¹²⁴ See HOME AFFAIRS COMMITTEE, TERRORISM AND COMMUNITY RELATIONS, SIXTH REPORT, 2004–05, H.C. 165–I para. 54 (U.K.) (referring to the Memorandum submitted by the Association of Chief Police Officers). Of the 702 arrests made under the Terrorism Act 2000 that occurred in the three years immediately following September 11, 2001, fifty percent (351 of 702 arrests) resulted in the release of the arrestee without charge. *Id.* para. 55. Notably, of the convictions under the Act, similar percentages of convicts were affiliated with Islamist causes as the Irish Republican Army. *Id.* para 56.

nature of threats to national security.¹²⁵ Although there is much disagreement as to whether the new policies and laws are effective in combating short-term and long-term national security threats,¹²⁶ the British government, police forces, and critics of the legislation agree that the effects of the new security measures fall disproportionately on the British Muslim population.¹²⁷ In fact, the public support for the more stringent legislation appears to be predicated, in part, by the understanding that the effects of the legislation will be felt most by a small minority of the British population¹²⁸—a reaction that appears to mirror the indifference to curtailed liberties for the Catholic population of Northern Ireland during the Troubles.

This racialized application of antiterrorism laws has led to a counterproductive result: resentment among the British Muslim population and sympathy among Muslim communities for extremist groups.¹²⁹ The same phenomenon occurred during the Troubles in Northern Ireland, in which legislation that appeared to be facially neutral was applied disproportionately to the Catholic population there. In the context of that conflict, disparate treatment led to a backlash against the British government and encouraged moderate Catholics to sympathize with and protect even violent separatists.¹³⁰

¹²⁵ See BLICK, *supra* note 118, at 9 (describing how terrorism and counterterrorism measures affect the relationship of trust between the public and government).

¹²⁶ See, e.g., BECKMAN, *supra* note 94, at 65–66 (analyzing arguments regarding the efficacy of the robust counterterrorism measures authorized under the 2000 Terrorism Act).

¹²⁷ See BLICK, *supra* note 118, at 9 (describing potential effects terrorism and counterterrorism measures on the Muslim community); Setty, *supra* note 3, at 149–50 (noting the counterterrorism techniques used in Northern Ireland during the Troubles of the 1970s and 1980s).

¹²⁸ See BLICK *supra* note 118, at 12 (noting that members of the general public did not feel that the 2000 Terrorism Act, or other antiterrorism legislation, would impinge on their rights because it was their understanding that the most intrusive aspects of the legislation “will not be used against ‘us,’ they will be used against ‘them’”).

¹²⁹ See *id.* at 15 (describing the growing sympathy for “religious and political extremism” among Britain’s Muslim communities).

¹³⁰ See *id.* at 33–34 (noting that that the government never realized the “potentially damaging effects” of counterterrorism measures); see also Setty, *supra* note 3, at 156–57 (describing how military sources saw a subsequent increase in political violence following the internment program in Northern Ireland).

3.2.2. Subsequent Anti-Terrorism Legislation

In the years following the September 11 attacks, Parliament passed a number of statutes meant to increase the number of substantive offenses associated with terrorism, the counter-terrorism powers of the government, and the penalties associated with a terrorism conviction. All of these measures were still predicated on the expansive and unevenly applied definition of terrorism that was laid out in the 2000 Act.

The Anti-Terrorism Crime and Security Act 2001 (ATSCA)¹³¹ was passed in an unusually fast timeframe in the months after the September 11 attacks¹³² and eliminated several of the procedural and civil liberty safeguards that Parliament took care to include in the 2000 Act. For example, whereas the 2000 Act—given the expansive reach of its definition of terrorism—took care to disallow criminal prosecution as terrorists of bystanders who choose not to speak during an investigation, that provision was reinstated in ATSCA.¹³³ ATSCA also authorized the indefinite detention and removal of aliens who, without a trial or process, were merely suspected of being terrorists.¹³⁴ Although this provision was judicially rejected in 2004, it demonstrates the severe ramifications of being labeled—without trial or further process—a terrorist.¹³⁵

¹³¹ See generally Anti-Terrorism Crime and Security Act, 2001, c.24 (U.K.) (hereinafter ATSCA) (amending the 2000 Terrorism Act through the addition of further provisions against terrorism including the freezing of assets and the extension of criminal laws and powers for law enforcement).

¹³² In November 2011, the House of Commons Select Committee on Home Affairs reported its discomfort at the speedy passage of such consequential legislation. See HOME AFFAIRS COMMITTEE, ANTI-TERRORISM CRIME AND SECURITY ACT OF 2001, FIRST REPORT, 2001, at paras. 11, 68. “A Bill . . . with major implications for civil liberties should not be passed by the House in such a short period and with so little time for detailed examination in committee.” *Id.* at para. 68.

¹³³ See ATSCA, *supra* note 131, § 117 (stating that a “person commits an offence if he does not disclose the information as soon as reasonably practicable”). See also BECKMAN, *supra* note 94, at 69 (discussing the reinstatement of the bystander cooperation rule).

¹³⁴ See ATSCA, *supra* note 131, at § 23 (“A suspected international terrorist may be detained . . . despite the fact that his removal or departure from the United Kingdom is prevented”). Reports suggest that fourteen individuals had been subject to indefinite detention, some for longer than two years, under this provision. BECKMAN, *supra* note 94, at 72.

¹³⁵ The detention and removal provisions of ATSCA were rejected in *A v. Secretary of State for the Home Department*, in which the Law Lords held that the

The Prevention of Terrorism Act 2005,¹³⁶ although subject to robust and heated debate,¹³⁷ continued Parliament's trend toward increasing police power, expanding substantive offenses related to terrorism and allowing for the undermining of fundamental civil liberties in the name of national security. One of the most controversial provisions in the 2005 legislation was the creation of a broad framework for control orders, which authorize the detention of or significantly curtail the freedom of movement of those suspected—but not convicted of—terrorism-related activity, or tendencies toward terrorism-related activity.¹³⁸ The definition of terrorism that underpins the use of control orders is the extremely broad provision created in the Terrorism Act 2000.¹³⁹

detention and removal powers were inconsistent with Section 4 of the Human Rights Act, 1998, c.42 (U.K.) and the U.K. obligations under Article 14 of the European Convention on Human Rights. *See generally* *A v. Secretary of State for the Home Department*, [2004] UKHL 56 (appeal taken from Eng.). Lord Hoffman, writing on the equal protection issue, noted that:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

Id. para. 97.

¹³⁶ Prevention of Terrorism Act, 2005, c.2 (U.K.).

¹³⁷ *See* BECKMAN, *supra* note 94, at 72–73 (detailing the divisions and debates within the governing Labor Party and in the House of Lords regarding the passage of the 2005 legislation).

¹³⁸ *See* Prevention of Terrorism Act 2005, *supra* note 136, §§ 1–9 (describing the framework for authorizing control orders); *see also id.* § 1(3) (authorizing the Secretary of State or a court to issue a control order when it is deemed “necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity”). This extremely vague standard severely implicates fundamental rights of privacy, dignity and association, and has come under harsh scrutiny from critics. *See, e.g.*, HUMAN RIGHTS WATCH, LETTER TO THE UK PARLIAMENT ON CONTROL ORDERS (Mar. 2, 2009), available at <http://www.hrw.org/en/news/2009/03/01/letter-uk-parliament-control-orders> (last visited Oct. 15, 2011) (detailing objections to the renewal of control order provisions from the 2005 Act).

¹³⁹ *See* Terrorism Act, 2000, c. 11, § 1 (U.K.) (defining “terrorism” as the “use or threat of action” (1) “designed to influence the government or an international governmental organization or to intimidate the public or a section of the public”; (2) “made for the purpose of advancing a political, religious, racial or ideological cause”; and (3) which (a) “involves serious violence against a person”; (b) “involves serious damage to property”; (c) “endangers a person’s life”; (d) “creates a serious risk to the health or safety of the public”; or (e) “is designed seriously to interfere with or seriously to disrupt an electronic system”). The

After the July 2005 attack on the London transit system,¹⁴⁰ pressure mounted on the British government to pass another round of counterterrorism legislation.¹⁴¹ Again, predicated on the broad definition of terrorism in the 2000 Act, the Terrorism Act of 2006 sought to extend the range of substantive terrorism offenses by criminalizing actions such as the “glorification” of terrorist activity, if such glorification is done with an intent or reckless disregard as to whether other people will be encouraged to commit terrorism offenses,¹⁴² and distributing a “terrorist publication” to others.¹⁴³ Such criminalization authorized the government to prosecute imams and other Muslim leaders who, according to the government, fomented the July 2005 transit attackers’ extremism.¹⁴⁴ The 2006 Act also authorizes pre-charge detention of up to 28 days¹⁴⁵ if an individual is arrested on suspicion of being a terrorist.¹⁴⁶

Council of Europe Convention on the Prevention of Terrorism 2005 relies on international treaties and conventions, such as those described in section 2, to provide some parameters for the definition of terrorism. See Council of Europe Convention on the Prevention of Terrorism art. 1(1), June 16, 2005, C.E.T.S. No. 196, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm> (defining a “terrorist offence” as “any of the offences within the scope of and as defined in one of the treaties listed in the Appendix”).

¹⁴⁰ See HOUSE OF COMMONS, *supra* note at 102 (recounting the events of the London bombings and noting that, as a result of the four terrorist explosions, fifty-six people were killed and more than 700 injured).

¹⁴¹ See BECKMAN, *supra* note 60, at 76 (noting that then-Prime Minister Tony Blair responded to calls for stricter measures following the London bombings by laying out a twelve-point counterterrorism plan and subsequently introducing new legislation in Parliament).

¹⁴² Terrorism Act, 2006, c. 11, §§ 1, 3 (U.K.) (clarifying statements that qualify as direct or indirect statements of encouragement to commit, prepare, or instigate acts of terrorism or Convention offenses).

¹⁴³ *Id.* § 2.

¹⁴⁴ BECKMAN, *supra* note 94, at 78. See also Alan Cowell, *Blair Vows New Laws to End Sanctuary for Muslim Extremists*, N.Y. TIMES (Aug. 5, 2005), <http://www.nytimes.com/2005/08/05/international/europe/05cnd-britain.html> (detailing the August 5, 2005 speech by then-Prime Minister Tony Blair in which he vowed to remove “extremist” Muslim leaders).

¹⁴⁵ This shift to twenty-eight days was extremely controversial as it deviates from other criminal and counterterrorism standards. For example, the Terrorism Act, 2000, allowed pre-charge detention to be a maximum of seven days. Terrorism Act, 2000, c. 11, § 41, sch. 8 (U.K.). Fourteen-day pre-charge detention is allowed under the Criminal Justice Act, 2003. Criminal Justice Act, 2003, c. 44, § 306 (U.K.). Although debate had occurred on increasing the authorized duration of pre-charge detention to ninety days. See Alexander Horne & Gavin Berman,

Such measures prompted introspection within the British government as well as international scrutiny of U.K. legal standards surrounding terrorism. Critics questioned whether such lengthy pre-charge detention periods comport with the European Convention on Human Rights standards for due process.¹⁴⁷ The British government has argued that the United Kingdom is in compliance with the Convention. The government, however, was forced to confront the question of whether such draconian consequences of being suspected of terrorism, when triggered by the broad definition of terrorism from the 2000 Act, go too far in curtailing civil liberties and ordinary rule of law protections in the name of national security.¹⁴⁸ The Tory-Liberal Democrats coalition government that took power in 2010 has made it clear that it plans

Pre-Charge Detention in Terrorism Cases, SN/HA/5634 House of Commons Library, Home Affairs Section and Social and General Statistics Section 1, 1 (June 29, 2010), <http://www.parliament.uk/briefing-papers/SN05634.pdf> [hereinafter 2010 Pre-Charge Detention Report] (noting that the twenty-eight-day period had initially been introduced as a compromise from the Government's original ninety-day period).

¹⁴⁶ Terrorism Act, 2006, c. 11, § 23(7) (U.K.) (detailing the extension of the detention period for suspected terrorists). In June 2009, Parliament conducted its annual review of the 2006 Act to determine whether the twenty-eight-day pre-charge detention period ought to be renewed (or allowed under the terms of the 2006 Act to revert to a fourteen-day limit). At that time, since the enactment of the 2006 Act, approximately eleven suspects had been held by the police in pre-charge detention for twenty-seven to twenty-eight days. Of those, eight were eventually charged with a crime and three were released. See JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (FIFTEENTH REPORT): ANNUAL RENEWAL OF 28 DAYS, 2008-9, H.L. 119, H.C. 726, ¶¶ 14, 20 (U.K.), available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/119/119.pdf> [hereinafter 2009 Annual Renewal Report] (providing an overview of the government's statistical support for the extended detention program).

¹⁴⁷ See Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5(2), 5(4), Nov. 4, 1950, E.T.S. No. 5 (guaranteeing due process and a meaningful right to habeas corpus); see also 2010 Pre-Charge Detention Report, *supra* note 145, at 5-7 (emphasizing that the twenty-eight day pre-charge detention period was ultimately decreased to fourteen days in January 2011 due to the highly controversial nature of the extended period).

¹⁴⁸ See 2009 Annual Renewal Report, *supra* note 146, ¶ 29 ("[W]e remain of the view that the renewal of the maximum extended period of 28 days risks leading in practice to breaches of Article 5(4) ECHR."); see also BLICK, *supra* note 118, at 48 (noting that critics suggest that this type of pre-arrest detention may violate the United Kingdom's obligations under the European Convention on Human Rights, unless the United Kingdom chooses to formally derogate from Article 5 of the Convention based on a national emergency).

to roll back the authorized pre-charge detention period as well as numerous other counterterrorism measures.¹⁴⁹

The government has also expressed some concern about the potential reputational damage of harsh counterterrorism legislation and the poor example it sets for other nations struggling to maintain the rule of law while implementing robust security measures. The authors of one parliamentary report commented that, “[i]t is distressing to see how the slackening of procedural safeguards in countries like France, the UK and the USA, has been exploited by other States with less well-entrenched legal systems and human rights safeguards.”¹⁵⁰

U.K. legislation from the 2000 Act onward illustrates two phenomena. First, a broad definition of terrorism is now entrenched. When the 2000 Act was introduced to Parliament, a robust debate on the protection of human rights, civil liberties, and the rule of law commenced. Parliament implemented a broad definition, repurposed and expanded from previous parameters set up specifically to deal with the troubles in Northern Ireland, without subsequent revision through the passage of numerous other counterterrorism laws. Second, each of the post-2000 counterterrorism laws included increasingly punitive measures—including authorizing the use of control orders, broad immigration deportation powers and extensive pre-charge detention—predicated on the same broad definition found in the 2000 Act.

With a system of broad counterterrorism measures that compromise rights and liberties in significant ways, the British government is confronted with the question of how and to what extent structural measures are necessary to safeguard against government overreaching and abuse.

¹⁴⁹ See HOME DEPARTMENT, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS, 2011, Cm. 8004, at 4–6 (U.K.), available at <http://www.official-documents.gov.uk/document/cm80/8004/8004.pdf> (recommending the overhaul of various counterterrorism measures, including curtailing the period of pre-charge detention, the use of control orders, and the scope of authorization for stopping and searching suspects).

¹⁵⁰ 2009 Annual Renewal Report, *supra* note 146, ¶ 31 (quoting INTERNATIONAL COMMISSION OF JURISTS, ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS 157 (2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf>).

3.2.3. Safeguards Against Abuse

Given the expansive scope and sometimes subjective and problematic application of the statutory definition of terrorism, the British Parliament has created several systemic safeguards that provide some procedural protection. A one-year renewal provision is embedded in many statutes, including those that deal with the definitional parameters of terrorism.¹⁵¹ Further, the legislation mandates an annual review of all counterterrorism measures by outside reviewers and parliamentary committees prior to renewal of the legislation.¹⁵²

When dealing with statutes such as the ATSCA, which was passed quickly and increased police powers considerably, Parliament combined sunset measures with robust review processes by independent reviewers to provide a substantial check on potential abuse by the government.¹⁵³ The more substantial review required under ATSCA did not extend to the authorization for issuance of control orders, which must be renewed each year¹⁵⁴ but are not subject to the level of external review required under ATSCA, pursuant to the 2005 Act.

In addition to including sunset measures and the mandate for parliamentary review, the British government has taken an additional step by appointing an independent examiner to review numerous aspects of British counterterrorism law and policy, including the definition of terrorism itself.¹⁵⁵

¹⁵¹ See, e.g., Prevention of Terrorism Act, 2005, c. 2, § 13(1) (U.K.) (“[This Act] expire[s] at the end of the period of 12 months beginning with the day on which this Act is passed.”).

¹⁵² See, e.g., BECKMAN, *supra* note 94, at 67 (indicating that the U.K. Anti-Terrorism Act of 2000 includes a provision “that mandates that the laws be reviewed and analyzed each year (i.e., annually) and that a report on the review be submitted back to the Parliament for reconsideration”).

¹⁵³ See HOME AFFAIRS COMMITTEE, *supra* note 132, ¶ 40 (requiring an annual review of detention powers by Parliament that is “based on an annual report by an independent commissioner”); *id.* ¶ 43 (requiring the expiration of certain immigration and detention powers such that it cannot be renewed quickly by Parliament, but rather would have to be re-enacted as primary legislation by the full Parliament after five years).

¹⁵⁴ See Prevention of Terrorism Act, 2005, c. 2, § 13(9) (U.K.) (“Nothing in this Act about the period for which a control order is to have effect or is renewed enables such an order to continue in force after the provision under which it was made or last renewed has expired or been repealed by virtue of this section.”).

¹⁵⁵ This is a particularly important safeguard, as counterterrorism measures

In 2005, the U.K. government asked Lord Carlile to examine the statutory definitions of terrorism to determine whether their scope and application comported with Parliamentary intent, and to analyze the definitions' implications on civil liberties.¹⁵⁶ Carlile's analysis is expansive, taking into account the history of terrorism's definitions in U.K. legislation.¹⁵⁷ Carlile began his assessment by critiquing the definition used in the 1989 legislation dealing with violence in Northern Ireland: "[T]he use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear[.]"¹⁵⁸

Carlile faulted this definition¹⁵⁹ for lacking differentiation based on the seriousness of the violence and for its exclusion of acts motivated by non-political purposes (e.g. religious ends).¹⁶⁰ He noted that the nature of a terrorist act, in its scope, intent, and method, is substantially different from an "ordinary" crime. Therefore, terrorism necessitates extraordinary measures by intelligence and law enforcement officers.¹⁶¹ Carlile also appears to

have become more robust and the consequences of being labeled a terrorist more severe. *See, e.g.,* CARLILE, *supra* note 37, ¶¶ 1-2 (noting that Lord Carlile has served as an independent reviewer of British counterterrorism legislation and policy since 2001, and that, in this capacity, he has made several recommendations to Parliament on the effect of various counterterrorism measures).

¹⁵⁶ *See id.* ¶ 1 (detailing the Parliament's request to Lord Carlile to write a report concerning the "definition of terrorism").

¹⁵⁷ *See, e.g.,* Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, Preamble (noting that the legislation was, in part, to replace legislation dealing with emergency measures for Northern Ireland); *id.* at pt. VI (detailing legislative measure specifically for Northern Ireland).

¹⁵⁸ *Id.* § 20(1).

¹⁵⁹ Other definitions have been faulted as well. For example, in 1996, Lord Lloyd of Berwick, a previous independent reviewer, had recommended that the United Kingdom adopt the operational definition used by the U.S. Federal Bureau of Investigation at the time: "The use of serious violence against persons or property, or threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives." CARLILE, *supra* note 37, ¶ 9 (opining that the FBI's definition was too narrow, excluding situations such as the "disruption of air traffic control or other vital electronic systems").

¹⁶⁰ *See* CARLILE, *supra* note 37, ¶ 8 ("That definition had major drawbacks [I]t was restricted in terms of intention/design, in that it excluded violence for a religious end, or for a non-political ideological end.").

¹⁶¹ *See* CARLILE, *supra* note 37, ¶¶ 29-31, 39-40 (arguing that although robust counterterrorism legislation and policies naturally reduce the rights and protections of individual defendants, the measures are appropriate given the circumstances, and can be likened to other contexts in which special legal

equate modern terrorism in the United Kingdom with Islamic jihadism, particularly noting the jihadist goal of “condemn[ing] Western society and its value systems,” replacing those systems with Islamic law, and changing the foreign policies of nations.¹⁶²

Given the expansive scope of the definition of terrorism and its perceived orientation toward Islamic jihadism, Carlile considers recommendations for certain exceptions to the definition of terrorism to improve protection for defendants’ rights. He analyzes arguments regarding the exclusion of “offences against property,” “offences for a religious purpose” because of the difficulty in defining religion precisely, offenses “lacking a sufficient political or ideological component/motive,” “mere preaching or glorification” of terrorist activity, and freedom fighting against an oppressive regime.¹⁶³ He also considers whether state actors should be considered within the framework of counterterrorism legislation.¹⁶⁴

These concerns and tensions almost exactly parallel the debates that continue to plague efforts to reach an international consensus on the definition of terrorism. Yet, ultimately, Lord Carlile rejects all of them,¹⁶⁵ despite noting problematic labeling, such as the

measures are already taken, such as “drug dealing and serious fraud”).

¹⁶² See CARLILE, *supra* note 37, ¶¶ 32–34 (considering whether other types of criminal behavior, including that of Theodore Kaczynski (a.k.a. the “Unabomber”) and “extreme animal rights activists,” ought to fall under the legal framework of “terrorism”). Carlile concludes, ultimately, that such individuals are not “terrorists” for the purposes of intelligence and law enforcement, and are appropriately treated as ordinary criminals, primarily because ordinary law enforcement measures can effectively deal with such actors, whereas those same measures would be inadequate to deal with terrorists such as Islamic jihadists. *Id.*; cf. Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1697 (2009) (arguing that the “racialized social construction” of an uncommonly dangerous Arab or Muslim terrorist was created by counterterrorism policies in the post 9/11 context). Racial or religious profiling based on the perception of the extraordinary threat of Islamic terrorism has pervaded some U.S. counterterrorism efforts, much to the detriment of establishing trust with the discontented communities being affected. See, e.g., Eileen Sullivan, *AP IMPACT: NYPD Spied on City’s Muslim Partners*, ASSOCIATED PRESS (Oct. 5, 2011), available at <http://abcnews.go.com/US/wireStory/ap-impact-nypd-spied-citys-muslim-partners-14674817>.

¹⁶³ CARLILE, *supra* note 37, ¶ 48.

¹⁶⁴ See CARLILE, *supra* note 37, ¶¶ 83–84 (discussing that although no one should be above the law, the issue is one of jurisdiction and not definition).

¹⁶⁵ See CARLILE, *supra* note 37, ¶¶ 50–54 (rejecting objections that the label of terrorism is inappropriately applied to offenses against property, offenses

inclusion of Nelson Mandela on a government-issued list of terrorists.¹⁶⁶ Not only does Carlile recommend maintaining the status quo with regard to the definition of terrorism, but he further argues that terrorism-related convictions ought to carry harsher penalties.¹⁶⁷ Carlile also suggests that any abuse of expansive police and prosecutorial powers related to terrorism can be resolved without modifying its threshold definition.¹⁶⁸ The government agreed with almost all of Carlile's conclusions¹⁶⁹ and

committed in the name of religion, and offenses that do not contain a significant political or ideological component); *id.* ¶ 72 (upholding the inclusion of glorification of terrorist activity as "terrorism," although voicing some concern based on the application of this type of criminalization stretching back to Henry II's execution of Priest Becket in 1164); *id.* ¶¶ 77-78 (rejecting the exclusion of freedom fighters from the label of "terrorism" based on the European Union mandate that member states adopt a "zero-tolerance" approach to terrorism); *id.* ¶¶ 84-85 (rejecting the inclusion of state actors in the definition of terrorism based on complications with foreign relations and diplomatic immunity).

¹⁶⁶ Nelson Mandela was removed from the Terrorist Watch List in 2008 as a result of presidential decree. *Mandela Taken Off US Terror List*, BBC NEWS, July 1, 2008, <http://news.bbc.co.uk/2/hi/7484517.stm>. Menachem Begin was also listed as a terrorist for his actions against the British regime in the early 1940s. See Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1227-29 (2002) (listing all of Menachem Begin's transgressions).

¹⁶⁷ See CARLILE, *supra* note 37, ¶ 86(8) (recommending new and additional sentencing powers for criminal activity that is "aggravated by the intention to facilitate or assist a terrorist").

¹⁶⁸ Carlile takes on one of the most difficult questions posed by the use of a broad and sweeping definition of terrorism: are law enforcement officers appropriately exercising their discretion when deciding to try a defendant as a terrorist, with the concomitant rights reductions that are entailed in such a designation, as opposed to an ordinary criminal? Carlile finds that the layers of review and code of ethics within the Crown Prosecutor's office, along with the protections of a jury trial for defendants, offer sufficient protections against selective or biased prosecution. See CARLILE, *supra* note 37, ¶¶ 60-62 (stating the parties involved in prosecution as follows: the police, the Crown Prosecution Service, the Director of Public Prosecutions, the Attorney General, potentially the judiciary through judicial review, and the jury); see also *id.* ¶ 63 (explaining that any impropriety by the Attorney General, who oversees the Director of Public Prosecutions, can be controlled by Parliament).

¹⁶⁹ See HOME DEPARTMENT, THE DEFINITION OF TERRORISM: THE GOVERNMENT REPLY TO THE REPORT BY LORD CARLILE OF BERRIEW Q.C. INDEPENDENT REVIEWER OF TERRORISM LEGISLATION, 2007, Cm. 7058, ¶¶ 1-10, 12-16 (U.K.) (accepting nearly all of Lord Carlile's conclusions). The only point of disagreement with Carlile's recommendations was that the Government did not think it necessary to clarify the definition of terrorism to include an intent requirement of intimidation. *Id.* ¶ 11 (emphasis in original) ("We do not consider that the bar is set too low by the use of the word *influence* [as opposed to *intimidate*].").

Parliament soon thereafter made changes to comport with most of Carlile's recommendations.¹⁷⁰

Carlile's analysis was extensive and included input from the military, law enforcement officers, intelligence agencies, Muslim community groups, human rights organizations, and others. This undertaking, although not resulting in greater substantive rights protections, provides one level of procedural fairness in the sense that the shifting legislative definitions of terrorism are going neither unnoticed nor unchecked. Carlile's conclusions, particularly those that seem to focus counterterrorism efforts on Islamic jihadist groups, may only serve to alienate British Muslims and other outsider groups.¹⁷¹ Nonetheless, the institutional element of undertaking such an independent review is valuable because it demonstrates that Parliament is cognizant of the potentially harsh effects of being considered a "terrorist." It has responded to the potential abuses of the definition by reassessing such legislation in a meaningful and comprehensive way.

3.3. India

India's struggle with issues concerning national security has been ongoing since its independence in 1947.¹⁷² India's legal response to those struggles has been characterized by a heavy reliance on constitutionally and statutorily granted emergency powers.¹⁷³ India also depends on robust non-emergency criminal

¹⁷⁰ E.g., Terrorism Act, 2006, c. 11, § 34 (U.K.) (amending the definition of the word "terrorism" by adding after the word government "or an international governmental organisation").

¹⁷¹ See DONOHUE, *supra* note 80, at 26–27 (describing how the alienation of British Muslims in the post 9/11 era is partly a result of disparate treatment under counterterrorism laws and the perception of a distortion in the application of the rule of law).

¹⁷² See Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 99 (2006) (describing violence related to terrorism as a "chronic crisis of national security"); see generally K.R. GUPTA, *ANTI-TERRORISM LAWS: INDIA, THE UNITED STATES, THE UNITED KINGDOM AND ISRAEL* (2002) (chronicling the history and development of "anti-terrorism legislation" in India).

¹⁷³ See INDIA CONST. arts. 352–56, *amended by* The Constitution (Ninety-fourth Amendment) Act, 2006 (stating the emergency powers provisions); see also GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 295–97 (2003) (discussing the era of Emergency Rule under Prime Minister Indira Gandhi).

laws that authorize broad police powers and significantly curtail defendant's rights in a manner strikingly similar to that of emergency powers.¹⁷⁴

3.3.1. History of Security Legislation

The robust police and intelligence-gathering powers granted to the Indian government in various statutes arise from a long history of the granting of such powers. The powers also come from a history of dealing with the terrorist/freedom-fighter duality. Being labeled a "terrorist" can often have an augmenting effect to a criminal cause, as such individuals are lauded as heroes and role models in some disaffected communities within India.¹⁷⁵

Security policies, regulations, and laws have been part of the governance of India since the East India Company¹⁷⁶ established rules for dealing with separatists and seditionists in 1793.¹⁷⁷

¹⁷⁴ See Kalhan et al., *supra* note 172, at 116-17 (arguing that Article 22 of the Indian Constitution provides that those arrested "must be provided the basis for arrest 'as soon as may be' and produced before a magistrate within 24 hours"). However, Article 22(3) of the Constitution allows the central and state governments to enact preventive detention laws during non-emergency times and contains a carve-out such that a person arrested or detained under preventive detention laws need not be brought before a "magistrate within 24 hours of being taken into custody[.]" nor does the detainee have the right to counsel or to be informed of grounds for arrest. *Id.* at 135 (citing INDIA CONST. art. 22(3), *amended by* The Constitution (Ninety-fourth Amendment) Act, 2006).

¹⁷⁵ See Madan Singh v. State of Bihar, (2004) 3 S.C.R. 692, 705 (India) (noting that "by wearing the cloak of terrorism, [criminals] aim to achieve acceptability and respectability in the society"); see also Schmid, *supra* note 12, at 389, 414 (discussing the distinction between terming violent attacks as freedom-fighting versus terrorism).

¹⁷⁶ The East India Company, under Royal Charter from the British Government, had administrative and military control over parts of India from the middle of the eighteenth century until 1858. Administrative control over India was officially transferred from the East India Company to the British government through the Government of India Act, 1858, 21 & 22 Vict. c. 106 (Eng.) following the First War of Independence in India, also referred to as the Sepoy Mutiny of 1857. Many of the regulations used by the Company during their rule in the previous 100 years were simply adopted by Parliament and their enforcement was unchanged by the shift in political, administrative, and military control. See generally SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY (2d ed. 2004); AUSTIN, *supra* note 173.

¹⁷⁷ CM Abraham, *India – An Overview*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 59, 60 (Andrew Harding & John Hatchard, eds., 1993) (discussing preventive-detention and security measures taken as early as 1784 by representatives of the East India Company).

Regulations allowed for preventive detention—even without grounds for trial—for state security reasons. This same preventive detention system has been modified over the years and continues to be used by the Indian government in modern times.¹⁷⁸

During colonial rule, numerous ordinances and regulations allowed for extraordinary measures to be taken in the name of national or governmental security, even in times of non-emergency.¹⁷⁹ In 1950, the Indian Constitution enshrined the government's ability to utilize emergency powers,¹⁸⁰ which continued to be used widely in the post-independence era, when the government relied on emergency powers to deal with external threats from China and Pakistan.¹⁸¹

Non-emergency and emergency powers were used to combat internal security threats during the 1970s and early 1980s. Yet even the non-emergency criminal provisions included expansive police powers, such as the power to preventively detain suspects for prolonged periods¹⁸² and freeze assets of those organizations deemed to be “unlawful.”¹⁸³

¹⁷⁸ See Kalhan et al., *supra* note 172, at 127–28 (noting in recent years, under TADA and POA, the government has maintained preventive detention centers).

¹⁷⁹ E.g., Indian Councils Act, 1861, 24 & 25 Vict., c. 67; Government of India Act, 1919, 9 & 10 Geo. 5, c. 101; Government of India Act, 1935, 26 Geo. 5, c. 2 (authorizing the appointed Governor-General to issue ordinances if necessary to preserve national security in the face of external or internal threats).

¹⁸⁰ See INDIA CONST. arts. 352–56, *amended by* The Constitution (Ninety-fourth Amendment) Act, 2006 (delineating emergency powers provisions).

¹⁸¹ See M.P. JAIN, *INDIAN CONSTITUTIONAL LAW*, 679–80 (5th ed. reprint 2008) (2003) (describing the invocation of Article 352 in the context of military conflicts with China and Pakistan).

¹⁸² See, e.g., The National Security Act, 1980, No. 65, Acts of Parliament, 1980, §§ 1, 13 (India) (describing the Act's objective as “to provide for preventive detention in certain cases and for matters connected therewith,” and allows for preventive detention for up to 12 months in certain cases).

¹⁸³ See, e.g., The Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967, § 7 (India) (describing the terms under which “funds of an unlawful association” can be prohibited). Far-reaching legislation, such as the UAPA and the Maintenance of Internal Security Act (1970), set a framework for harsh treatment and penalties for criminal acts related to external and internal security, but did not attempt to define terrorism for the purpose of criminalizing the substantive acts in question.

3.3.2. Defining Terrorism

In the period after Emergency Rule ended in India, political and economic instability, exacerbated by security threats, kept the Indian polity in a state of extreme upheaval.¹⁸⁴ In the 1980s the Punjabi separatist movement fueled government fears that violence would spread and separatist movements throughout India would gain strength.¹⁸⁵ The fears motivated the Parliament to pass the Terrorist Affected Areas Act of 1984 (TAAA), which granted more structured and comprehensive police and intelligence-gathering powers.¹⁸⁶ This statute contains the first legislative definition of a "terrorist," which requires that a person kills, acts violently, disrupts essential services, or damages property; with the purpose of intimidating the public, coercing the government, endangering the sovereignty or integrity of India, or "affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities."¹⁸⁷

This extraordinarily broad language is mitigated by two factors: first, like the U.K. legislation governing conflicts in Northern Ireland, the legislation is limited to particular areas of conflict designated by the government.¹⁸⁸ Second, the substance of TAAA focuses on the establishment and use of special, expedited courts for trying suspected terrorists in designated "affected areas."¹⁸⁹ Although using special courts for suspected terrorists raises important due process and rule of law issues,¹⁹⁰ TAAA's

¹⁸⁴ See AUSTIN, *supra* note 173, at 295-97 (detailing the reaction to authoritarian rule during the Emergency).

¹⁸⁵ The government's fear of Sikh separatists gaining strength fueled the ill-conceived Operation Bluestar attack on Sikhs in Amritsar in 1984.

¹⁸⁶ See Terrorist Affected Areas (Special Courts) Act, 1984, No. 61, Acts of Parliament, 1984 (India) [hereinafter TAAA] ("An act to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith.").

¹⁸⁷ See *id.* § 2(1)(h) (noting that this definition of a terrorist could, if applied indiscriminately or subjectively, cover many legitimate activities related to business or free expression).

¹⁸⁸ See *id.* § 3 (designating "affected areas").

¹⁸⁹ See *id.* §§ 4-16 (establishing rules, procedures, and jurisdiction of the special courts).

¹⁹⁰ See Setty, *supra* note 3, at 164-70 (discussing the historical use of specialized courts in India and the accompanying curtailment of suspected terrorists' procedural rights).

limited geographic and procedural scope curtailed, to some extent, concerns about civil rights and constitutional infringement.¹⁹¹

However, as is evident in other domestic counterterrorism contexts, the definition of terrorism was quickly repurposed and its application was broadened vastly. In the wake of the assassination of Prime Minister Indira Gandhi, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was passed in 1985.¹⁹² This new act defined terrorism in largely the same terms as TAAA.¹⁹³ The geographic and situational limitations that limited the civil liberties implications of TAAA, however, were lifted, such that the definition of terrorism and the concomitant police powers it granted were expanded to all of India.¹⁹⁴ TADA also resurrected robust police powers and measures drawn out of the emergency

¹⁹¹ See Kalhan et al., *supra* note 172, at 145 (noting that substantive offenses are only categorized as acts of terrorism if they occur in certain regions, under the TAAA).

¹⁹² See The Terrorist and Disruptive Activities (Prevention) Act, 1985, No. 31, Acts of Parliament, 1985 (India) [hereinafter TADA] (“An act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto.”).

¹⁹³ Part II of the TADA adds detail to the manner of attack or threat contained within TAAA’s definition of terrorism:

Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, commits a terrorist act.

See *id.* § (3)(1).

¹⁹⁴ Although TADA was initially enacted with a carve-out for Jammu and Kashmir, it was quickly amended to apply to all regions of India. See *Kartar Singh v. State of Punjab*, (1994) 3 S.C.C. 569, 635 (India) (holding that the 1985 TADA, among other acts, “fall[s] within the legislative competence of Parliament in view of Article 248”); see also The Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28, Acts of Parliament, 1987, Part I, §1(2) (India) [hereinafter TADA 1987 Amendments] (amending TADA to expand the statute’s jurisdiction to cover all of India, Indian citizens throughout the world, employees of the Indian government, and passengers on “ships and aircraft registered in India”); Kalhan et al., *supra* note 172, at 100 (noting that the 1987 version of TADA was renewed repeatedly until it was allowed to expire in 1995).

period and earlier, such as allowing coerced confessions by police officers to be used against defendants in the special courts,¹⁹⁵ and increasing the penalties for those convicted of terrorist or disruptive acts.¹⁹⁶

The constitutionality of TADA, including that of its vague and broad definition of terrorism,¹⁹⁷ was upheld by the Indian courts with some reservations about the limitation of rights and potential abuse of power.¹⁹⁸ In validating the scope and jurisdiction of the definition of terrorism, without close examination of its impact or the original intent of the legislation, the courts cemented the right of the government to use such definitions, even after TADA expired in 1995.¹⁹⁹

¹⁹⁵ See TADA 1987 Amendments, *supra* note 194, pt. III, § 15 (considering specific kinds of confessions made to police officers).

¹⁹⁶ See TADA 1987 Amendments, *supra* note 194, pt. II, § 6 (describing enhanced penal provisions).

¹⁹⁷ The TADA definition of terrorism is broad, vague, and subject to much criticism. See *e.g.*, Kalhan et al., *supra* note 172, at 225 (recommending that the Indian government “narrow the definitions of substantive terrorism-related offenses under UAPA to eliminate vagueness”). However, the Act was not found to be a defeating measure for those convicted pursuant to the statute. See *Madan Singh v. State of Bihar*, (2004) 3 S.C.R. 692 (India) (observing that it is not possible to provide a precise definition of terrorism).

¹⁹⁸ See *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375 (India) (upholding the constitutionality of TADA, but in recognition of its potential problems, establishing guidelines to be followed by police officers in recording a confession). Along the same lines as the critique of the material support statute in the United States, the Indian Supreme Court has expressed some concern about the vagueness of the intent requirement when showing that a defendant has aided and abetted a terrorist act. Notwithstanding such concern, the Indian Supreme Court has upheld the relevant provisions of TADA and POTA. *Id.*; see also V. Vijayakumar, *Legal and Institutional Responses to Terrorism in India*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* 351, 353 (Victor V. Ramraj et al. eds., 2005) (indicating that although the Supreme Court observed the application of TADA to political opponents and petty criminals, for example, it upheld the constitutionality of the legislation “in spite of the sweeping powers given to the authorities”).

¹⁹⁹ Various groups objected to the long-lasting effect of TADA on the counterterrorism landscape in India. For example, the National Human Rights Commission (NHRC), established in 1994 by The Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India), objected to the renewals of TADA and, in the 1990s, argued that “any worthwhile strategy to combat insurgency and terrorism requires strong citizen support[,]” which can be achieved by dialogue with the respective societies affected by the acts of terrorism. NAT’L HUMAN RIGHTS COMM’N, ANNUAL REPORT 10 (1996–1997). The NHRC further noted that that the registration of over 250 allegations of abuse and misuse by security forces, and India’s obligations to adhere to international human rights standards, should give pause to the police powers granted under any future counterterrorism

TADA's definition of terrorism was reused and broadened with the enactment of the Prevention of Terrorism Act, 2002 (POTA),²⁰⁰ passed partially in response to the Resolution 1373 global mandate to fight terrorism.²⁰¹ Although POTA was repealed as part of a political pledge to deal with human rights abuses by police and intelligence forces,²⁰² many of the substantive provisions regarding the treatment of terrorism suspects were incorporated into amendments to the Unlawful Activities Prevention Act (UAPA),²⁰³ thereby edging counterterrorism legislation closer to colonial and Emergency-era provisions that provided a framework for criminalizing seditious and disruptive activities.²⁰⁴ The Indian Supreme Court continued its deferential stance toward such legislation, validating the broad exercise of police powers because of the compelling state interest in counterterrorism without

legislation. *Id.* at 10–12.

²⁰⁰ See The Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002 (India) Chapter II, § 3(1)(a), for a definition of perpetrator of a terrorist act as one who:

[W]ith intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances . . . of a hazardous nature or by any other means whatsoever, in such a manner as to cause . . . death of, or injuries to any persons or loss of, or damage to . . . property or disruption of any supplies or services essential to the life of the community

Id.

²⁰¹ See V. Venkatesan, *The POTA Passage*, FRONTLINE, vol. 19, issue 8, Apr. 13, 2002, at 13 (noting that various cabinet ministers had encouraged the passage of POTA in parliamentary debates based on the mandate of Resolution 1373, and that even opposition groups eventually voted to pass POTA as a result of these pressures).

²⁰² *Repeal of "Anti-democratic" Laws Sought*, THE HINDU, Aug. 7, 2004, <http://www.hindu.com/2004/08/07/stories/2004080707001100.htm> (describing the misuse of POTA, TADA, and the Armed Forces Special Powers Act (AFSPA), especially in Manipur and Bihar's Jehanabad district).

²⁰³ The 2004 UAPA amendments included incorporating a definition of terrorism, which was not a part of the original 1967 legislation. The 2004 definition largely paralleled the POTA definition. See The Unlawful Activities (Prevention) Amendment Ordinance, 2004, No. 2, § 15, Acts of Parliament, 2004 (India) (defining "terrorist act").

²⁰⁴ See generally Kalhan, *supra* note 172 (focusing on the underlying continuity between colonial-era provisions and modern police powers and counterterrorism laws).

examining the definition of terrorism on which those powers were predicated.²⁰⁵

The most recent set of counterterrorism laws were enacted after a three-day terrorist attack in Mumbai in late November 2008, in which 163 people were killed.²⁰⁶ Outrage among the Indian public led to demands for stronger national security and antiterrorism measures.²⁰⁷ In response, Parliament rapidly passed the National Investigation Agency Act (NIA Act)²⁰⁸ and further amendments to the UAPA.²⁰⁹ These Acts broadened police powers²¹⁰ and curtailed civil liberties at trials in the newly reinstated special courts²¹¹ in ways that are identical to POTA provisions that Parliament had rejected in its legislative repeal four years earlier.²¹²

However, the effect of the new legislation is actually broader and more prone to abuse because of the definition of terrorism on which the new police and intelligence powers are predicated. The

²⁰⁵ See *People's Union for Civil Liberties v. Union of India*, 6 (Supp.) S.C.R. 860, 880 (2004) (India) (upholding the constitutionality of the Prevention of Terrorism Act, 2002, and noting that, on policy grounds, it was not permitted to "go into and examine the 'need'" for the act). The Court further observed that the Government "has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution," and that the "mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional." *Id.*

²⁰⁶ See Somini Sengupta, *In Mumbai Transcripts, an Attack Directed from Afar*, N.Y. TIMES, Jan. 7, 2009, at A5 (describing intercepted communication detailing the preparations of the attacks).

²⁰⁷ See Somini Sengupta & Keith Bradsher, *India Faces a Reckoning as Terror Toll Eclipses 170*, N.Y. TIMES, Nov. 30, 2008, at A1 (questioning whether Indian authorities could have better anticipated the terrorist attack and ensured heightened security).

²⁰⁸ See National Investigation Agency Act, 2008, No. 34, Acts of Parliament, 2008 (India) (creating an "investigation agency at the national level" to handle security issues).

²⁰⁹ See Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, Acts of Parliament, 2008 (India) [hereinafter UAPA 2008 Amendments].

²¹⁰ See Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, § 43D(2)(a-b), Acts of Parliament, 2008 (India) (authorizing prolonged preventive detention); see also *id.* § 43D(5-7) (limiting access to bail for pre-trial detainees).

²¹¹ These changes to trial procedures included shifting the burden of proof to the defendant in some cases, *id.* § 16(1), using summary trials, *id.* § 16(2), and allowing the court to proceed without the defendant in attendance. *Id.* § 16(5). In a regular criminal proceeding, the accused is protected by The Code of Criminal Procedure, 1973, Act No. 2 of 1974, § 273 (India), which requires evidence to be taken by a court only when the accused is present.

²¹² See National Investigation Agency Act, *supra* note 208, ch. IV.

2008 UAPA amendments broaden the definition of a terrorist act from the previous definition used in POTA, so that acts “likely to cause” the type of damage contemplated in the POTA-era legislation are now also considered to be “terrorist acts.”²¹³

Although such measures may seem extraordinary, the history of Indian legislation against perceived security threats serves as a reminder that many individual elements of current counterterrorism legislation can trace their roots directly back to the colonial era. The burden-shifting provision in the 2008 UAPA amendments, for example, was not only part of POTA, but can be found a century earlier in 1908 legislation dealing with explosive substances.²¹⁴ However, as the government introduced these measures into Parliament in 2008, it did not hearken back to the

²¹³ The Unlawful Activities (Prevention) Amendment Ordinance, *supra* note 203, § 15. The specific definition is as follows:

Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using [weapons as described in the POTA definition], in such a manner as to cause, or *likely to cause*, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or [other damage to infrastructure and defense], or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

Id. (emphasis added); see also *Repeating the Mistakes of the Past*, HUMAN RIGHTS DOCUMENTATION CENTER (Jan. 22, 2009), <http://www.hrdoc.net/sahrdc/hrfeatures/HRF191.htm> (noting that this definition institutionalizes the worst overreaching and missteps from TADA and POTA because it relates not only to counterterrorism policy, but to other “disruptive” activities).

²¹⁴ The Explosive Substances Act, 1908, Act No. 6 of 1908 (India). Under this Act, if a person knowingly possesses or controls an explosive substance and the police have a “reasonable suspicion” that the possession is for unlawful purposes, the burden shifts to the defendant to prove lawfulness. If he is unable to do so and is, therefore, convicted, punishment is penal transportation for up to 14 years, plus the possibility of a fine being imposed. *Id.* § 5. The Explosive Substances Act also provides for punishing material support to the same degree as the offense itself. *Id.* § 6. Likewise, the authority for warrantless wiretapping found in the Unlawful Activities (Prevention) Amendment Act, *supra* note 209, finds its roots in colonial legislation from 1885. See The Indian Telegraph Act, 1885, Act No. 13 of 1885, § 5 (India) (noting that telegraph messages may be intercepted and kept by the central or state governments in times of “public emergency, or in the interest of the public safety” if it is deemed necessary or expedient to do so “in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence”).

colonial and Emergency-era history of India; instead, it claimed that these measures were a necessary step in India's obligations to fight terrorism under international mandates such as Resolution 1373.²¹⁵

As the law currently stands, India has used the leverage of the mandate under Resolution 1373 to implement or reinstate counterterrorism measures that are problematic on a number of fronts. First, the definition of terrorism on which the measures are based is extremely broad and subjective, making the potential for government abuse high.²¹⁶ Second, many of the substantive provisions in the UAPA 2008 Amendments had been previously rejected based on concerns over human rights abuses, including the targeting of Muslim populations and other groups without political power.²¹⁷ Third, although TADA and POTA both

²¹⁵ See *Statement of Objects and Reasons of Unlawful Activities (Prevention) Amendment Bill*, *supra* note 209. Here, the government noted the concerns over human rights abuses under previous counterterrorism legislation, but stated that:

[K]eeping in view that India has been a front-runner in the global fight against terrorism, its commitments in terms of the United Nations Security Council Resolution, 1373 dated 28th September, 2001 and the resolve not to allow any compromise in the fight against terrorism, the Unlawful Activities (Prevention) Act, 1967 was amended to make provisions to deal with terrorism and terrorist activities.

Id. (statement of P. Chidambaram).

²¹⁶ See Kalhan, *supra* note 172, at 181-98 (detailing various problems in the application of counterterrorism laws by the police and intelligence forces, including violations of political speech and associational rights, malicious prosecution of non-terrorism related crimes under terrorism statutes against disfavored social groups, police misconduct, and threats against defense and human rights lawyers).

²¹⁷ Critics of TADA and POTA often noted that Muslims were prosecuted severely under these statutes, whereas Hindus accused of the same acts were often not prosecuted or charged with ordinary criminal offenses that carried lighter sentences upon conviction. See Amos Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 SAN DIEGO INT'L L.J. 125, 171 (2005) (noting that some described POTA as a "terrorist law [that would be] . . . used to terrorise minorities"); see also Sudha Ramachandran, *Filling India's Anti-terrorism Void*, ASIA TIMES ONLINE, Sept. 23, 2004, http://www.atimes.com/atimes/South_Asia/FI23Df03.html (noting that while the majority of the 32 organizations banned under POTA were Muslim, none of the Hindu extremist groups were ever targeted); Sachin Mehta, *Repeal of POTA Justified*, LEGAL SERVICES INDIA, <http://www.legalservicesindia.com/articles/pota.htm> (last visited Oct. 10, 2011) (observing that POTA had been "abused to book, without lucidity and accountability, political opponents and underprivileged communities").

contained sunset provisions meant to provide at least some legislative check on the powers exercised by police and intelligence forces, the 2008 UAPA amendments do not contain similar protections. Finally, the 2008 UAPA amendments do not require any meaningful judicial scrutiny of the prosecutor's decision—and the central government's review authority—as to whether detainees will be categorized as ordinary criminals or treated as terrorism suspects who are then afforded many fewer rights.²¹⁸

4. DEFINITIONS WITHIN A COMPARATIVE AND INTERNATIONAL CONTEXT

The arc of post-September 11 counterterrorism policy at the United Nations is one in which the initial drive to mandate robust counterterrorism measures affected domestic policies deeply, and it was tempered only years later with reminders to member states of their human rights obligations under international law. This lag in emphasizing the rights aspect of counterterrorism efforts was costly in terms of creating the political space for domestic laws that are vague, subjective, and allow for potential abuses.

Part of the post-September 11 shift in domestic definitions of terrorism is attributable to domestic political forces and the legitimate need to reassess the efficacy of counterterrorism law and policy in light of the attacks that had occurred. However, domestic forces offer only part of the explanation for the changes. The broad mandate of Resolution 1373 and the lack of a comprehensive General Assembly definition of terrorism created pressure for domestic action and leverage for political actors to push through controversial legislation in the name of international compliance,²¹⁹

²¹⁸ See *Repeating the Mistakes of the Past*, *supra* note 213.

²¹⁹ For example, in India, proponents of strong antiterrorism legislation used the mandate from Resolution 1373 to push through the 2001 Prevention of Terrorism Ordinance (POTO) and the 2002 Prevention of Terrorism Act. Notably, POTO had been in the works, through the Indian Law Commission and other channels, since 2000. See LAW COMM'N OF INDIA, 173RD REPORT ON PREVENTION OF TERRORISM BILL, ANNEXURE II § 30, 33 (2000) (containing provisions similar to those found in POTA regarding the extension of preventive detention and arrested suspects' access to legal counsel); see also Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 615–16 (2009) (discussing the history of POTA, and explaining that the Indian Law Commission's report was "an early iteration of some of the POTA policies"). There had been significant opposition to the adoption of POTO based on human rights concerns related to similar powers

regardless of whether such legislation fostered potential abuses of discretion and the poor treatment of socially disfavored groups.²²⁰

After the benefit of several years of experience with member states' actions in the "war on terror," the United Nations established rights-oriented structural mechanisms,²²¹ made clear that counterterrorism measures had to take into account the human rights of individual nations,²²² and, more recently, created a

granted under TADA. Politicians and government officials cited the need to comply with Resolution 1373 as an incentive for the passage of this legislation over the objections of human rights groups. See Press Release, Government of India, Press Brief on Chief Minister's Conference on Internal Security (Nov. 17, 2001) (describing the Home Minister's response to critics of POTO, observing that "UN Resolution 1373 mandated follow up legislation to give effect to the provisions of the Resolution and some provisions of this law were in part implementation of the UN Resolution"). As such, the passage of POTO represents an instance of a state "us[ing] terrorist incidents to pursue agendas that reach far beyond the immediate threat." DONOHUE, *supra* note 80, at 15. On the transnational front, India and the United States used Resolution 1373 as a springboard for mutual cooperation in increasing intelligence-sharing and in providing additional technological resource to Indian intelligence officials. See Press Release, Embassy of India, Joint Statement of the India-U.S. Joint Working Group on Counterterrorism (July 12, 2002) (detailing the cooperative efforts between the United States and India, including the following directives: exchange of information, strengthened intelligence, a mutual assistance treaty, and other initiatives on the implementation of UNSC Resolution 1373).

²²⁰ For example, the Indian National Human Rights Commission's (NHRC) objections—that The Prevention of Terrorism Ordinance of 2000 would lead to gross human rights abuses and contravene India's obligations under international human rights standards—were overwhelmed by the political pressure to enact new legislation after Resolution 1373 was passed. See Vijayakumar, *supra* note 198, at 356–57 (noting that the NHRC rejected the need for new counterterrorism legislation in 2000 in light of existing criminal laws that were sufficient to cover all of the relevant substantive acts could be prosecuted).

²²¹ See S.C. Res. 1535, ¶ 1-8, U.N. Doc. S/RES/1535 (Mar. 26, 2004) (establishing the Counter-Terrorism Committee Executive Directorate, a committee with a proactive obligation to ensure that human rights concerns were being met by member states attempting to comply with the mandate of Resolution 1373); see also *Protecting Human Rights While Countering Terrorism*, COUNTER-TERRORISM COMM., <http://www.un.org/en/sc/ctc/rights.html> (last updated June 20, 2011) (clarifying that, although human rights law is outside the scope of the Counter-Terrorism Committee's (CTC) mandate, the CTC remains aware of human rights concerns, and explaining that both the CTC and the CTC Executive Directorate should incorporate human rights into their communications strategies as part of their mission to support compliance with Resolution 1373).

²²² See S.C. Res. 1566, *supra* note 2, ¶ 6 (making clear that nations are obligated to ensure that "any measures taken to combat terrorism comply with all their obligations under international law . . . in particular international human rights, refugee, and humanitarian law"). U.N. Security Council Resolution 1624

working group to consider ways in which member states can be effectively encouraged to harmonize their coexisting counterterrorism and human rights obligations.²²³

The United Nations' shifting emphasis toward human rights reflects several priorities: the deontological imperative to protect individuals from overreaching and abusive governments; the need to remind nations of their international obligations under the Geneva Conventions and the International Convention on Civil and Political Rights;²²⁴ and a pragmatic view of counterterrorism, since governmental abuse of human rights and the targeting of disaffected minority groups results in mistrust of the government and alienation in those groups most likely to be sympathetic to the cause of terrorists.²²⁵

Yet the nations examined here have not all followed the trajectory of the United Nations toward focusing on strengthening security measures and rights protection simultaneously. Each of these nations has broadened its definitions of terrorism and the scope of the application of those definitions.²²⁶ In the United

likewise emphasizes the need to respect human rights in counterterrorism operations. See S.C. Res. 1624, *supra* note 34, ¶ 5 (expressing deep concern about the importance of upholding human rights obligations when implementing counterterrorism measures).

²²³ See S.C. Res. 1805, at 3, U.N. Doc. S/RES/1805 (Mar. 20, 2008) (affirming the CTC's endorsement of the "Organizational plan for the Counter-Terrorism Executive Directorate"); see also Rosand, *supra* note 52, at 340 (creating a working group to focus on human rights issues in the context of domestic counterterrorism efforts).

²²⁴ All of the nations examined in this Article are signatories to both conventions.

²²⁵ See U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 140-47, U.N. Doc. A/59/2005 (Mar. 21, 2005) (detailing the importance of human rights in combating terrorism). Then Secretary-General Kofi Annan opined:

It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions.

Id. ¶ 140.

²²⁶ See DONOHUE, *supra* note 80, at 15 (describing how counterterrorist measures create an institutional interest such that government agencies once entrusted with expansive powers are always reluctant to give up those powers).

States, several legal developments paint a picture of a continuing trend away from rights protection. First, the Patriot Act definition of terrorism broadens its scope and application. Second, the 2006 vote that made the amendments permanent and removed the sunset provisions in the legislation essentially cemented a broad and arguably vague definition of terrorism. Third, recent Supreme Court jurisprudence makes clear that the Court will defer to executive and legislative conceptions of terrorism, however vague,²²⁷ and concomitantly limit the availability of remedies to individual plaintiffs when potential abuses of power are alleged.²²⁸

Similarly, definitional creep has occurred in India. The original justifications for broad definitions—such as the limited application of the definition to a particular situation for a limited period of time in a case of genuine Emergency—no longer exist in the law. Instead, Indian legislation has seen ever-broadening definitions of terrorism with the removal of sunset provisions and procedural safeguards. Although the Indian government claims that misuse will not be tolerated,²²⁹ abuse has been rampant under vague parameters in laws like TADA and POTA, and the subjectivity of prosecutorial and investigative decision-making in the application of the statutes makes them ripe for overreaching and misuse.²³⁰ The discourse regarding the justifications for broadly written legislation has become less resonant, as such measures are seen as necessary to comply with international mandates, and are normalized within society as national security crises continue to occur.

²²⁷ See Said, *supra* note 97, at 580–82 (explaining the expansion of the definition for terrorist organization).

²²⁸ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (holding that generalized pleadings regarding alleged governmental abuses motivated by religious animus were insufficient to meet the notice pleading standard articulated in Federal Rule of Civil Procedure 8(a)(2) and as described in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

²²⁹ See, e.g., *Human Rights Violations Will Not Be Tolerated in Jammu and Kashmir: Manmohan*, THE HINDU, June 7, 2010, <http://www.thehindu.com/news/national/article448962.ece> (quoting Indian Prime Minister Manmohan Singh as stating, “the government policy is to protect the human rights of the people even when dealing with terrorism We will act to remove any deficiency in the implementation of [this policy]”).

²³⁰ Setty, *supra* note 3, at 167–70 (detailing human rights concerns related to the application and enforcement of TADA, POTA, and the 2008 UAPA amendments).

Like the United States and India, British counterterrorism law has undergone a serious transformation in the last two decades, particularly since the September 11 attacks in the United States and the July 2005 attacks in London. The definition of terrorism has been broadened and repurposed from the limited context of Emergency provisions for Northern Ireland to the Terrorism Act of 2000, which applied generally and was further expanded by later legislation. This pattern paralleled the United States' shift in definition from the limited FISA context to the broad Patriot Act context, and the Indian shift from the limited application of TAAA to the broad applicability of police and intelligence powers in TADA and all subsequent counterterrorism legislation.

However, compared with the United States and India, the United Kingdom has maintained at least some check on potential abuses of power associated with a broad definition of terrorism by continuing the mandatory renewal provisions for counterterrorism legislation, utilizing—and taking seriously—the recommendations of an independent reviewer, and enjoying a more robust system of parliamentary and judicial review for counterterrorism legislation.²³¹

Additionally, as of 2010, the Tory-Liberal Democrat coalition government has made clear that it will try to curtail various antiterrorism measures that were prone to abuse,²³² giving rise to

²³¹ Scholars have argued that the many layers of institutional review utilized in the United Kingdom are not evident in the U.S. system because of a historical reliance on separation of powers, but note that such reliance may be misplaced in times of unified government. See DONOHUE, *supra* note 80, at 18–19 (explaining the absence of independent oversight mechanisms in the United States); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314–15 (2006) (detailing how the rise of political parties changed the dynamics of separation of powers, and explaining that executive power aggregates when the President and both houses of Congress are controlled by the same political party).

²³² See REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 149, at 3 (recommending the repeal or narrowing of various counterterrorism measures in order to “correct the imbalance that has developed between the State’s security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary”); CONSERVATIVE-LIBERAL DEMOCRAT COALITION AGREEMENT 2010, ¶ 10, available at <http://www.conservatives.com/~media/Files/Downloadable%20Files/agreement.ashx?dl=true> (noting that the Agreement states that, among other goals, the coalition government will work toward curtailing invasive and overreaching laws, and instituting “[s]afeguards against the misuse of anti-terrorism legislation”); see also Queen Elizabeth II, Her

the possibility that coalition-building between the political left—interested in protecting civil liberties and reducing the marginalization of outsider communities²³³—and the political right—interested in cutting back on costly government programs and lessening government involvement in the lives of private citizens²³⁴—can lead to synergies in curtailing potential misuse and abuse of national security powers.²³⁵

The United Kingdom has also set an example in the inclusion sunset clauses in all antiterrorism legislation, even those that have seemingly less controversial provisions such as definitions,²³⁶ and requiring that the legislative committee must first review all of the

Majesty's most gracious speech to both Houses of Parliament on 25 May 2010 (May 25, 2010) (transcript available at <http://www.number10.gov.uk/news/queens-speech-2010-2/>) (emphasizing the need to repeal legislation that has compromised civil liberties).

²³³ See LIBERAL DEMOCRAT MANIFESTO 2010, at 94–95, (detailing a 2010 campaign platform by the Liberal Democrats noted that “the best way to combat terrorism is to prosecute terrorists, not give away hard-won British freedoms”). The manifesto promised four reforms in Britain’s security framework: (1) to “[r]each out to the communities most at risk of radicalisation to improve the relationships between them and the police and increase the flow of intelligence”; (2) to eliminate “control orders, which can use secret evidence to place people under house arrest”; (3) to “[r]educe the maximum period of pre-charge detention to 14 days”; and (4) to “[m]ake it easier to prosecute and convict terrorists by allowing intercept evidence in court and by making greater use of post-charge questioning.” *Id.*

²³⁴ See INVITATION TO JOIN OUR GOVERNMENT: THE CONSERVATIVE MANIFESTO 2010, at 79. This 2010 campaign platform by the Conservatives argued that the Labor government had “trampled on liberties and, in their place, compiled huge databases to track the activities of millions of perfectly innocent people, giving public bodies extraordinary powers to intervene in the way we live our lives.” *Id.* Instead, the Conservatives suggested that new legislation be introduced to stop “state encroachment,” “protect people from unwarranted intrusion by the state,” and save money by cutting back on unnecessary security initiatives. *Id.*

²³⁵ See Henry Porter, *A Tory-Lib Dem Coalition Offers Hope for Civil Liberties*, THE GUARDIAN, May 10, 2010, <http://www.guardian.co.uk/commentisfree/henryporter/2010/may/10/conservative-liberal-democrat-coalition-civil-liberties> (noting that civil liberties was one of a few areas in which Conservative and Liberal Democrat priorities were aligned); see also David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 606, 617 (theorizing that national security policy may be better reasoned in nations where political minorities take an active role in governance).

²³⁶ See John Ip, *Sunset Clauses and Counterterrorism Legislation 3* (May 26, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853945& (detailing the history of U.K. sunset clauses in counterterrorism legislation).

provisions of a statute, including definitions, and subsequently renew the antiterrorism legislation.²³⁷

The appointment of an independent reviewer of counterterrorism legislation offers further procedural protections against abuse. Such a measure does not necessarily translate into the curtailing of counterterrorism legislation—in fact, Lord Carlile recommended that most elements of the legislative definition of terrorism remain intact. However, the review process itself provides some safeguard by assuring external, expert, apolitical review of basic questions of national security and human rights. Such review is not foreign to the United States—the review process for designations of Foreign Terrorist Organizations under the AEDPA exists to ensure accuracy and provide a procedural safeguard against misuse. Adoption of a requirement for the review of all counterterrorism legislation, including the fundamental question of how terrorism is defined, would parallel protections that we already recognize as necessary in some counterterrorism contexts.

5. CONCLUSION

The definitional creep occurring in these jurisdictions reflects the problematic re-contextualization that seems almost endemic as governments attempting to delineate the parameters of executive power in national security matters. But because the definition of terrorism is a threshold question that has widespread and sometimes severe ramifications, we must be aware of the shifting application of the definition and its historical roots. Only with such an analysis can we consider whether the definition continues to be appropriate in the larger calculus of national security, human rights, legal protections for defendants, and rule of law considerations.

Perhaps this definitional question, which in each nation seems to have broadened and expanded its definition of terrorism²³⁸—not

²³⁷ BLICK, *supra* note 118, at 59–60 (recommending a review process that encourages, at a minimum, a “public focus for debate”). *But see* DONOHUE, *supra* note 80, at 339–40 (arguing that sunset provisions rarely provide a substantial check on potential abuse, and suggesting that more robust reporting requirements would be more useful).

²³⁸ Notably, these nations have not broadened the definitions of terrorism to include state actors, a move in which a nation would potentially implicate itself and its allies. *See* Sami Zeidan, *Desperately Seeking Definition: The International*

just the police powers or sentencing guidelines that go along with it, but the definition itself – with each major national security crisis, also sheds some light onto why there continues to be so much controversy at the international level as to the definition of terrorism.

The stakes are extremely high and the application of the definition seems to evolve without much consideration in the legislative process as to the appropriateness of each application. Instead, political pressures lead to the development of broad definitions of terrorism as one means of constructing a strong counterterrorism program. Political pressure is a powerful shaping mechanism on legislators and the executive, and can lead to less self-policing and a decreased emphasis on safeguarding civil rights and liberties in the process of defining terrorism and applying the definition to individuals. As with many legislative or executive decisions regarding national security and a high level of politicization and emotional investment, the brunt of government overreaching falls on politically unpopular and/or disenfranchised minorities.

Courts have provided little check with regard to vagueness or the scope of the application of the definition of terrorism, instead of relying on a long-standing deference to the political branches in matters of national security.²³⁹

As such, any rights protection based on concern of overreaching and/or disparate impact on outsider communities must come from legislative self-policing, such as that which has occurred in the United Kingdom. Such self-policing, if it comes in the form of a legislative appointment of an independent reviewing

Community's Quest for Identifying the Specter of Terrorism, 36 CORNELL INT'L L. J. 491, 494–95 (2004) (arguing for inclusion of state-sponsored acts – such as the support given to Osama bin Laden by the Taliban, or the support given by the U.S. and U.S.S.R. to various revolutionary movements during the Cold War – in the definition of terrorism).

²³⁹ Such judicial deference for foreign policy and war-making matters has a long history in the United States. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (deferring to executive power in wartime and finding the internment of all Japanese during wartime constitutional); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (finding that the legislative branch may grant executive discretion in matters of foreign affairs); *Prize Cases*, 67 U.S. 635 (1863) (finding that the executive branch had the power to impose a naval blockade against secessionist states without prior approval from the legislative branch).

body,²⁴⁰ would insulate politicians from the potential politically damaging effects of such a review, and would provide a structural core encouraging of impartiality and a deep level of review.

Of the nations compared here, the United Kingdom has made the most promising assessment of the problems concomitant with a broad domestic definition of terrorism, an international mandate to pursue counterterrorism measures, and the human and civil rights abuses that may occur as a result. In doing so, it has followed the trajectory of the post-September 11 reaction of the United Nations Security Council—moving from broad-based mandates to combat terrorism to a more nuanced and even-handed approach that values safeguards against human rights abuses.

The United States and India could and should do the same—going beyond current efforts to pursue both security and rights, and enacting laws that narrow the definition(s) of terrorism to suit current needs, or justify current, or broader, definitions through examination, consideration, and due weight given to the enormous rights implications that ensue once the definition of terrorism is found to apply.

²⁴⁰ In India, the Indian Law Commission, a non-partisan group of lawyers and judges commissioned by the central government to offer advice and proposals for legal reform, could serve as an independent reviewing body for definitions of terrorism, as it has reviewed and proposed numerous pieces of counterterrorism legislation. *E.g.*, 173RD REPORT ON PREVENTION OF TERRORISM BILL, *supra* note 219, § 30, 33.