

THE EMPIRE OF SECURITY AND THE SECURITY OF EMPIRE

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The debate on the constitutionalisation of international law will not resemble domestic constitution-making for the simple reason that not only does the international realm lack a pouvoir constituant but that if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm.¹

I. INTRODUCTION

Martti Koskenniemi asks us to be careful what we wish for in international law—or at least not to expect too much of what we wish.² International law is, in Koskenniemi’s vision, neither a set of right answers nor even a disciplinary field that disciplines its practitioners within a single orthodoxy.³ It is a set of strategies of argumentation, of fields of vision, of ways of being in the world.⁴ And while

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1. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197, 200 (2004) [hereinafter Koskenniemi, *International Law and Hegemony*].

2. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQ. L. 9, 11 (2007) (“What laws mean and the objectives they may appear to have will depend on the judgment of the law-applier. And that judgment, the act of competent creation of an individual norm is, as Kelsen would say, a political act.”); *id.* at 21 (“Even if law offers a solution to every problem, we cannot know what that solution is. After all, *rules do not spell out the conditions of their own application.*”).

3. Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 11 (2009) (“Each such vocabulary [of a different branch of international law] is likely to highlight some solutions, some actors, some interests. None of them is any ‘truer’ than the others. Each renders some aspects of the [single contract of] carriage visible, while pushing other aspects into the background, preferring some ways to deal with it at the cost of other ways.”).

4. Koskenniemi, *International Law and Hegemony*, *supra* note 1, at 200 (“Law is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they do not support the adversary.”); Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113, 118 (2005) (“[A] universal law . . . has no voice of its own [A]ll we hear are voices

international law has been present at the creation of something that might be called progress, it has also been a midwife to atrocity.⁵

At its most resonant moments, international law operates as a field of debates characterized by, in Koskenniemi's words:

[T]he manner in which they are conducted: by open reference to rules and principles instead of in secret and without adequate documentation, by aiming toward coherence and consistency, instead of a selective bargaining between 'old boys'; by an openness to revision in light of new information and accountability for choices made, instead of counting on getting away with it.⁶

But international law is not always at its most resonant moment. As Koskenniemi reminds us:

However universal the terms in which international law is invoked, it never appears as an autonomous and stable set of demands over a political reality. Instead it always appears through the positions of political actors, as a way of dressing political claims in a specialized technical idiom in the conditions of hegemonic contestation.⁷

Koskenniemi's method requires academics to see international law as it is rather than as it should be, even while practitioners do what they can to improve the world from inside the fragmented fields of argumentation that they have inherited.⁸ In a symposium to honor Koskenniemi's work, international law should be in the spotlight, without sentimentality and yet without cynicism. And so, I will examine what happened to international law after and because of 9/11.

As is by now a commonplace, the United States either ignored, bent, or circumvented the apparent strictures of the law of war to do what it wanted after 9/11. The wars in Afghanistan and Iraq were launched without going through the full process in the U.N. Security Council.⁹ Detention operations in the field soon turned into long-term detention facilities far from the war zones, both at

making claims under the law.”).

5. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2002).

6. Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT. L. 455, 478 (1996) [hereinafter Koskenniemi, *The Place of Law in Collective Security*].

7. Koskenniemi, *International Law and Hegemony*, *supra* note 1, at 199.

8. See Koskenniemi, *The Place of Law in Collective Security*, *supra* note 6, at 472–77 (recounting the legal debates taking place around the U.N. Security Council resolutions on Iraq's invasion of Kuwait, showing quite vividly how the inside view at the Security Council turned from politics to legality once a resolution was on the table.) From his account one can see that legality and politics are not the same thing.

9. See Lori Fisler Damrosch & Bernard H. Oxman, Editors' Introduction, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553, 553–57, 803–04 (2003) (discussing the U.S. debate over the legality of the Iraq War); W. Michael Reisman, Editorial Comments, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833 (2001) (discussing the U.S. debate over the legality of the war in Afghanistan); Richard Norton-Taylor, *Chilcot Inquiry: Iraq Papers Show Lord Goldsmith's Warning to Tony Blair*, THE GUARDIAN (June 30, 2010), <http://www.theguardian.com/uk/2010/jun/30/chilcot-inquiry-lord-goldsmith-blair> (demonstrating, among other things, that Tony Blair was warned by the Attorney General of the United Kingdom that involvement in the Iraq War may be illegal).

Guantánamo Bay and in CIA black sites.¹⁰ Suspects detained in these sites were captured not only on the battlefields of the shooting wars, but anywhere in the world.¹¹ Covert operations snatched suspects off the streets in countries that were not at war with the United States.¹² Extraordinary rendition moved the suspects from their point of capture to the long-term detention sites, where they were often held incommunicado.¹³ Frequently, the journeys of the CIA-contracted planes that rendered these suspects to the detention sites were known to—or at least generated the strong suspicion of—the countries whose airspace and runways were used, countries that either assisted with the effort or pretended not to notice.¹⁴ “Enhanced interrogation”—torture by any other name—was used at these detention sites to get the suspects to talk.¹⁵ The torture program was widely known and the security services of many states participated in the related interrogations, even when—

10. See Jane Mayer, *The Black Sites, A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46–57 (detailing the CIA’s use of torture and “harsh” interrogation techniques in secret prisons around the world and tracing the path to the disclosures that rocked the program); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A01 (discussing the use of secret prisons to detain suspected terrorists incommunicado for long periods of time). See generally KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTÁNAMO’S FIRST 100 DAYS* (2009) (narrating the first 100 days at the Guantanamo Bay detention facility).

11. See *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited Oct. 18, 2013) (“Tracking documents and research related to the 779 people who have been sent to the Guantánamo Bay prison since 2002.”). The website shows where each individual was captured before being taken to Guantánamo, if such information could be determined.

12. See Britta Sandberg, *Abu Omar Case: Italian Court Delivers Damning Verdict on CIA Renditions*, SPIEGEL ONLINE (Nov. 5, 2009), <http://www.spiegel.de/international/europe/abu-omar-case-italian-court-delivers-damning-verdict-on-cia-renditions-a-659418.html> (detailing the case of a radical cleric kidnapped by the CIA from the streets of Milan in 2003).

13. Jane Mayer, *Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program*, NEW YORKER, Feb. 14, 2005, at 106–22 [hereinafter Mayer, *Outsourcing Torture*].

14. See Council of Europe, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, EUR. PARL. DOC. 11302 rev. (June 11, 2007) (prepared by Dick Marty), available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=11555&Language=EN> (detailing the results of an investigation into “black sites” operated by the U.S. CIA in the Council of Europe Member States of Poland and Romania, an investigation which revealed not only how those countries cooperated but also how other Member States through which detainees transited looked the other way). Later, Marty confirmed news reports that Lithuania also hosted a CIA-run black site. Press Release, Parliamentary Assembly of the Council of Europe, Dick Marty: Time for Europe to Come Clean Once and For All over Secret Detentions, available at http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4859&L=2.

15. See generally JANE MAYER, *THE DARK SIDE* (2009) (detailing the internal fight within the George W. Bush Administration over interrogation and detention policies and documenting the Bush Administration’s adoption of policies that permitted detainees to be tortured); PHILIPPE SANDS, *TORTURE TEAM* (2008) (investigating the Bush Administration’s policies and interrogation techniques).

perhaps even especially when—their own nationals were the suspects.¹⁶ Courts around the world have since used information obtained through these coercive methods to detain and convict terrorism suspects in ordinary legal proceedings.¹⁷ The United States may have led the way on these matters, but much of the world—including many constitutional, rule-of-law states—helped, benefited, or at least averted their eyes.

During the eight long years of the Bush Administration, the United States often sneered at law.¹⁸ Despite the extraordinary secrecy that tried to hide the details—the wars, the black sites, the renditions, the torture—the United States nonetheless made it quite publicly clear that international law was to be no barrier to U.S. action if its self-interest was at stake.¹⁹ American conduct in the “global war on terror” (GWOT) threw out a generation’s worth of uneven progress in bringing humanitarianism to international conflict. The Geneva Conventions had established that international humanitarian law covered all persons in spaces of armed conflict who did not fight or who had stopped fighting²⁰—and yet detainees

16. See Duncan Gardham & Gordon Rayner, *MI5 'Knew Guantanamo Detainee Binyam Mohamed Was Being Tortured'*, TELEGRAPH (Feb. 10, 2010), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7204741/MI5-knew-Guantanamo-detainee-Binyam-Mohamed-was-being-tortured.html> (explaining that MI5 was aware of ongoing torture of UK nationals and detailing how the High Court of Justice affirmed such complicity and involvement in such interrogations); Charmaine Noronha, *Canada Faces Allegations of Torture Complicity*, SEATTLE TIMES, (Nov. 19, 2009), http://seattletimes.com/html/nationworld/2010311666_apcncanadaafghandetainees.html (discussing how Canada’s defense minister called for a public inquiry into the complicity of several Canadian intelligence officials in interrogations involving torture of Canadian nationals); see also *Arar Gratefully Accepts Apology, Still on U.S. List*, CTV NEWS (Jan. 26, 2007), <http://www.ctvnews.ca/arar-gratefully-accepts-apology-still-on-u-s-list-1.226332> (detailing how the Canadian government offered a public apology and monetary reparations for involvement in Canadian national Maher Arar’s torture); Patrick Wintour, *Guantanamo Bay Detainees To Be Paid Compensation by UK Government*, THE GUARDIAN, Nov. 15, 2010, <http://www.theguardian.com/world/2010/nov/16/guantanamo-bay-compensation-claim> (reporting that both Canada and the United Kingdom have since paid compensation to their nationals who were questioned by their own state security services while held by the U.S. government in detention sites where torture and harsh interrogation were practiced).

17. See generally Kim Lane Scheppelle, *Evidence from Torture: Dilemmas for International and Domestic Law*, 99 AM. SOC’Y INT’L L. PROC. 271 (2005) (discussing how, although international law generally bans the use of information acquired through torture in legal proceedings, courts in a number of different legal systems have found ways to use statements acquired from detainees who were tortured, generally in exculpation when requested to do so by the defense in cases involving non-detainees).

18. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 58–59 (2007) (showing how the Bush Administration accused its enemies of using “lawfare” when invoking the U.S. legal system to challenge the infringement of the rights of detainees).

19. See George W. Bush, State of the Union Address (Jan. 29, 2002) (“[O]ur war against terror is only beginning My hope is that all nations will heed our call But some governments will be timid in the face of terror. And make no mistake about it: If they do not act, America will And all nations should know: America will do what is necessary to ensure our nation’s security.”).

20. INTERNATIONAL COMMITTEE OF THE RED CROSS, *THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: A MANUAL* 15 (2013) (“[International Humanitarian

were labeled “enemy combatants” and lifted out of the Geneva Convention system altogether.²¹ The Convention Against Torture and many other international instruments had established strict rules not only against torture itself, but also against cruel, inhumane, and degrading treatment of detainees²²—and, yet, “enhanced interrogation” brought back beatings, stress positions, sensory assaults, sleep deprivation, and the waterboard, which were defended as both legal under U.S. law and wise as U.S. policy.²³ Formal extradition treaties had generally governed the movement of detained persons from country to country;²⁴ extra-legal transfers of persons (renditions) were used primarily when a suspect was moved to stand trial in a country that abided by international norms.²⁵ And yet, after 9/11, extraordinary rendition transported terrorism suspects from places where they *were* protected by law to places where they were *not*.²⁶

On the eve of 9/11, there was even budding international agreement that major international conflicts were in fact to be resolved through the U.N. Security Council.²⁷ And yet the U.N. Security Council was bypassed as soon as it became evident that it would not agree to what the United States wanted to do. U.S.

Law] aims to protect persons who are not or who are no longer taking part in hostilities”).

21. “Protected Person” Status in Occupied Iraq under the Fourth Geneva Convention, 28 Op. O.L.C. 12–13 (2004), *available at* www.justice.gov/olc/2004/gc4mar18.pdf. The memo was written by then Assistant Attorney General Jack Goldsmith.

22. *See generally* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (providing that each member state must take legislative, administrative, and judicial measures to prevent the use of torture and to also take measures to prevent the use of cruel, inhuman and degrading treatment of punishment); United Nations International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (banning the use of both torture and cruel, inhuman or degrading treatment and punishment). *See also* Winston Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87 (2001) (reviewing international instruments that address torture). While the general human rights conventions like the ICCPR twin torture with cruel, inhuman and degrading treatment and equally prohibit both, the CAT separates the two. Stronger state obligations attach to the prevention and prohibition of torture in Arts. 1–15 of the CAT while weaker protections against cruel, inhuman and degrading treatment are inscribed in Art. 16 of the CAT.

23. Kim Lane Scheppele, *Hypothetical Torture in the War on Terrorism*, 1 J. NAT. SEC. L. & POL. 285, 299–301 (2005).

24. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT’L L. 187, 187 (1998) (“The international community has . . . creat[ed] new institutions and expand[ed] the network of bilateral and multilateral treaties designed to outlaw transnational crime, promote extradition, and authorize mutual assistance.”).

25. *See* Alona E. Evans, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 74 AM. SOC’Y INT’L L. PROC. 274, 275 (1980) (detailing the use of extradition in international criminal proceedings).

26. *See* Mayer, *Outsourcing Torture*, *supra* note 13 (detailing accounts of prisoners being moved to countries where they would most likely be subject to torture).

27. *International Law After the Cold War*, A.S.I.L. NEWSL., Nov. 1993 (“International lawyers are just beginning to consider the implications for international law and institutions of the end of the Cold War and the demise of Communism. We have been dazzled by the revival of the UN Security Council . . .”).

conduct after 9/11 proceeded in clear conflict with well-established principles of international law, at least as seen by America's European allies. U.S. officials even seemed to delight in their destruction of the pre-existing international framework. For example, in a press conference on December 11, 2003 President George W. Bush was asked whether his Iraq policy was consistent with international law. The President joked, "International law? I better call my lawyer; he didn't bring that up to me."²⁸

But even though the Bush Administration made a clear attempt—even a boasting attempt—to trash international humanitarian and human rights law after 9/11,²⁹ the very same American government was also *promoting* a new body of international law to sustain the American anti-terror project. Just as the United States was flaunting international law in some respects, it was at the same time pressing for and winning an unprecedented series of U.N. Security Council resolutions creating a new and general legal framework for fighting terrorism. This Article explores that constructive effort, in which the United States *reaffirmed* and *contributed to the development of* international law to coordinate its friends, bully less compliant allies, and sometimes even gain leverage over countries that would only work with the United States under the table. By using the path of the law, the United States was able to convince its law-promoting friends to go along with its initiatives. By going through the Security Council, the United States was able to issue directives to all Member States of the United Nations with binding legal force. By developing an international law framework that outsourced outsized powers to the national executives of states around the world, the United States was able to gain support from authoritarian leaders who in turn received controversial new repressive powers that nonetheless appeared to align their interests with those of the United States.

After 9/11, then, the United States appeared to deal international law a number of serious setbacks, but the United States at the very same time also sponsored one of the fastest growing and most rapidly successful drives to *create* international law, at least if by "successful" one understands the fast enactment, institutional entrenchment, and asserted compliance by states around the world with the terms of the new law. I will call this new body of international law sponsored by the United States, enacted by the Security Council, and adopted around the world "global security law."

28. CHRISTOPHER JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 4 (2005) (quoting President George W. Bush).

29. See Application of Treaties and Laws to al Qaeda and Taliban Detainees, Op. O.L.C. (Jan. 22, 2002), <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (arguing that the Geneva Conventions did not apply either to the Taliban or to al Qaeda in the U.S. war in Afghanistan); see also Interview by Tony Snow with Dick Cheney, Vice President of the United States (Fox News Sunday broadcast Jan. 7, 2008) ("[I]n a case where you have non-state actors out to kill civilians, then there's a serious question whether or not the Geneva Convention [sic] even applies."); cf. Dick Cheney, Vice President of the United States, Commencement Speech, West Point Military Academy (May 26, 2007), available at <http://www.usma.edu/classes2/SitePages/GradSpeech07.aspx> ("Capture one of these killers, and he'll be quick to demand the protections of the Geneva Convention [sic] and the Constitution of the United States. Yet when they wage attacks or take captives, their delicate sensibilities seem to fall away.").

II. EMPIRE AND THE LOGIC OF GLOBAL SECURITY LAW³⁰

Global security law was created by a series of remarkable resolutions passed by the U.N. Security Council after 9/11,³¹ resolutions mandating that all Member States of the United Nations change their domestic laws to fight the GWOT³² in parallel ways. Because of its connections with the national logics of national security, this new international legal frame operates to enhance the powers of states, to change the balance of power between states, to alter the power relations internal to national governments, and to give these national governments far more direct power over their nationals and residents.

In the development of global security law, the “international community”—and for that, read: the United States and other veto-bearing powers on the Security Council—outsourced the GWOT to national governments around the world. National governments then picked up the GWOT as an opportunity to rearrange their own domestic political architecture in ways that benefited national executives by strengthening their powers relative to others in their domestic sphere. Because the interests of powerful countries in the Security Council could be linked to the fate of national executives around the world—including those in the veto-bearing states themselves—compliance with the new global security law has been extraordinarily high.³³ The astonishingly rapid changes of national laws around the

30. This section has been updated and adapted from Kim Lane Scheppele, *The Empire's New Laws: Terrorism and the New Security Empire after 9/11*, in *SOCIOLOGY & EMPIRE* 245 (George Steinmetz ed., 2013).

31. The first and most important resolution was S.C. Res. 1373, S/RES/1373 (Sept. 28, 2001). See generally U.N. Counter-Terrorism Committee, *Security Council Resolutions Pertaining to Terrorism*, <http://www.un.org/en/sc/ctc/resources/res-sc.html>, for the whole set of resolutions on terrorism passed by the U.N. Security Council after 9/11.

32. The Bush Administration used the “global war on terrorism” (GWOT) as its preferred designation for the anti-terror fight. It even awarded special military honors under this heading. U.S. Army Human Resources Command Website, Global War on Terrorism Expeditionary Medal GWOTEM and Global War on Terrorism Service Medal GWOTSM, *available at* <https://www.hrc.army.mil/tagd/global%20war%20on%20terrorism%20expeditionary%20medal%20gwotem%20and%20global%20war%20on%20terrorism%20service%20medal%20gwotsm>. But the Obama Administration retired this term, calling the anti-terror campaign an “Overseas Contingency Operation” instead. Scott Wilson and Al Kamen, ‘Global War On Terror’ Is Given New Name, *WASH. POST* (Mar. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>. This designation never caught on as a public label. I will use the GWOT to describe the anti-terror campaign particularly when run by the Bush Administration, as this was its own self-designation.

33. See Counter-Terrorism Committee, Letter Dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the Secretary-General, U.N. Doc. S/2011/463 at ¶ 12 (Sept. 1, 2011) (“Most States have now taken steps to criminalize terrorist acts in their domestic laws and regulations, in accordance with their obligations under the resolution and the relevant international instruments. Financial intelligence units and other mechanisms have been set up in many States to guard more effectively against terrorist financing. New systems of border security, such as enhanced cargo screening and the introduction in most States of machine-readable travel documents, as called for by the International Civil Aviation Organization (ICAO), have significantly complicated terrorists’ transnational activities. There is better information exchange

world in response to changes in international law occurred because the need for national terrorism law was presented in two contradictory ways for two different sorts of states.

First, for states whose commitment to international law is part of their own deep devotion to the rule of law as a basic principle of state legitimacy, new draconian anti-terrorism laws could be portrayed as necessary in order to comply with international law.³⁴ But for international law to underwrite these national laws, the identities of the core states at the center of the new imperial web had to be disguised in the fiction that the United Nations acts on behalf of a global community of agreement.³⁵ In practice, the five veto-bearing states on the Security Council—the United States, the United Kingdom, France, Russia, and China—can act together with some combination of rotating states in the Security Council to become “the international community” on whose behalf the new law is being created, while the vast majority of states to whom this new law applies have never been consulted and it is far from clear that they, their courts, or their populations would have consented if they had been.³⁶

International law has traditionally been binding on a state only if it consents to be bound or participates in creating a near-universal practice.³⁷ As a result, the newly realized ability of the U.N. Security Council to “legislate” through passing

between States, and it appears that mutual legal assistance now occurs more systematically.”).

34. For example, the German government pushed through two ambitious security packages in fall 2001 and reported back to the Security Council on schedule that they were complying with the resolution:

As early as 19 September [2001], the Cabinet adopted a first anti-terrorism package intended to improve air-traffic safety. . . . [T]he German Government has since then considerably improved and strengthened the relevant legal framework and enhanced its implementation. The second anti-terrorism package . . . has been passed by the *Bundestag* (German Federal Parliament) and the *Bundesrat* (German Federal Council) and will enter into force at the beginning of 2002. International cooperation has also been considerably widened and deepened.

Report of Germany to the Counter-Terrorism Committee, at 3, U.N. Doc. S/2002/11 (Jan. 2, 2002).

35. *See id.* (“We are convinced that this challenge of international terrorism cannot be taken on by individual UN Member States alone. While it is necessary to have national instruments and experienced personnel available at national level, our report also stresses the utmost necessity of global cooperation in preventing and combating and finally eliminating international terrorism.”).

36. In the German case, for example, the Federal Constitutional Court struck down most of the provisions of the anti-terrorism laws that were challenged before the Court after 9/11. *See* Russell A. Miller, *Balancing Security and Liberty in Germany*, 4 J. NAT'L. SEC. L. & POL'Y 369, 371 (2010) (“Before 9/11, the Court deferred to the legislature’s attempts at promoting security. This inclination, however, changed dramatically in the post-9/11 period. In a string of cases the Court has consistently invalidated national security legislation for failing to adequately take account of constitutionally protected liberty interests.”).

37. *See* ANTONIO CASSESE, INTERNATIONAL LAW 153 (2d ed. 2005) (“From the beginning of the international community States have evolved two principal methods for creating legally binding rules: *treaties* and *custom* Both responded to the basic need of not imposing obligations on States that did not wish to be bound by them.”).

binding resolutions has upended this first principle of state consent. Not surprisingly, then, “the international community” is often framed as the author of these new mandates,³⁸ as if there is a new democratic demos that includes all states, especially the international-law-compliant ones, so that consent of some of them represents consent of all of them. But, as Martti Koskeniemi’s epigraph at the start of this Article anticipates, in the absence of an actual international demos, international law reverts to its imperial roots.³⁹

Second, for states of a more nationalist bent who believe international law is a threat to sovereignty, anti-terrorism laws could be presented to national publics as national ideas driven by purely national self-interest. The very fact that sovereignty-anxious states were being compelled to comply with the directives of the Security Council could be disguised in the fiction that these states retained their sovereign law-making authority because, after all, they were writing their own domestic laws in front of their own domestic publics. That these national statutes *also* complied with international law did not have to be mentioned in the domestic debates, if that would have derailed or delegitimized the process. As a result, the conduct of some states in passing anti-terrorism laws and joining the global anti-terrorism campaign was often reframed nationally, and nationalistically, to domestic constituencies as required by “national interest.”⁴⁰

These two fictions—that international law represents the whole international community and/or that anti-terrorism law primarily serves national interests—have combined to create a common global security framework underwritten by a dual rationale. In introducing a similar domestic anti-terrorism framework in country after country, national executives bringing such legislation to their parliaments could use either an international consensus or a domestic sovereignty rationale, depending on which was more locally persuasive. But both rationales led to the same policy. Taken together, these two strategies of legitimation have produced a concerted, coordinated anti-terrorism campaign that has united most countries in the world in a common template of action. As a result, the Security Council resolutions have managed to produce overwhelming compliance of states as they

38. See, e.g., Stewart M. Patrick, *A “Global” War on Terror: Multilateral Achievements since 9/11*, COUNCIL ON FOREIGN RELATIONS BLOG (Aug. 19, 2011), <http://blogs.cfr.org/patrick/2011/08/19/a-global-war-on-terror-multilateral-achievements-since-911> (“In the decade since 9/11, the international community has shown remarkable cohesiveness and solidarity in its effort to protect innocent people from terrorist attacks, despite significant challenges that remain.”).

39. See Koskeniemi, *International Law and Hegemony*, *supra* note 1, at 206.

40. See, e.g., AUSTRAL. GOV’T DEP’T OF FOREIGN AFFAIRS & TRADE, TRANSNATIONAL TERRORISM: THE THREAT TO AUSTRALIA 76 (2004) (“The Australian Government is firmly committed to the global campaign against terrorism. This is in Australia’s national interest. We made the choice to join our international partners in taking the fight to the terrorists to protect our country, our people, our way of life, our values and our freedom.”); Bivitri Susanti, National Security, Terrorism, and Human Rights in Indonesia at 6 (Oct. 8-9, 2002) (unpublished manuscript), available at <https://digitalcollections.anu.edu.au/bitstream/1885/42063/1/Bivitri.pdf> (“Romli Atmasasmita, the chair of the drafting committee [writing the anti-terrorism law] said that such law is needed to protect national interest . . .”).

developed policy along remarkably similar lines.⁴¹ This doesn't look like old-fashioned imperialism because the mechanisms of coordination are different. But in its ability to control a large periphery from the small number of core states, the new global security law reproduces the logic of empire.

As Koskenniemi's analysis of the Security Council reveals, an "imperial" frame is useful to describe the Security Council's place in the system of international law:

*The composition and procedures of the Council are determined by the single-minded purpose to establish a causally effective centre of international power. That the five Great Powers have permanent membership and the right of veto in the Council and that the Council has the authority to bind members would be indefensible under any conception of institutional justice worthy of that name. . . . The UN's collective security-system . . . is based on the co-option of overwhelming power. It follows tautologically that if such power is overwhelming it allows co-option only on its own terms.*⁴²

I want to take that imperial analogy seriously, not just to demonstrate that a hegemon can get its way. Instead, as we now know from a prodigious amount of imperial history, empires are built through substantially more complicated arrangements than those defined only by an overwhelming power in the face of which the subordinates are helpless.⁴³ If we consider this new coordination between core and peripheral states—with the powerful states on the Security Council at the core and the rest who had no say on the periphery—as an *imperial* relationship, we will see that it operates in practice in much the same way as old colonial logics did. As in the old empires, core states use peripheral states to move to the center resources that are not in the direct possession of the core states by binding this extraction to a discipline that benefits the core states.⁴⁴ But while material resources were generally the object of extraction in old-fashioned imperial formations, now, in the new empire, "terrorists" are produced and either killed on site or relocated to the center as the key activity of empire. Either way, the center gets from the periphery what the center needs. In exchange, the peripheral states, and especially their leaders, get powerful protection and approval from the center.

41. See Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L. SEC. L. & POL'Y 437, 437–38 (2010) (discussing the strikingly similar approaches taken to combating terrorism by various countries after 9/11).

42. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 338 (1995).

43. See JANE BURBANK & FRED COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 448–49 (2010) ("No one form of colonial rule was ever the object of a stable consensus among metropolitan publics—or broadly convincing to the people in the colonies whose contingent accommodation was needed. Using the political language of their colonizers, Asians and Africans insisted that the ideas of liberty should apply to themselves. Colonial rule was also contested in other idioms and with other objectives—restoration of local forms of rule, Islamic unity, and anticolonial alliances.")

44. See generally Stephen G. Bunker, *Modes of Extraction, Unequal Exchange, and the Progressive Underdevelopment of an Extreme Periphery: The Brazilian Amazon, 1600-1980*, 89 AM. J. SOC. 1017, 1017–64 (1984).

The dependence is mutual and complicated, even if the power is also at times blatantly unequal and straightforwardly exercised.⁴⁵

In addition, in new, as well as in the old empires, the disciplinary logics of control have worked to discipline populations both in the center and the periphery while appearing to shape only the latter.⁴⁶ In the old empires, the control radiating out from the center could often be used by peripheral leaders for local advantage out in their bailiwicks because these local leaders would be backed up with power from the center. At the same time, these disciplinary logics of control could be used by leaders at the center against segments of their own domestic populations, because the power of leaders at the center was built up by their enhanced control over the periphery.⁴⁷

In the new post-9/11 empire, one can see the same dynamic at work, where the leaders in the periphery use their backing from the center to enhance their local power while leaders at the core use the control they exercise over the periphery to shore up their power at the core. National officials in the peripheral states benefit from being part of the imperial project, just as national officials in the core states are able to use this security project effectively for transnational control and for localized repression at home and abroad. As in the old empires, states at the core define the interests, options, and strategies of the peripheral territories. In so doing, they transform themselves as well because everything they do is observed closely from the periphery as a sign of what is to come. States in the imperial core must therefore shift constantly to adapt to their imperial role.⁴⁸ The global war on terror has created security regimes within the core states that are echoed in their parallel accomplishments at the periphery and the leaders of both sorts of states gain power from their ability to work with each other.

In short, old and new empires share a common imperial logic. They both generate core control over crucial internationally dispersed resources. And both old and new empires are able to sustain themselves because leaders at all levels benefit

45. John L. Comaroff, *Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa*, in *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 163, 165 (Frederick Cooper & Ann Laura Stoler eds., 1997) (“[One must] treat as problematic the *making* of both colonizers and colonized in order to understand better the forces that, over time, have drawn them into an extraordinarily intricate web of relations.”).

46. *See id.* at 186 (“It is, after all, something of an irony to the colonized that those who come to rule them spend so much time fighting among themselves over the terms of command. Indeed, African popular protest was to make a good deal of the irony, often turning it into a bitterly satirical commentary on the poetics—or, rather, the poetic injustice—of oppression.”).

47. This analysis focuses our attention on “imperial intermediaries” who were sometimes indigenous elites picked by the imperial powers to rule, sometimes settlers who were sent out from the center to govern. The study of empires therefore foregrounds the “people pushing and tugging on relationships with those above and below them, changing but only sometimes breaking the lines of authority and power.” *See* BURBANK & COOPER, *supra* note 43, at 14.

48. *See id.* at 16 (“Empires’ durability depended to a large extent on their ability to combine and shift strategies, from consolidating territory to planting enclaves, from loose supervision of intermediaries to tight, top-down control, from frank assertion of imperial authority to denial of acting like an empire.”).

from imperial structures. In this Article, I explain and explore these new legal changes to show how the new imperial reach created by the Security Council after 9/11 operates in ways that will look familiar if one keeps the logic of empire in mind.

III. THE LEGAL ARCHITECTURE OF THE NEW IMPERIALISM

The shock of 9/11 to the international system was immediate and immense. International bodies moved with extraordinary speed. Very soon after the attacks—in many cases within days—resolutions condemning terrorism were passed by the U.N. General Assembly,⁴⁹ the Arab League,⁵⁰ the Association of South-East Asian States,⁵¹ the European Union,⁵² the African Union,⁵³ the Organization of American States,⁵⁴ and more.⁵⁵ All of these organizations embarked quite quickly in adopting wide-ranging, anti-terrorism initiatives.

But the “ground zero” of international legal development, as it were, was the U.N. Security Council. With the explicit mandate to protect international peace and security,⁵⁶ the Security Council immediately seized the lead in the international response to 9/11. Its main headquarters was so close to the site of the New York attacks that diplomats there could see and feel the collapse of the Twin Towers just one mile away.⁵⁷

The United States pressed for a strong response from the United Nations. The Security Council obliged by passing a series of radical resolutions, beginning on September 12 with a resolution condemning the attacks. In its preamble, Resolution 1368 set the terms of the Security Council’s engagement with

49. U.N. GAOR, 56th Sess., 1st plen. mtg. at 1–9, U.N. Doc. A/56/PV.1 (Sept. 12, 2001).

50. Arab League Council, *Communiqué issued by the Arab League Council Extraordinary Meeting* (Sept. 13, 2001), <http://www.law.kuleuven.be/iir/nl/onderwijs/terrorisme/LOScomm.doc>.

51. Association of Southeast Asian Nations, *2001 ASEAN Declaration on Joint Action to Counter Terrorism* (Nov. 5, 2001), <http://www.asean.org/news/item/2001-asean-declaration-on-joint-action-to-counter-terrorism>.

52. Press Release, European Union, General Affairs, (Sept. 12, 2001), *available at* http://europa.eu/rapid/press-release_PRES-01-318_en.htm.

53. African Conference on Terrorism, Oct. 17, 2001, *Dakar Declaration Against Terrorism*, U.N. Doc. A/56/513-S/2001/1021, *available at* www.un.org/documents/ga/docs/56/a56513.pdf.

54. Organization of American States, *Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, OAS Doc. RC.23/RES.1/01 (Sept. 21, 2001), *available at* www.oas.org/OASpage/crisis/RC.23e.htm.

55. *See, e.g.*, Organization for Security and Cooperation in Europe, *Bishkek International Conference on Enhancing Security and Stability in Central Asia: Strengthening Comprehensive Efforts to Counter Terrorism* (Dec. 13–14, 2001), *available at* <http://www.osce.org/atu/42545>.

56. *See* U.N. Charter art. 24, para. 1 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

57. André Erdős, *9/11 through the Eyes of a Diplomat. A Personal Experience*, LA REVUE GÉOPOLITIQUE (Sept. 4, 2011), <http://www.diploweb.com/9-11-through-the-Eyes-of-a.html> (describing the author’s personal experience being in the U.N. building when the attacks took place).

terrorism:

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter . . .⁵⁸

These three preambular assertions signaled the approach that the Security Council would take from that moment on: (1) The “Charter of the United Nations” was engaged by the 9/11 attack which meant that a terrorist strike by a non-state entity against a single Member State was now considered an international threat; (2) “All means” would be considered fair game to use in the battle against terrorism, which kept military force on the table; and (3) “Self-defense” justified the unilateral actions of attacked states over and above the Charter’s general insistence on collective responses. Resolution 1368 went on to condemn the attacks against the United States in the strongest possible terms and to call upon all states to act to prevent future attacks.⁵⁹ The Security Council, the resolution said, would remain seized of the matter.⁶⁰

And seized they were. It took only slightly more than two weeks for the Security Council to enact perhaps the boldest resolution it had ever passed, Resolution 1373.⁶¹ The ambassadors of the Security Council Member States received instructions from their governments to cooperate with the United States.⁶² Resolution 1373 was what the United States asked for and got. Passed on September 28, as the ruins of the World Trade Center still smoldered a mile away, Resolution 1373 laid out the concrete plan of action that all states were to follow. But in sharp contrast with the usual Security Council resolution—instructing states to not sell arms to country X or warning a deviant state that sanctions would follow if it did not act in a particular way⁶³—Resolution 1373 directed *all Member States* of the United Nations *to change their domestic laws* to create a world-spanning net

58. S.C. Res. 1368, pmb., U.N. Doc. S/RES/1368 (Sept. 12, 2001).

59. *See id.* ¶ 1 (“[The Security Council] [*u*]nequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security”) and ¶ 4 (“Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts. . . .”).

60. *Id.* ¶ 6.

61. S.C. Res. 1373, *supra* note 31.

62. *See* Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 284 n.50 (2008) (finding in his interviews with those involved in the Security Council at the time that not only did all states want to help the United States in its hour of need, but that some states were particularly anxious to do so precisely to keep the United States working within the United Nations’ system instead of freelancing outside of it).

63. *See generally* ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004) (providing a comprehensive account of how Chapter VII resolutions have been used).

of legal interdiction.⁶⁴ Acting under Chapter VII of the U.N. Charter, which made the resolution binding on signatories to the Charter,⁶⁵ the Security Council converted international law from a body of legal norms that it was hard for a state to be subject to (unless the state had either consented or was a pariah) into a body of legal norms that a state was automatically bound by (even if it objected and was not alone in doing so). The very basis of international law—that it grows out of and is reinforced by widespread consent within the family of nations and, in particular, by consent of the particular state to be bound—was changed by Resolution 1373. The Security Council began *legislating*.⁶⁶

To see the radical nature of Resolution 1373, it is important to review more precisely how the U.N. Security Council works. The U.N. Security Council consists at any one time of the representatives of fifteen Member States. Five are permanent members and have the capacity to block any resolution by a veto. The Permanent Five (P-5) are the United States, United Kingdom, France, Russia, and China.⁶⁷ The other ten countries are elected by the U.N. General Assembly according to a system of regional allocation of seats so that all parts of the world have some representation on the Council.⁶⁸ A resolution needs to gain the positive votes of nine of the fifteen members for it to pass, as long as none of the P-5 states veto it.⁶⁹ Practically speaking, however, the P-5 states run the show. Resolutions are generally bargained among the P-5 to ensure that there are no blocking votes before they are put before the Security Council as a whole. Regardless of what occurred in the bargaining and what disagreements were papered over with small adjustments of wording, however, the Security Council can bind all of the now-193⁷⁰ U.N. Member States with the vote of just nine states, absent any P-5 vetoes. This means, of course, that the democratic deficit of the Security Council is enormous.⁷¹ In fact, the Security Council's relationship to democratic legitimacy has been described as a "double deficit."⁷²

64. See S.C. Res. 1373, *supra* note 31.

65. *Id.* pmb. ("Acting under Chapter VII of the Charter of the United Nations . . .").

66. See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

67. U.N. Charter art. 23, para. 1.

68. See generally *Security Council*, UN ELECTIONS, <http://www.unelections.org/?q=node/33> (last visited Oct. 15, 2013) (providing information on the system of U.N. Security Council elections).

69. See U.N. Charter art. 27, para. 2 ("Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members."). The procedural rules of the Security Council permit any state affected by a resolution of the Council to be present and to participate during the relevant deliberations, but such permission must be granted by the Security Council itself and the affected state does not have a vote. See generally U.N. Security Council, *Provisional Rules of Procedure of the Security Council*, Rule 37, S/96/Rev.7.

70. See generally United Nations, *Member States*, <http://www.un.org/en/members/growth.shtml> (last visited Oct. 15, 2013) (listing Member States and their years of accession).

71. See Johnstone, *supra* note 62, at 306 (stating, among other things, that the five permanent members of the Security Council are never held accountable through elections).

72. Heiner Hänggi, *The Use of Force Under International Auspices: Parliamentary Accountability and 'Democratic Deficits'*, in THE 'DOUBLE DEMOCRATIC DEFICIT':

The first deficit, an “internal democracy” deficit, comes from the failure of the Security Council to represent the complexities of the political situation within each of the Member States that are actually represented at the table. In particular, the legislatures of the Member States do not themselves have direct representation at the Security Council, which reflects with certainty only the views of the executive branches of these states.⁷³ Security Council votes, then, may reflect only the views of the present executive branch of the country and not a broader political or public consensus in the state in question. This is obviously especially true for the non-democracies at the table, but it is even true of the democracies as well.

The second deficit, an “external democracy” deficit, emerges from the lack of equal state representation and participation in Council lawmaking. Since so few of the 193 U.N. Member States have a vote at any one time, the Security Council does not command a deep enough source of consent to bind the world with its resolutions.⁷⁴ Security Council *legislation* raises all sorts of new issues in international law because it is the first time that an international organization has been able to claim that it could create new, universally applicable general norms through the vote of a few countries without the dissenting countries—even if overwhelming in number—having a way to avoid the binding effect of the norms.

One might imagine that, at the very least, Security Council resolutions issued under Chapter VII could not be as powerful a source of international law as treaties, particularly treaties with near-global acceptance like the major human rights covenants or the U.N. Charter itself. But that would be wrong—or at least

PARLIAMENTARY ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL AUSPICES 3, 4–5, 7 (Hans Born & Heiner Hänggi eds., 2004).

73. See Johnstone, *supra* note 62, at 282 (arguing that, even though states are the principal actors in the international legal system, “individuals, communities, and corporations ought to be accounted for in making and implementing the law because they are often most directly affected. And as the value of democratic deliberation to sound decision making gains traction internationally, the overlap with transnational legal process—where individuals, NGOs, corporations, and levels of government other than the executive branch play a role—becomes more apparent.”). One can see this separation between executive action in the Security Council and parliamentary difference back at home even in parliamentary systems where the executive is guaranteed a majority in his own parliament. For example, Britain’s Prime Minister David Cameron went to the U.N. Security Council to get a resolution condemning the use of chemical weapons by Syria in preparation for military action while at the same time he lost a vote on the same matter before the British Parliament. Andrew Osborn, *UK’s Cameron Forced to Delay Strike Against Syria*, REUTERS (Aug. 28, 2013), <http://www.reuters.com/article/2013/08/28/us-syria-crisis-britain-idUSBRE97R1BD20130828>. It would have been an interesting test of the relative pulls of international organizations and domestic parliaments if the Security Council had approved a resolution authorizing military intervention but the British Parliament still said no.

74. A high-level Security Council staffer explained to me in an interview that, since the Council is always working both with incoming states to explain continuing conflicts that the new states will have to address and with outgoing states to follow up on issues that were in process while they were on the Council, in practice there are more than fifteen states “in the loop” of backstage negotiations at any one time. But even if there were double the number of Member States involved in these backstage negotiations as were formally on the Security Council at the time, they would still constitute a small minority of the “international community.”

not clearly right. Article 103 of the U.N. Charter provides a rule for sorting out conflicts among sources of international law, and it says that the U.N. Charter takes precedence over all others where they conflict.⁷⁵ And binding resolutions issued under the U.N. Charter have been generally accepted as just as binding as the Charter itself.⁷⁶

75. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

76. One court that has adopted the view that U.N. Security Council resolutions trump all other sources of international law is the British Law Lords (since reconstituted as the Supreme Court). In *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58 (H.L.), the House of Lords found that a British-Iraqi dual national captured in Iraq by British forces had no *habeas* rights in the United Kingdom because the United Kingdom’s obligations under the Human Rights Act had been displaced by its obligations under the U.N. Charter. British forces in Iraq were serving in an operation authorized by the U.N. Security Council at that point, and as a result, the Law Lords found that Art. 103 of the U.N. Charter took precedence over other sources of international law, including Art. 5 of the European Convention on Human Rights, which would have otherwise prohibited detention for so long a period, absent a derogation.

A Grand Chamber of the European Court of Human Rights disagreed with the Law Lords but sidestepped the question of the supremacy of the U.N. Charter as given specificity by a Security Council resolution. Case of *Al-Jedda v. The United Kingdom*, App. No. 27021/08 (Eur. Ct H.R., July 7, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612>. The Grand Chamber in *Al-Jedda* found that the U.N. Charter contained multiple principles beyond those related to peace and security, in particular the protection of human rights. For the U.N. Security Council to require a Member State to violate its international law obligations under the Charter to protect human rights, the Court argued, the instruction that security took precedence over the other values had to be explicit. Why?

102. [T]he Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

Id. ¶ 102. And in the absence of that explicit language in *Al-Jedda*’s case authorizing indefinite detention without legal process, the Court found in his favor.

But of course, some of the Security Council resolutions do in fact impose concrete obligations on Member States to violate individual rights. The Court had to confront this situation soon after *Al-Jedda* in *Nada v. Switzerland*, App. No. 10593/08 (Eur. Ct. H.R., Sept. 12, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118>. In that case, Switzerland was accused of having infringed the petitioner’s Convention rights by refusing to permit him to cross an international border to see both his family and his doctors after he had been put on the Security Council anti-terrorism blacklist authorized under Resolutions 1267 and 1333 (setting up and extending the al Qaeda sanctions regime). It would seem that the Court was hemmed in by its earlier ruling because here the instruction to violate a person’s rights was clear. Blacklisting explicitly came with a series of sanctions that quite clearly imposed heavy and rights-violating burdens on individuals, including not being able to cross international borders to return to one’s country of citizenship. But the European Court of Human Rights steadfastly

refused to rule directly on the question of whether Security Council resolutions are hierarchically above the European Convention. Instead, it found that Switzerland had not done all it could have done to harmonize its international obligations to comply with the Security Council resolution while simultaneously avoiding infringement of the petitioner's rights under the Convention, thereby mooted the question:

197. That finding [that Switzerland could have done more to respect the petitioner's rights consistent with its obligations under the U.N. Charter] dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other.

Id. ¶ 197.

This decision put states in a difficult position, trying to find a way to protect the rights of those within its jurisdiction under one set of international obligations while simultaneously responding to direct orders from the U.N. Security Council made under the U.N. Charter. Under the sanctions to be levied against suspected terrorists, however, there are some exceptions that might permit a state such leeway. The asset freeze regime now includes provisions for humanitarian relief, to permit a person the basic necessities. U.N. Security Council Sanctions Committee, Fact Sheet on the Asset Freeze and Its Exemptions, *available at* http://www.un.org/sc/committees/1267/fact_sheet_assets_freeze.shtml. The travel ban regime at issue in the Nada case permits exceptions as well, including travel for medical treatment. U.N. Security Council Sanctions Committee, Fact Sheet on the Travel Ban and Its Exemptions, *available at* http://www.un.org/sc/committees/1267/fact_sheet_travel_ban.shtml. So it appears that there might be a way for a state to avoid the requirements of a particular resolution in a particular case and still stay within the Security Council framework. But that is not a general solution to the hierarchy of norms problem.

The issue of incompatibility between the U.N. Security Council's resolutions and state obligations under the European Convention of Human Rights arose again in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, App. No. 5809/08, (Eur. Ct. H.R., Nov. 26, 2013). The case involved an applicant who was alleged to have been the finance manager for Saddam Hussein's secret service. Under U.N. Security Council Resolution 1483, the assets of all state agencies and high-level officials of the former Iraqi government were to be confiscated for distribution to the Iraqi people through Development Fund for Iraq. Carrying out its obligations under this resolution, the Swiss government ordered the confiscation of Swiss-based assets belonging to Al-Dulimi and a company for which he was the managing director. The Swiss Federal Court ruled that it had no jurisdiction to hear a challenge to the confiscation order despite the fact that the Swiss government had issued it. Al-Dulimi argued that this was a violation of his Convention right to a fair hearing.

The European Court of Human Rights judgment in *Al-Dulimi* held that when a signatory state joins an international organization, that organization is presumed to protect human rights at the same level as the Member State itself. But when an international organization fails to do so, as was the case with the U.N. Security Council, it was nonetheless up to the ECHR signatory state to find a way to honor its ECHR obligations. Switzerland was therefore required to provide a forum for challenging the confiscation order even if it were not responsible for the international instrument under which the confiscation was required. It was therefore found to have infringed Dulimi's right to a fair hearing.

Here, too, however, things may not be as bad for the state caught between two international obligations as may appear to be the case. When Switzerland organizes a hearing for Al-Dulimi, the only factual matter that could be contested was whether he was indeed the finance manager of the Iraqi secret services. Unlike connections to terrorism, which may be hard to prove and disprove without access to classified material, Al-Dulimi's status in the government of Saddam

With this extraordinary and extraordinarily controversial power to potentially override all other sources of international law, what did the Security Council do on its first time out in the legislation business? Resolution 1373 laid out a complete and ambitious agenda for fighting terrorism. The resolution requires states to:

- Criminalize terrorism in domestic law.
- Block terrorism financing by freezing assets of individuals and groups on Security Council blacklists, by ensuring that no funds reach terrorists or terrorist groups through domestic channels, and by providing that any financing of terrorist activity is criminalized in domestic law.
- Block the use of the state's territory by terrorist groups through suppressing recruitment of terrorists, eliminating their access to weapons, and denying safe haven to any of their members.
- Ensure that terrorists cannot travel internationally by stepping up border controls, increasing the security of travel documents, and examining more closely claims for refugee and asylum status.
- Cooperate with the criminal investigations of other states, and share information with them about suspects and threats.
- Take "the necessary steps to prevent the commission of terrorist acts."⁷⁷

This is an impressive list of things for states to do. And it is a list that requires states to reach deeply into their own domestic legal systems in order to comply.

But this was not a random list. In fact, it tracks rather closely the USA PATRIOT Act,⁷⁸ which the Bush Administration was pushing through the U.S. Congress at the same time.⁷⁹ The USA PATRIOT Act includes a detailed mix of financial regulation (to make virtually all financial transactions transparent to the state); criminalization of a wide range of activities in support of terrorism (expanding the definition of terrorism itself, as well as specifying a broader range

Hussein could be more easily put to the test with public proof. In fact, anticipating this problem, the United States had already asked the Iraqi government to provide proof of this fact. Stephan Hollenberg, *Al-Dulimi U.N. Sanctions Judgment*, ECHR BLOG (Dec. 15, 2013), <http://echrblog.blogspot.com/2013/12/al-dulimi-un-sanctions-judgment.html>. As a result, even if the Security Council were to provide Switzerland with no additional information on point with which to hold the hearing, a Swiss court should still be able to determine whether the Security Council's classification of Al-Dulimi was correct. The general problem remains, however, how states are to uphold their obligations to protect human rights when the Security Council makes it difficult for them to do so. And the ultimate question of whether Security Council resolutions displace all other international obligations or only add to them is still not clear.

77. S.C. Res. 1373, *supra* note 31, ¶¶ 1(c), 2(a) & (e), 3(c), (f).

78. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

79. The USA PATRIOT Act was first introduced into the Congress on October 2, 2001, five days after Resolution 1373 passed, and it was signed by the President on October 26, 2001. *Bill Summary & Status 107th Congress (2001–2002) H.R. 2975 Major Congressional Actions*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02975:@@R> (last visited Oct. 16, 2013); *Bill Summary & Status 107th Congress (2001–2002) H.R.3162 Major Congressional Actions*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@R> (last visited Oct. 16, 2013). The United States must therefore have been working on Resolution 1373 and the PATRIOT Act at the same time.

of activities that could count as “material support” of terrorism); loosened restrictions on government surveillance (through more lax warrant requirements and expanded authorization of electronic surveillance); and incentives for increased cooperation between ordinary police and intelligence services (through institutionalization of information-sharing across agencies).⁸⁰ Resolution 1373 was the international version of the USA PATRIOT Act.

Resolution 1373, in fact, was international legislation on a grand scale. And it was backed up with both institutional enforcement and international pressure. Resolution 1373 created the Counter-Terrorism Committee (CTC) of the Security Council, with the power to monitor and enforce the resolution.⁸¹ All Member States of the United Nations were required to take steps to comply with 1373 immediately, to report back to the Security Council on what they had done by December 27, 2001, and to set up a system for reporting periodically thereafter.⁸² To emphasize the seriousness of the matter, the Security Council passed Resolution 1377 on November 23, 2001,⁸³ exhorting states to take steps to comply with Security Council resolutions to fight the “scourge of international terrorism” and offering assistance to states that were having trouble drafting the relevant legislation by offering “technical, financial, regulatory, legislative or other assistance programmes” to ensure compliance by the deadline.⁸⁴

Regional bodies eagerly joined in the task of designing frameworks for fighting terrorism and requiring their Member States to comply. In general, regional bodies adopted the same framework in their resolutions and action plans as Resolution 1373 had directed, even though these regional bodies were not directly bound by Security Council resolutions, not being signatories to the U.N. Charter themselves. But regional bodies also required their Member States to criminalize terrorism, block terrorism financing, take steps to root out terrorist groups on their territory, and harden borders while increasing surveillance over international travel, just as the Security Council had done.

For example, in fall 2001, the European Union created an action plan against terrorism, which tracked these crucial aspects of Resolution 1373.⁸⁵ In early 2002,

80. USA PATRIOT Act of 2001, *supra* note 78. For a summary, see Charles Doyle, *The USA PATRIOT Act: A Sketch*, CONGRESSIONAL RESEARCH SERVICE REPORTS (Apr. 18, 2002), available at <http://fpc.state.gov/documents/organization/10091.pdf>.

81. See S.C. Res. 1373, *supra* note 31, ¶ 6 (directing the Security Council to establish a Committee with all members of the Council to monitor the implementation of the Resolution).

82. *Id.* ¶ 6 (requiring all States to report to the Committee no later than ninety days from the date of adoption of the Resolution).

83. S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001).

84. *Id.* ¶¶ 9, 13. The first “programme of work” issued by the CTC set a series of deadlines for state reports and posed questions to be answered in those reports, questions that asked states to explain the domestic legislation and other legal norms that were in place by that date to comply with the resolution. Counter-Terrorism Committee, Annex to the Letter Dated 19 Oct. 2001 from the Chairman of the Counter-Terrorism Committee Addressed to the President of the Security Council, at 3–4, U.N. Doc. S/2001/986 (Oct. 19, 2001).

85. See European Union (EU): Conclusions and Plan of Action of the Extraordinary

the European Union announced the creation of Eurojust to coordinate some aspects of terrorism investigations across Europe.⁸⁶ The European Union also then sped up initiation of the European Arrest Warrant to create a common Europe-wide system of terrorism arrests and prosecutions.⁸⁷ In June 2002, the European Union promulgated a Framework Decision on Terrorism, specifying how terrorist offenses were to be defined in the laws of the Member States of the European Union.⁸⁸ And the European Union has ever since used the anti-terror campaign to push new requirements through to Member States, including extensive rules about blocking terrorism financing and freezing the assets of suspected terrorists.⁸⁹ The European Union has been a strong defender of Resolution 1373 and implemented it at the level of E.U. law despite the fact that terrorism was not in the core “first pillar” of European law in 2001.⁹⁰

While the European Union might have the most elaborate strategy for

European Council Meeting on 21 September 2001, 40 I.L.M. 1284 (Sept. 21, 2001) (noting the European Union’s support for the United States and outlining its policy against terrorism); European Parliament Resolution B5-0666, 0668 & 0674/2001 on the Extraordinary European Council Meeting in Brussels on 21 September 2001, 2002 O.J. (C 87 E) 216, 217 (“having regard to UN Security Council Resolution 1373 (2001) of 28 September 2001”). E.U. anti-terrorism activity in fall 2001 culminated in the adoption of Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, which committed the European Union to carrying out many of the measures announced in U.N.S.C. Res. 1371. *See* Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, OFFICIAL J. EUROPEAN UNION, 2001/931/CFSP (2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

86. *See generally* Council Decision 2002/187/JHA of 28 February 2002 Setting Up Eurojust With a View to Reinforcing the Fight Against Serious Crime, 2002 O.J. (L 63) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0187:EN:NOT>.

87. *See generally* Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>.

88. Council Framework Decision of 13 June 2002 on Combating Terrorism, 2002 OJ (L 164) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:NOT>.

89. *See* Council of the European Union, *EU Fight Against Terrorism*, <http://www.consilium.europa.eu/policies/fight-against-terrorism?lang=en> (last visited Oct. 17, 2013) (providing information about the various programs that the European Union has launched to fight terrorism). Note that the webpage detailing the anti-terrorism program of the European Union is run by the Council of the European Union because terrorism remains a matter of inter-governmental coordination for which the Council is responsible.

90. *See* Presidency of the Council of the European Union, *A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice*, ¶ 1, E.U. Doc. 14366/3/05 REV 3 (Nov. 30, 2005), available at <http://register.consilium.europa.eu/pdf/en/05/st14/st14366-re03.en05.pdf> (noting the importance of international cooperation in the area of combating terrorism); Christian Kaunert, *Towards Supranational Governance in EU Counter-Terrorism? – The Role of the Commission and the Council Secretariat*, 4 CENT. EUR. J. INT'L & SECURITY STUD. 9, 22 (2010), available at <http://www.esdp-course.ethz.ch/content/pubkms/detail.cfm?lng=en&id=117611> (arguing that “the EU has adopted and implemented an *ad hoc* set of rules to transpose UNSC Resolution 1373 in the context of the second pillar.”).

responding to terrorism and supporting the implementation of Resolution 1373, it is hardly alone. The African Union held a number of high-level meetings in fall 2001 and announced a plan of action explicitly intended to bring Resolution 1373 to African states.⁹¹ The Association of South-East Asian Nations (ASEAN) has also developed a detailed regional plan to fight terrorism “especially taking into account the importance of all relevant U.N. resolutions.”⁹² The Organization of American States, which had already created an Inter-American Committee against Terrorism before 9/11, sprang into action and developed new action plans in fall 2001, culminating in 2002 in the adoption of the Inter-American Convention Against Terrorism.⁹³ The Organization for Security and Cooperation in Europe adopted an action plan in fall 2001 explicitly tracking the U.N. framework for fighting terrorism.⁹⁴ The South Asian Association for Regional Cooperation (SAARC) pledged its support for Resolution 1373 by reinforcing its existing SAARC Regional Convention on the Suppression of Terrorism.⁹⁵ Practically every major regional organization in the world signed onto the program outlined by Resolution 1373 and all of these organizations added their moral and legal force to the effort to get states to comply.

The urgency of the 1373 deadline—states were to report back to the Security Council within three months⁹⁶—created a body of global security law virtually overnight. Not all states met the reporting deadline, let alone used the deadline to pass a whole raft of new laws, but virtually all states attempted to do something.⁹⁷

91. See generally African Union, *Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, AU Doc. Mtg/HLIG/Conv.Terror/Plan.(I) (Sept. 14, 2002), available at http://www.issafrica.org/af/RegOrg/unity_to_union/pdfs/oau/keydocs/PoAfinal.pdf; OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, 2219 U.N.T.S. 205 (entered into force Dec. 6, 2002).

92. See *Joint Communiqué of the Special ASEAN Ministerial Meeting on Terrorism Kuala Lumpur, 20-21 May 2002*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ¶ 11, <http://www.asean.org/news/item/joint-communicue-of-the-special-asean-ministerial-meeting-on-terrorism-kuala-lumpur-20-21-may-2002> (Oct. 18, 2013).

93. Inter-American Convention Against Terrorism, June 3, 2002, 42 I.L.M. 19, AG/RES. 1840 (XXXII-O/02); Organization of American States, *Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, OAS Doc. RC.23/RES.1/01 (Sept. 21, 2001).

94. See Organization for Security and Co-operation in Europe, *Decision on Combating Terrorism and the Bucharest Plan of Action for Combating Terrorism*, ¶ 4, OSCE Doc. MC(9).DEC/1 (Dec. 3-4, 2001), available at www.osce.org/atu/42524 (citing U.N. Resolutions as the global framework for the fight against terrorism).

95. SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, available at <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>; South Asian Association for Regional Cooperation, *Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism*, Jan. 6, 2004, available at <http://www.refworld.org/pdfid/49f6b7ad2.pdf>.

96. S.C. Res. 1373, *supra* note 31, ¶ 3(g)(6).

97. The U.N. Security Council CTC has published the first five years of such reports on its website. The dates and contents of those reports show just how many states passed new laws and otherwise took steps to come into compliance. See Counter-Terrorism Committee, *Country Reports*, <http://www.un.org/en/sc/ctc/resources/1373.html> (last visited Oct. 18, 2013) (providing reports by Member States pursuant to Resolution 1373). All CTC reports referenced in this paper

Although it was created quickly, this was a body of law that would prove hard to undo. At the core of global security law are U.N. Security Council resolutions with 1373 as the cornerstone; many resolutions since that time have added to the framework.⁹⁸ But 1373 has no sunset date. Changing it requires nothing short of passing another resolution through the Security Council, and it would not be surprising if the United States—even now under the Obama Administration—would veto such changes. Global security law is, as a result, heavily entrenched.

By and large, internationalists were impressed with the speed and comprehensiveness of the response to 9/11. As then-Secretary General Kofi Annan said of the creation of global security law, “[t]he work of the Counter-Terrorism Committee, and the cooperation it has received from Member States, have been unprecedented and exemplary.”⁹⁹ It seemed, finally, that the system of collective security organized through the U.N. Security Council had worked.

IV. DOWN TO THE GROUND: THE SECURITY COUNCIL’S MANDATE ENCOUNTERS THE MEMBER STATES

To be successful, however, the U.N. Security Council had to bring U.N. Member States on board in a common fight. But what exactly was the common international threat that the Security Council had identified? The attacks of 9/11 made al Qaeda-connected terrorism the reason for the Security Council’s actions. But the one-size-fits-all Security Council approach—where all Member States were required to enact these laws regardless of the level of al Qaeda presence in their country and regardless of their country’s other domestic threats—hit different agendas as the national laws were passed. As we will see, just as in empires, a common mandate from the center fractured into many quite disparate pieces once it got down to the ground.

The fracturing of a common agenda into a myriad of different responses happened across many different aspects of the Security Council’s anti-terrorism

can be found at this site.

98. There are currently nineteen resolutions that constitute the Security Council framework for fighting terrorism. United Nations Security Council, *Counter-Terrorism Committee Resolutions*, <http://www.un.org/en/sc/ctc/resources/res-sc.html> (last updated Jan. 30, 2012). In addition to the resolutions that fall under the purview of the CTC to monitor, the Sanctions Committee of the Security Council is also involved in the anti-terrorism effort because Resolution 1267 of October 15, 1999 set up special sanctions against al Qaeda and the Taliban even before 9/11. The sanctions regime has been updated by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), and 2083 (2012) so that the sanctions now apply to designated individuals and entities associated with al Qaeda, Osama bin Laden and/or the Taliban wherever they are located in the world. United Nations Security Council, *Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities*, <http://www.un.org/sc/committees/1267/index.shtml> (last visited Oct. 17, 2013).

99. United Nations Press Release, Secretary-General Addressing Council Meeting On Counter-Terrorism, Says United Nations ‘Stand Four-Square’ Against Scourge, U.N. Press Release SG/SM/8105, SC/7277 (Jan. 18, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8105.doc.htm>.

strategy, but for now I will focus on one: criminalizing terrorism. Resolution 1373 required states to create a crime called “terrorism” in their own domestic criminal codes so that acts of terrorism would have no safe haven anywhere in the world.¹⁰⁰ The idea was that, by creating a common and global web of interdiction, terrorists would have no place to hide.

But the resolution could not actually produce such a web of global interdiction for two primary reasons. First, it did not solve the key conceptual problem in fighting terrorism across the whole world at once, which was the absence of any international agreement on what constitutes terrorism. Second, even if states had had a common definition of terrorism, Member States would surely not all prioritize fighting someone else’s fight when they had their own national security issues to address. The combination of these two factors meant that Member States generally defined terrorism in ways that prioritized their own local agendas first and foremost while they addressed the internationally identified threat only insofar as it supported these local agendas.

As for the definitional problem, Resolution 1373 simply required states to criminalize “terrorism” *without* providing a definition of terrorism. It therefore left the definition of terrorism up to each Member State. While it is by now a commonplace to say that “one man’s terrorist is another man’s freedom fighter,” the conceptual problems surrounding the definition of terrorism are not just matters of personal perspective in the way that the quotation suggests. Instead, a definition of terrorism engages fundamental questions about the authority of a state and when it is legitimate to contest it. A definition of terrorism will therefore have the effect of separating worthy and unworthy political causes as well as legitimate and illegitimate political techniques. And these are subjects that produce the most profound levels of political disagreement, particularly across states that have fundamentally different political commitments in the first place.

As the U.N. Secretary General’s High Level Panel on Threats, Challenges and Change noted, a common international definition of terrorism ran aground over two fundamental issues: whether state violence must also count as terrorism and whether certain violent struggles against unjust authority could escape the definition of terrorism because of the justness of the cause.¹⁰¹ What these fights over the definition of terrorism—and the inability of the United Nations to resolve them—reveal is that the definition of terrorism is centrally about justification and legitimation of particular forms of political action, about which there is no international consensus.¹⁰² Building an international program in an area where,

100. S.C. Res. 1373, *supra* note 31, ¶¶ 2(a), (e).

101. Report of the U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 160, U.N. Doc. A/59/565 (Dec. 2, 2004).

102. The report attempts to get around these issues by pinpointing the hallmark of terrorism as the deliberate targeting of civilian populations rather than, as most domestic laws now indicate, carrying out violent actions with a particular sort of political motivation. *Id.* at ¶ 164. This would be a neat way around the definitional conundrum, but there is no sign that the CTC is encouraging that definition in Member States.

deep down, there was no political agreement was bound to be a fraught enterprise.

When the Security Council nonetheless required all states to criminalize terrorism, the logic was imperial. The Security Council was projecting to all Member States of the United Nations what the core states of the international community—and particularly the United States—wanted them to do. But, as with other empires where the locals in the periphery do not share a common world view with those at the center, the end result was a mash-up of imposed, top-down diktat, and bottom-up adaptation with a lot of local variation. And the result is exactly what a student of empires would expect.

Studies of colonialism have repeatedly shown the colonial power may want something from a diverse periphery, but the peripheral leaders often have their own ideas about how to appear to comply just enough to keep the colonial power off their backs while carrying out their own local programs.¹⁰³ What one gets in imperial structures, therefore, is generally a variegated mix of compliance strategies. Some leaders in the peripheral states are eager to comply with the mandate as seen from the center; others only appear to comply while doing something that matches their own agendas more than those at the center; still others take the radiated power they get from the center and use it to shore up their own positions, sometimes even at cross-purposes with what the center demands. In short, colonial governance rarely results in uniformity of implementation of a common program from the center. Instead, what one gets is a patchwork of results, depending on the degree of leverage that the center has over the periphery combined with the varying inclinations of the local leaders and what they try to get for themselves in the deal.¹⁰⁴

Terrorism has an irreducibly political nature. Many national definitions of terrorism specify that those labeled as terrorists must have a political motive for what they do. Murdering someone for personal gain is not generally considered terrorism; doing the same thing for the purposes of leveraging the release of political prisoners is.¹⁰⁵ But once political motivations enter into the equation, many regimes see no point in separating illegitimate terrorism from what should be considered legitimate political dissent. Burning an effigy of the president may be considered peaceful protest by one regime, and it may be considered dangerous violence by another. The fact that there is no general agreement about which is which prevents adoption of a uniform definition of terrorism that would cabin the offense and make predictable what actions would count as terrorism.

One could solve the problem by defining certain specific violent actions that

103. BURBANK & COOPER, *supra* note 43, at 13–14.

104. *Id.* at 14 (“Imperial agents . . . required incentives as well as discipline. Empires unintentionally created subversive possibilities for intermediaries, who could circumvent imperial purposes by establishing alternative networks or allegiances, attaching themselves to other empires, or rebelling Because empires preserved distinction, they augmented centrifugal possibilities What successful empires produced, usually, was neither consistent loyalty nor constant resistance: they produced contingent accommodation.”).

105. See Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT. CRIM. JUS. 933, 937 (2006) (stating that a generally accepted definition of terrorism requires political, not personal, motive).

tend to be associated with terrorism—like hijacking airplanes, poisoning water supplies, exploding car bombs—as terrorist actions, when done to influence the conduct of a state or international organization. This would have the advantage of making clearer what is prohibited and would limit terrorism offenses to particular egregious actions. But even when states had criminalized specific actions like this before 9/11, the Security Council pressed them after 9/11 to criminalize a general offense called “terrorism” over and above these lists of specific crimes.

Since states were left to come up with a definition of terrorism on their own, the results were quite varied. Many of the definitions were vague, which raised serious questions about who would interpret these new laws. The enforcement of criminal law tends to be tasked to prosecutors within the executive branches of most countries, if not at the initial investigative stage, then at least by the time that decisions are made to prosecute. The vague criminalization of terrorism tends to affect constitutional balances of power, handing more powers to the executive branch.

Once the Security Council passed Resolution 1373, a range of responses was on display, as one might guess from understanding the logic of empires. Some states enthusiastically joined the campaign to fight al Qaeda and welcomed the swift and decisive response of the Security Council. That was particularly true of the states that considered themselves to be at the core of the world system, regardless of whether they held a seat on the Security Council. For example, Germany acted quickly to beef up its terrorism laws; spoke out in favor of international cooperation; and generally engaged in model compliance with Resolution 1373.¹⁰⁶ In fact, Germany’s intelligence services were so closely focused on precisely what the Security Council had identified as the key global threat—Islamist terrorism—that they totally missed a series of more locally inspired neo-Nazi attacks on Muslims that might have also qualified as terrorism.¹⁰⁷

Even in highly compliant core countries with long constitutional traditions, however, the definitions of the new terrorism offenses could be quite sweeping and indiscriminate, lending themselves to many distinctive local agendas. Britain’s experience reveals a different logic from Germany’s, one connected both to its position as the target of a long-running domestic terrorism campaign from Northern Ireland and also to its position at the head of a once-mighty empire. Britain enacted a definition of terrorism before 9/11 as part of its Terrorism Act 2000.¹⁰⁸ This definition sweeps very broadly. Terrorism is defined as the use or

106. See Miller, *supra* note 36, at 385 (documenting Germany’s response to post-9/11 terrorism threats).

107. *NSU Inquiry Report Released*, DEUTSCHE WELLE (Aug. 22, 2013), <http://www.dw.de/nsu-inquiry-report-released/av-17038934> (discussing the discovery by the police of the National Socialist Underground four years after a string of murders that included eight Turkish merchants, a Greek and a policewoman had ended).

108. Terrorism Act, 2000, c. 11, § 1(1)–(2) (U.K.). This law was designed to get rid of the need for special emergency laws in Northern Ireland by bringing all emergency powers under one law that applied to the whole country. LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND

threat of actions that involve serious violence to a person, serious damage to property, or creates a serious risk to public health and safety, when those actions are “designed to influence the government or to intimidate the public . . .” and are “made for the purpose of advancing a political, religious or ideological cause.”¹⁰⁹ Though the comprehensive anti-terrorism law went into effect just before 9/11, Britain beefed up its anti-terrorism laws again after 9/11, creating controversial regimes of preventive detention, broad search and seizure provisions, and limitations on speech and photography, among other things.¹¹⁰

In addition to having an aggressive anti-terror regime at home, Britain has been very active through the Commonwealth of Nations in promoting this definition for other countries in its orbit after the U.N. Security Council mandated the criminalization of terrorism in every Member State.¹¹¹ In short, a number of states in its former empire have adopted legislation modeled after Britain’s.¹¹² A similar definition of terrorism was therefore adopted by Vanuatu,¹¹³ for example. Other small Commonwealth countries, like Belize,¹¹⁴ followed suit. Guyana went one better by adopting an even broader definition, branding a terrorist anyone who “threatens the security or sovereignty of Guyana or strikes terror into any section of the population.”¹¹⁵

The problem, of course, is that the breadth of the U.K. definition¹¹⁶ and the even broader definitions adopted by some Commonwealth states leave enormous prosecutorial discretion in the hands of the government, including in the hands of governments whose histories of conspicuous constitutionalism are a good deal thinner than Britain’s. For example, in Vanuatu, the first person charged with a terrorist offense was not a member of al Qaeda, but instead a journalist who had

EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 321 (2001).

109. Terrorism Act, *supra* note 108, § 1(1)–(2).

110. See *Overview of Terrorism Legislation*, LIBERTY 80, <https://www.liberty-humanrights.org.uk/human-rights/terrorism/overview-of-terrorism-legislation/index.php> (last visited Oct. 18, 2013) (summarizing and critiquing the new powers granted to Britain in its counter-terror laws).

111. See Commonwealth Secretariat, *Assistance Provided by the Commonwealth Secretariat in the Field of Counterterrorism*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, <http://www.osce.org/atu/24671> (last visited Oct. 18, 2013) (citing the report, which has, however, since been removed from the Commonwealth’s website); see also Dominic Bascombe, *Anti Terrorism Legislation in the Commonwealth: A Briefing Paper for the Commonwealth Human Rights Initiative*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, 5–20 (May 2003), available at http://www.humanrightsinitiative.org/new/papers/chri_paper.pdf (assessing the laws in the first two years after 9/11).

112. See generally Dominic Bascombe, *An Update of Anti Terror Legislation in the Commonwealth*, COMMONWEALTH HUMAN RIGHTS INITIATIVE (July 2004), http://www.humanrightsinitiative.org/new/anti_terror_legislation_cw2004.pdf (reviewing Commonwealth Legislation through 2004).

113. Report of Vanuatu to the Counter-Terrorism Committee, at 8, U.N. Doc. S/2003/497 (Apr. 18, 2003).

114. Report of Belize to the Counter-Terrorism Committee, at 3, U.N. Doc. S/2003/485 (Apr. 4, 2003).

115. Bascombe, *Anti Terrorism Legislation in the Commonwealth*, *supra* note 111, at 6.

116. See CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION 20–30 (2002) (providing further analysis of this definition and its dangers).

criticized the government.¹¹⁷ In Guyana, the anti-terrorism laws were used against a foreign newspaper while government ministers threatened the political opposition with being prosecuted as terrorists.¹¹⁸ The fact that an overbroad British definition swept through its former colonies using a neo-colonial structure lends further support to the view that even quite traditional imperial structures were at work as the Security Council resolution took effect.

Some non-democratic states seized on the Security Council requirement of having a criminal offense called “terrorism” to define terrorism by sweeping virtually all political dissent into the mix. Some of the states that had no known al Qaeda threats were among the most revealing from our international-law-as-imperial perspective.

Vietnam, for example, reported to the CTC in early 2003 that it was complying with Resolution 1373 because it had the following definition of terrorism in its penal code:

Article 84. Terrorism 1. Those who intend to oppose the people’s administration and infringe upon the life of officials, public employees or citizens shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment.¹¹⁹

Vietnam’s definition clearly blurs the search for terrorists with the condemnation of all political dissenters. And in fact, it was only a matter of time before the anti-terrorism laws were used to squelch political dissent. In 2012, U.S. citizen Nguyen Quoc Qua was detained and charged with terrorism for attempting to halt celebrations of the communist victory at the end of the Vietnam War. He had been arrested and jailed before on similar charges in 2008. In fact, as the Associated Press reported, “Hanoi often uses vague national security laws to charge pro-democracy activists with terrorism.”¹²⁰ But there is no sign that the CTC resisted Vietnam’s overbroad definition and, if anything, the CTC seemed to have encouraged Vietnam to broaden it still further.¹²¹

Brunei had also already criminalized terrorism before 9/11, as it dutifully

117. *Terrorism Charges Dropped Against Vanuatu Journalist*, ABC RADIO AUSTRALIA (May 8, 2013), <http://www.radioaustralia.net.au/international/2013-05-08/terrorism-charges-dropped-against-vanuatu-journalist/1127862>.

118. Bascombe, *Anti Terrorism Legislation in the Commonwealth*, *supra* note 111, at 6.

119. Supplementary Report of Vietnam to the Counter-Terrorism Committee, at 4, U.N. Doc. S/2003/128 (Jan. 14, 2003).

120. *See US Pro-Democracy Activist Accused of Terrorism in Vietnam*, FOX NEWS (Apr. 29, 2012), <http://www.foxnews.com/world/2012/04/29/us-pro-democracy-activist-accused-terrorism-in-vietnam/> (stating that Mr. Qua was arrested by Vietnamese authorities for allegedly planning to hold protests against commemoration of the communist victory in the Vietnam War).

121. The website for the CTC does not publish its responses to specific countries. We cannot know for certain, then, whether the CTC objected. Given Vietnam’s later reports, however, it does not appear that they were challenged in their broad definition of terrorism. Instead, the CTC apparently asked Vietnam to make sure to criminalize the activities of those who plotted to commit terrorist crimes abroad and not just at home. Second Supplementary Report of Vietnam to the Counter-Terrorism Committee, U.N. Doc. S/2003/1171 (Dec. 15, 2003).

reported to the CTC.¹²² According to the Internal Security Act of 1984, a terrorist is defined as “any person who . . . by the use of any firearm, explosive or ammunition acts in a manner prejudicial to public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order.”¹²³ As if that were not enough, however, Brunei expanded its definition of terrorism further in 2011, with the explicit rationale of complying with U.N. Security Council resolutions.¹²⁴ Brunei’s definition of terrorism also blends terrorism into general political dissent. While there have been no reports of abuse of the anti-terrorism laws specifically, Brunei’s dictatorial leader has plenty of repressive powers under the Sedition Act which he uses often to limit political freedoms.¹²⁵ But the anti-terror laws give him even more powers should he need them, courtesy of U.N. Security Council Resolution 1373.

Turkey, which has long faced a violent challenge posed by Kurdish separatists, introduced its primary anti-terrorism law in 1991. The definition of terrorism is broad:

Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.¹²⁶

After 9/11, in response to the Security Council resolutions, Turkey attached more consequences to this law without changing the definition, so that someone could not only be charged with a criminal offense under the law, but could also have his or her assets frozen or be punished for inciting terrorism.¹²⁷ After punishing thousands of politicians, activists, and journalists under the anti-terrorism laws,

122. Report of Brunei Darussalam to the Counter-Terrorism Committee, at 3–4, U.N. Doc. S/2002/682 (June 17, 2002).

123. Supplementary Report of Brunei Darussalam to the Counter-Terrorism Committee, at 4, U.N. Doc. S/2003/552 (May 19, 2003).

124. Syazwan Sadikin & Quratul-Ain Bandial Bandar Seri Begawan, *Gov’t Strengthens Anti-Terror Law*, THE BRUNEI TIMES (Aug. 2, 2011), <http://www.bt.com.bn/news-national/2011/08/02/govt-strengthens-anti-terror-law>.

125. U.S. DEP’T OF STATE, 2012 HUMAN RIGHTS REPORT: BRUNEI at 5–7, *available at* <http://www.state.gov/documents/organization/204398.pdf>.

126. Law on Fight Against Terrorism of Turkey (Act No. 3713/1991, as amended 1995, 1999, 2003, 2006, 2010), *available at* http://legislationline.org/download/action/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf; *see also* Law to Fight Terrorism (Act. No. 3713/1991), *available at* http://www.opbw.org/nat_imp/leg_reg/turkey/anti-terror.pdf (providing an alternative translation showing that the bulk of the amended definition still dates to the 1991 original law).

127. Wendy Zeldin, *Turkey; United Nations: Criticism of Anti-Terrorism Laws*, THE GLOBAL LEGAL MONITOR (Nov. 8, 2012), *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403397_text.

Turkey finally bent to E.U. pressure in the context of normalizing relations with its Kurdish minority, and in 2013 modified the law criminalizing incitement to terrorism to narrow its scope.¹²⁸ But most of the draconian anti-terrorism framework remains.

One of the P-5 “core” countries, China, has also used anti-terrorism laws to address problems that preceded 9/11 and were unrelated to the 9/11 attacks. In its first report to the Security Council’s CTC, China reported that it, too, had already covered key forms of terrorism in its criminal law before 2001.¹²⁹ As it noted, Article 249 of the Chinese Criminal Code punished the provocation of ethnic hatred and discrimination; Article 294 punished crimes of organizing, leading, or actively participating in a “criminal underworld organization;” and Article 300 dealt with “the use of superstitious sects, secret societies and evil religious organizations to sabotage the implementation of the law.”¹³⁰ The international community might be forgiven for thinking that China’s criminal law ran rather roughshod over religious groups and had an unnervingly vague sense of what constituted an “underworld criminal organization” even before 9/11. And the fact that China reported these sections of the criminal code as covering the offense of terrorism provides insight into China’s sense of the political threat posed by particular groups. Nonetheless, China amended its criminal code at the end of 2001 under the guise of compliance with Resolution 1373 to add a number of new offenses, including the offense of “endanger[ing] public security by causing fires, floods or explosions or disseminating poisonous or radioactive substances or contagious-disease pathogens or other dangerous means” (Article 114) and of leading “a terrorist organization” (Article 120).¹³¹ Though it is a country at the core rather than the periphery of the global security empire, China nonetheless found it convenient to use the excuse of 1373 to give the government more powers, particularly with regard to cracking down on the Muslim Uighur minority.¹³²

128. Reuters, *Turkey Passes Anti-terrorism Law Reform*, VOICE OF AMERICA (Apr. 12, 2013), available at <http://www.voanews.com/content/turkey-passes-anti-terrorism-law-reform/1640169.html>.

129. Report of China to the Counter-Terrorism Committee, at 7, U.N. Doc S/2001/1270 (Dec. 22, 2001).

130. *Id.*

131. Supplementary Report of China to the Counter-Terrorism Committee, at 3, U.N. Doc S/2001/1270/Add.1 (Dec. 30, 2001).

132.

[I]mmediately after the September 11 attacks on the United States, . . . [the Chinese government] asserted that opposition in Xinjiang [the Uighur Autonomous Region] was connected to international terrorism. They also asserted that in some cases the movement had connections to Osama bin Laden himself. China claimed that “Osama bin Laden and the Taliban in Afghanistan had provided the ‘Eastern Turkestan’ terrorist organizations with equipment and financial resources and trained their personnel,” and that one particular organization, the “Eastern Turkestan Islamic Movement” (ETIM) was a “major component of the terrorist network headed by Osama bin Laden.”

By October the Chinese Foreign Ministry spokesman declared that, as “a victim of international terrorism,” China hoped that “efforts to fight against East Turkestan terrorist

On the tenth anniversary of 9/11, an Associated Press review of the uses of the post-9/11 laws criminalizing terrorism found that only two countries accounted for half of the roughly 35,000 convictions for terrorism worldwide since 9/11.¹³³ Those two countries were China and Turkey.¹³⁴ What had started at the Security Council as a campaign against al Qaeda, then, quickly turned into mass repression against two Muslim minority groups by countries with their own agendas that were not connected to 9/11. In short, when the Security Council attempted to act like an empire and press a top-down campaign through diverse local settings, it got what empires usually get, which is diversion of the central edicts onto local agendas. An imperial press against al Qaeda and related groups turned into the mass repression of Kurds and Uighurs.

But it was not just countries whose constitutional-democratic status was questionable that took advantage of global security law to work on its own local agendas. Even core states in Europe were not immune from mission creep as the central focus of attacking al Qaeda eventually gave way to other more important local agendas. First, as might be expected, virtually all European countries beefed up their anti-terrorism laws to comply with the Security Council mandate. Then, those laws were used for other things.

For example, France toughened its already substantial anti-terrorism laws after 9/11. France already had a sweeping definition of terrorism on the books, one

forces should become a part of the international efforts and should also win support and understanding.”

On November 12, 2001, China told the U.N. Security Council that anti-state Uighur groups had links with the Taliban in Afghanistan and claimed that they were supported from abroad by radical Islamist organizations. Siding with the U.S. in the new “global war against terrorism,” the Chinese government initiated an active diplomatic and propaganda campaign against “East Turkestan terrorist forces.” This label was henceforth to be applied indiscriminately to any Uighur suspected of separatist activities. There has been no sign of any attempt by the Chinese authorities to distinguish between peaceful political activists, peaceful separatists, and those advocating or using violence.

Human Rights Watch, *Devastating Blows: Religious Repression of Uighur in Xinjiang*, 17 Human Rights Watch Series (C) Asia, No. 2, Apr. 2005, available at <http://www.hrw.org/reports/2005/china0405/china0405.pdf>.

133.

More than half the convictions came from two countries accused of using anti-terror laws to crack down on dissent, Turkey and China. Turkey alone accounted for a third of all convictions, with 12,897. The range of people in jail reflects the dozens of ways different countries define a terrorist. China has arrested more than 7,000 people under a definition that counts terrorism as one of Three Evils, along with separatism and extremism . . . Turkey passed new and stricter anti-terror laws in 2006. Convictions shot up from 273 in 2005 to 6,345 in 2009, the latest year available, according to data AP got through Turkey's right to information law.

Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, HUFFINGTON POST (Sept. 3, 2011, 4:10 PM), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html (The AP's survey covered sixty-six countries containing 70% of the world's population.).

134. *Id.*

that included not only ordinary crimes that were committed in order to provoke terror but also—unusual for Europe—criminal conspiracy to commit terrorism.¹³⁵ After 9/11, France instituted by an Act of 18 March 2003 a new offense of “pimping for terrorism.”¹³⁶ This offense can be charged against anyone who fails to substantiate the source of income that supports his or her lifestyle, when the government believes that the person’s associates are terrorists. The assumption behind the law is that those with no accountable means of support must have gotten their income from terrorist activity if they have terrorist friends. The offense does not require demonstration that the charged person him or herself has committed or planned to commit terrorist acts. Anyone in the vicinity of a suspected terrorist with suspicious amounts of money could be swept into this net. This new offense shows how very broadly some terrorism crimes were defined.

Similarly, while Austria’s 2001 report to the CTC indicated that it could surely punish all terrorist acts under its present penal code without difficulty even though there was no specific offense of terrorism, by 2003 Austria had amended its criminal code to specifically criminalize terrorism.¹³⁷ Belgium, too, started by reporting that it had no specific offense of terrorism on its books, but by its 2004 report it noted that it had enacted a law on terrorism that added terrorism offenses to the criminal code.¹³⁸

As the GWOT declined in public attention, however, anti-terrorism laws throughout Europe were deployed for new purposes, to the point where the latest Europol report on anti-terrorism efforts across the European Union devotes separate chapters to Islamist Terrorism, Ethno-Nationalist and Separatist Terrorism, Left-Wing and Anarchist Terrorism, Right-Wing Terrorism, and Single Issue Terrorism.¹³⁹ Clearly, over the last decade the focus of the post-9/11 anti-terrorism efforts has shifted to new threats farther away from the Security Council’s agenda, an agenda that had nothing to do with separatism, anarchism, or animal rights (one of the single-issue terrorisms).

In North America, as well, the post-9/11 anti-terrorism push from the Security Council met with broad definitions of terrorism and later expansion of those definitions to cover threats that were not what the Security Council had in mind. Canada criminalized terrorism for the first time after 9/11. Bill C-36 was rushed

135. Olivier Dutheillet De Lamothe, *French Legislation Against Terrorism: Constitutional Issues* (Nov. 2006), at 5, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/constitutionalterrism.pdf.

136. Fourth Supplementary Report of France to the Counter-Terrorism Committee, at 16, U.N. Doc S/2004/226 (Mar. 29, 2004).

137. Report of Austria to the Counter-Terrorism Committee, at 7, U.N. Doc S/2001/1242 (Dec. 26, 2001); Additional Information by Austria to the Counter-Terrorism Committee, at 1, U.N. Doc S/2002/969 (Aug. 29, 2002); Additional Information by Austria to the Counter-Terrorism Committee, at 3, U.N. Doc S/2003/276 (Mar. 6, 2003).

138. Fourth Report of Belgium to the Counter-Terrorism Committee, at 6, U.N. Doc S/2004/993 (Dec 22, 2004).

139. Europol, *TE-SAT 2010: EU Terrorism, Situation and Trend Report*, at 3 (2010), available at www.consilium.europa.eu/uedocs/cmsUpload/TE-SAT%202010.pdf.

through the Canadian Parliament to meet the deadline set by Resolution 1373.¹⁴⁰ While the new definition of terrorism limited the offense of terrorism to a specific list of crimes, making the set of activities covered by terrorism more clearly defined than in other countries we have seen, the law created an offense of terrorism that required proof that the act was carried out “in whole or in part for a political, religious or ideological purpose, objective or cause.”¹⁴¹ As Kent Roach has argued, proof of motive is not customarily required in criminal law in Canada and criminalizing motive poses a very real danger of infringing the very political, religious, or ideological beliefs that would otherwise be protected as matters of individual conscience or as subjects for free expression.¹⁴² Also, the very breadth of the sweep of “motive” gives substantial prosecutorial discretion to the government, particularly since the bill had created several new worrisome changes in the law. Canada’s anti-terrorism framework now includes the establishment of investigative hearings in which those implicated in terrorism investigations can be compelled to testify about what they know and it also permits the preventive detention of suspected terrorists.

While most uses of the anti-terrorism laws in Canada have in fact targeted al Qaeda-connected individuals and groups, it is clear that the Canadian Security and Intelligence Service (CSIS) also sees other threats. By 2013, the top-listed terrorism threats to Canada were listed on the CSIS website as coming from animal rights groups and white supremacists. As CSIS explains on its website:

Although Canada has not often been targeted specifically for a terrorist attack, it is vulnerable to terrorism for the following reasons: Extremists from environmental and animal-rights groups are willing to use dangerous and violent tactics in the fight for their cause (for example, extremists have engaged in arson attacks, tree spiking and spraying of noxious substances in public places so as to forestall logging operations; animal-rights extremists have mailed pipe bombs and letters containing razor blades tainted with poisonous substances to scientists and taxidermists, and hunting outfitters have publicized threats of poisoned food supplies). White supremacists have been aggressively opposing the immigration policies of the Canadian government and have used violent rhetoric against the Jewish community.¹⁴³

In short, anti-terrorism measures in Canada do not just apply to the threat that the Security Council had in mind, even if the anti-terrorism laws were passed in response to the Security Council mandate.

The United States, which has remained perhaps most diligently fixated on the al Qaeda threat, has faltered in the use of criminal law to prosecute terrorists. A comprehensive study by the Center for Law and Security at NYU Law School found that in the first ten years after 9/11, there were 578 prosecutions of “jihadist

140. KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA 67 (2003).

141. Anti-Terrorism Act, S.C. 2001, c. 36, 83.01(1)(b)(i)(A) (Can.).

142. ROACH, *supra* note 140, at 25–28.

143. Canadian Security and Intelligence Service, *Examples of Terrorist Threats to Canada*, <http://www.csis-scrs.gc.ca/prts/trrrsm/xmpls-eng.asp> (last visited Sept. 1, 2013).

defendants” under many different statutes.¹⁴⁴ But over that span, there were also about 500 terrorism prosecutions of defendants who had nothing to do with 9/11-connected terrorism.¹⁴⁵ Each study of terrorism prosecutions comes up with different statistics. A 2009 study by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University found that different U.S. federal agencies had different definitions of terrorism, which made it nearly impossible to sort out whether those who were thought by one agency to be terrorists were pursued as such by another.¹⁴⁶ On the FBI’s website listing the ten most wanted terrorists in September 2013, one, Joanne Chesimard, was a member of the Black Liberation Army and another, Daniel Andreas San Diego, was affiliated with extremist animal rights groups.¹⁴⁷ The remaining eight were affiliated with Islamic extremism, though one, Husayn Muhammad Al-Umari, is wanted for his participation in the bombing of Pan Am Flight 830 in 1982.¹⁴⁸ In short, even in the United States, terrorism offenses are frequently charged against those who have nothing to do with 9/11.

Even though the Security Council required all Member States of the United Nations to criminalize terrorism, there are large parts of the world where al Qaeda neither has been, nor will likely be, a presence.¹⁴⁹ And some of those states attempted to push back. Mexico, for example, had no serious threat from global terrorism, so it indicated in its first report to the CTC in 2001 that it could clearly handle all crimes that might amount to terrorism within its current criminal code without explicitly calling terrorism a crime as such, especially if one took into

144. CENTER FOR LAW AND SECURITY, NEW YORK UNIVERSITY SCHOOL OF LAW, TEN YEARS LATER: TERRORIST TRIAL REPORT CARD (2011), at 7, available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>.

145. See *id.* (indicating that the analyses in the report do not incorporate data from the nearly 500 terror cases without a link to jihadist crimes, such as violence by far right wing paramilitary terror groups).

146.

Eight years after 9/11, federal agencies can't seem to agree on who is a terrorist and who is not. The failure has potentially serious implications, weakening efforts to use the criminal law to combat terrorism and at the same time undermining civil liberties. Evidence of this surprising lapse has emerged from extensive analyses by the Transactional Records Access Clearinghouse (TRAC) of many thousands of records obtained from the federal courts and from two agencies in the Justice Department.

Even for the government terrorism investigations that ultimately led to an actual prosecution for what often appeared to be serious crimes, TRAC found that the federal agencies differ markedly about who was labeled a terrorist and who was not.

Transactional Records Access Clearinghouse, *Who Is A Terrorist? Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk* (2009), available at <http://trac.syr.edu/tracreports/terrorism/215/>.

147. Federal Bureau of Investigation, *Wanted by the FBI*, http://www.fbi.gov/wanted/wanted_terrorists (last visited Sept. 2, 2013).

148. *Id.*

149. See Mark P. Sullivan & June S. Beittel, *Latin America: Terrorism Issues*, CONG. RES. SERV. (July 11, 2013), available at <http://www.hsdl.org/?view&did=741239>.

account the provisions for conspiracy, aiding and abetting, and criminal association.¹⁵⁰ But since Mexico was one of those few countries that reported the CTC questions along with its answers in its later reports, we can see that the CTC specifically pressed Mexico to criminalize “recruitment for the purposes of carrying out terrorist acts regardless of whether such acts have actually been committed or attempted.”¹⁵¹ Mexico responded that such people could be punished as accomplices under the current penal code.¹⁵²

By the time of the 2003 CTC report, however, Mexico reported having criminalized the recruitment of members to terrorist groups.¹⁵³ It also added the new offenses of threats to commit terrorism, conspiracy to commit terrorism, and the concealment of terrorist activities.¹⁵⁴ This appears to be as clear an indication as any that Mexico was pressured by the CTC to do this. We can also see in the CTC reports from Mexico that, in direct response to CTC request, Mexico changed the minimum sentence for a terrorism offense from two years to eighteen years.¹⁵⁵ Mexico has been under substantial pressure to beef up its border security with the United States to keep U.S.-aimed terrorists away.¹⁵⁶ In the meantime, however, Mexico has been using its anti-terrorism laws to pursue gang violence or other quite unrelated offenses.¹⁵⁷

One can see the difficulty with “contracting out” definitions of terrorism, as it were. Countries given the encouragement to define terrorism in their own ways invariably connect the global instructions with local realities on the ground. While many states did in fact use their post-9/11 terrorism laws to go after the threats that the Security Council wanted them to address, most added to the list other terrorist threats of peculiar interest to them. Some focused on different threats entirely.

So far as anyone can tell from the CTC’s reaction,¹⁵⁸ it has not condemned

150. Report of Mexico to the Counter-Terrorism Committee, at 4, U.N. Doc S/2001/1254 (Dec. 27, 2001).

151. Second Report of Mexico to the Counter-Terrorism Committee, at 10, U.N. Doc S/2002/877 (Aug. 1, 2002).

152. *Id.*

153. Third Report of Mexico to the Counter-Terrorism Committee, at 5–6, U.N. Doc S/2003/869 (Sept. 10, 2003).

154. *Id.*

155. Second Report of Mexico to Counter-Terrorism Committee, *supra* note 151, at 16.

156. Deroy Murdock, *The Southern Border: Our Welcome Mat for Terrorists*, NAT. REV. (Apr. 25, 2013), available at <http://www.nationalreview.com/article/346591/southern-border-our-welcome-mat-terrorists>.

157. *Mexico Deploys 1,500 Troops After ‘Terrorist’ Casino Attack*, CNN (Aug. 27, 2011), <http://www.cnn.com/2011/WORLD/americas/08/27/mexico.attack/index.html>; *Terrorism Charges for 2 in Mexico Who Spread Attack Rumor on Twitter, Facebook*, LA TIMES BLOG (Sept. 1, 2011), <http://latimesblogs.latimes.com/laplaza/2011/09/twitter-tweets-veracruz-mexico-terrorism-drug-war-censorship-rumors.html>.

158. The CTC reviews each country report individually and writes specific questions back to the country at issue. Sometimes it is possible to see what the CTC asked because the country organizes its next report in the order of the numbered questions it received from the CTC, which it reproduces in its report. But while the CTC posts country reports on its website, it does not post its own questions on the website, so it is impossible to tell how harsh the CTC is with countries

broad definitions even when they have overreached the Security Council's purpose and threatened fundamental rights. Nor did the Security Council assess whether a country experienced a real threat from 9/11-related terrorism before it pushed the country to adopt anti-terrorism laws that might be used against other targets. In addition, in the early years when most states were actually drafting their laws, the CTC seems not to have considered a state's human rights obligations or its human rights record before urging it to comply with Resolution 1373.¹⁵⁹

Resolution 1373 clearly pushed a number of countries to criminalize terrorism that otherwise would not have done so. But many of these laws were never aimed at and never in fact aided in the global control of the sorts of threats that led to 9/11. Instead, the CTC seems to have placed its international imprimatur on definitions of terrorism that swept up political dissidents, ordinary religious practitioners, and those who simply hung around with suspicious people, along with those who might actually commit heinous terrorist acts but for completely different reasons. Resolution 1373 might have required all countries to criminalize terrorism, but the variety of definitions indicates that Resolution 1373 did not succeed in installing a common framework for fighting terrorism. Instead, the global mandate dissolved into a series of local agendas, justified back to the center as responses to an international directive.

Against this background of local agendas, we can then understand why some countries reacted so strongly to the mandate given by the Security Council's response to 9/11. They may have used the opportunity to criminalize terrorism—or to further entrench or expand their preexisting definition of terrorism—to bring the prosecution of politically tinged crimes within an ambitious national executive's reach. But framed as a compliant response to Resolution 1373, these laws were able to get a break from international criticism and they may even have generated international praise. Not all countries have used their laws to go after the political opposition and expand the discretionary powers of national executives, of course. But when we see what happened in light of what we know about historical empires and how they have functioned, then we can understand how compliance with commands from the center was motivated by many things other than sharing the center's agendas.

V. THE NEW SECURITY EMPIRE

The new international legal framework developed since 9/11 enables control of the periphery by the center as did earlier empires. But, as we know now from post-colonial studies, all empires are precarious because commands from the center are interpreted and used for different purposes at the periphery. In addition,

that use the anti-terrorism campaign for purposes that are not those of the CTC.

159. See Counter-Terrorism Committee, *Protecting Human Rights While Countering Terrorism*, (Oct. 17, 2011, 11:45 AM), <http://www.un.org/en/sc/ctc/rights.html> (describing the history of CTC's engagement with human rights). From this site, one can see that the first "policy guidance" document that urged states to pay attention to their international obligations to protect human rights was not issued until 2006.

compliance with a common program may occur alongside the provision of side benefits for local leaders who carry out central mandates. Empires rest on the guarantee that imperial power will be exercised in ways that benefit powerful locals so that they continue to support the center. This often involves the transfer of resources from the center outward to reward local leaders and give them the wherewithal to do the job asked of them. The approval (or license) by the center of what is happening at the periphery is given in exchange for the production and transfer of other scarce resources—in this case, crackdowns on terrorists—from the periphery back to the core. The new security empire has much in common with the old empire of material extraction, except now the center provides material support and legitimation of local governments in exchange for those governments acting to search out and disable terrorists. In exchange, the local governments are allowed to use the legal resources created to fight terrorism for their own, quite different, purposes as well.

As with the old-fashioned system of imperial control, the new international law links powerful and less powerful states in a global embrace to accomplish ends dictated in large measure by the powerful states, but with local agendas adapting the central mandates for local purposes. Because local leaders had their own agendas when they joined the international anti-terrorism campaign after 9/11, the new imperial reach—like the old one—ended in an only partial grasp. Not only do states at the global periphery escape full control by the center but, in addition, states at the global center use the powers they get from managing the empire for unrelated purposes of their own as well. The global anti-terror campaign pulled both powerful and powerless states together and gave to each one a set of repressive new tools to use. These tools were particularly helpful to domestic national executives because they typically control the police, military, and security services whose powers have been bolstered in the anti-terrorism campaign. And that may be precisely why leaders around the world were so eager to sign on.

The new system of imperial control, however, hides the hands of influence more effectively than in previous imperial formations. In the vast majority of states that changed their laws after 9/11 to fit this new legal frame, it was not apparent to much of their populations that the domestic legal changes were made in concert with an internationally coordinated campaign or that those changes were evidence that a particular state was going along with international demands. Instead, these domestic legal changes were often generated by local campaigns of fear, portrayed as crucial for domestic national—often nationalistic—security and offered as examples of heightened sovereignty of nation-states. Moreover, insofar as Security Council resolutions require the veto-bearing members to go along with the new campaign on terrorism, this gave particularly sweet opportunities for states with seats on the Council to take extra benefits for themselves.¹⁶⁰

160. For example, a brutal terrorist attack was launched against a school in Beslan, North Ossetia in Russia in 2004 in which 300 people died, half of them children. See Peter Baker & Susan B. Glasser, *Russia School Siege Ends in Carnage: Hundreds Die As Troops Battle Hostage Takers*, WASH. POST (Sept. 4, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A58381-2004Sep3.html>. Following the attack, Russia went to the Security Council to

As with the old imperial formations, however, the new global security law operates primarily by permitting strong states to shape the content of the internal legal systems of weak states, which facilitates the peripheral regimes doing the jobs they have been delegated. In the new empire, international institutions have given all states marching orders (or license) about how to change their domestic laws to combat terrorism. States have complied with these new international mandates at a quite astonishing rate, but that is at least in part because the domestic executives who have pushed the changes at home often themselves have something to gain quite directly in terms of enhanced power and room to maneuver, just as old colonial elites often stood to gain personally and institutionally from being the enforcers of colonial law.

The new international law requires all states to take radical steps to criminalize terrorism, curb terrorist threats at home, and to act as barriers to the transnational flows of people and money involved in terrorism. Not surprisingly, these domestic actions have had repressive effects on particular domestic populations at both center and periphery as well as on the expression of political dissent and on the budding constitutional structures of rights protection in many states. Traditional empires involved the repression of far-flung populations directly at the behest of a core of powerful states and, in this respect, the new empire is surprisingly like the old. But there is an important difference. The states that are swept up in this new form of empire never lose their sovereignty, and in fact, may not appear to be acting in concert with the core imperial states at all. The new empire is managed through international law and that means both that the agents behind the new empire appear only as the “international community” and that the compliant states in this new empire appear only to be “following the law” as a sovereign state. This new international order permits states to use the new mandates of international law for their own domestic repressive purposes, as long as they comply enough to provide what the center wants. As we saw with more traditional empires, “[c]olonial regimes were neither monolithic nor omnipotent. Closer investigation reveals competing agendas for using power, competing strategies for maintaining control, and doubts about the legitimacy of the venture.”¹⁶¹

get a counter-terrorism resolution of its own, which it was well-positioned to do as one of the P-5. Resolution 1566, passed on Oct. 4, 2004, called upon Member States to extradite any person who had facilitated terrorist acts of any kind. S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004). Given that Russia believed that Chechen nationalists who had plotted these attacks had been given refuge in Western Europe, the resolution was seen in Russia as a victory for their domestic fight against terrorism. Moreover, the resolution constituted a new committee of the Security Council with the mandate to consider expanding the terrorism watch list of the U.N. Sanctions Committee to go beyond al Qaeda and Taliban members, the groups to whom sanctions had previously been limited. While no Chechen or other Caucasian groups have been listed as eligible for targeted sanctions since this resolution was passed, Russia clearly wanted the ability to argue that Chechen fighters should be part of the United Nations’ campaign against terror. And China most likely voted for this resolution hoping to separately list its Uighur groups when the set of international terrorists expanded.

161. Frederick Cooper & Ann Laura Stoler, *Between Metropole and Colony*, in TENSIONS

Writing about the Security Council in the 1990s, during that window between the end of the Cold War and the start of the GWOT, when it seemed like the Security Council would become the international arbiter of armed conflict, Martti Koskenniemi could not have known how literally true his statement about the imperial power at the core of security law would become.