

January 2007

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### Recommended Citation

Mohamed R. Hassanien, International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective, 36 Denv. J. Int'l L. & Pol'y 221 (2007).

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## International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective

### Keywords

International Law: History, Terrorism, International Trade, Military Law, War

**INTERNATIONAL LAW FIGHTS TERRORISM IN THE  
MUSLIM WORLD:  
A MIDDLE EASTERN PERSPECTIVE**

MOHAMED R. HASSANIEN\*

INTRODUCTION

The September 11 terrorist attacks ignited global interest in the Muslim world;<sup>1</sup> hence the region has become a primary concern for the international community, with national security bolted to the forefront of the American foreign policy and that of the rest of the world as well.<sup>2</sup> Six years after the attacks on New York, Pennsylvania and Washington DC, the American perspective has been the prevailing one in most of the writings about International law and terrorism. However, the Middle Eastern approach toward international terrorism needs to be explored carefully in light of the globalization that is taking place everywhere.

The Muslim world – in the post-September 11 era – has been the scene for major American operations whether in Afghanistan or Iraq.<sup>3</sup> Consequently, Muslims consider the U.S. to be the major threat to them.<sup>4</sup> The populace in the Middle East contemplates the invasion of Iraq, Afghanistan and the current tension between Iran and U.S. as major reasons to root in rather than uproot terrorism in the Middle East. After almost four years of the war on Iraq, international terrorism has proven to be a pervasive and unconventional enemy, making it evident that the use of force is no longer the most effective tool in combating it. Free trade,

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1. Tarik M. Yousef, *Development, Growth and Policy Reform in the Middle East and North Africa 2* (2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=594621](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594621); see also Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161, 179 (2006).

2. See Maxwell O. Chibundu, *Commentary, For God, For Country, For Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 892-898 (2004); Tung Yin, *The Impact of the 9/11 Attacks on National Security Law Casebooks*, 19 ST. THOMAS L. REV. 157, 160, 162 (2006).

3. Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299, 300-301 (2006).

4. P.W. SINGER, *THE 9-11 WAR PLUS 5: LOOKING BACK AND LOOKING FORWARD AT U.S.-ISLAMIC WORLD RELATIONS 2* (Brookings Project on U.S. Relations with the Islamic World Analysis Paper No. 10, 2006), available at [http://www.brookings.edu/papers/2006/09islamicworld\\_singer.aspx](http://www.brookings.edu/papers/2006/09islamicworld_singer.aspx).

economic development, strengthening international law and engaging the Muslim world could equally solve the problem. These tools have to be considered in the American portfolio of combating international terrorism.

America, as a global power, has to realize that engaging other parts of the world, including the Muslim world, in the war on terror is a must. International terrorism has two sides;<sup>5</sup> Shibley Telhami described the terrorism phenomena as having two sides, the first is the demand side, where international trade law could be relevant.<sup>6</sup> As free trade agreements are more than liberalizing certain markets, they have a lot of economic and political ramifications that may defuse the causes of terrorism in the Middle East. However, this paper does not propose that free trade is the ultimate solution for terrorism in the Middle East, but rather suggests that free trade is one of the tools that may provide a way out of the problems that besiege the region. But it would be meaningless or even harmful if it is not accompanied with political reform in the region.<sup>7</sup> The strengthening of international treaty law, the law of armed conflict, and engaging the Muslim world in the fight against terrorism can also help combat the supply side of terrorism.

This paper presents a Middle Eastern perspective for what may be the best course in the global war on terrorism. Part one illustrates the reasons why terrorism is more prevalent in Middle East now and the stance of Islam on terrorism. The second part explores the role of free trade in the development of the Middle East, applying the case-study of the Middle East Free Trade initiative (MEFTA) and highlighting the major developments of this initiative and the current challenges and opportunities awaiting countries in this region. Part three is devoted to exploring the norms embodied in international law which relate to international terrorism, and how the U.S. and the Muslim world could jointly work toward improving the stance of international law norms on terrorism.

#### I. TERRORISM IN THE MIDDLE EAST

Two polarized approaches compete in the debate on the causes of terrorism in the Middle East.<sup>8</sup> The first one focuses on the root causes, which are simply: poverty, ignorance, and lack of political expression, which create a breeding ground for terrorist groups. Consequently this approach calls for a certain set of priorities in dealing with terrorism, which are political, social and economic development in the Islamic world. This theory is called the *demand side* of terrorism.<sup>9</sup> The second approach denies any economic-socio reasons for terrorist attacks; it rather presents the threat as a mere security issue, and dealing with this

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5. Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L L.J. 581, 586-87 (2002).

6. *Id.* The demand-side of terrorism means terrorist organizations, regardless of their aims, that need to recruit willing members, raise funds, and appeal to public opinion in pursuit of their political objectives. The supply-side of terrorism is the product of organized groups that could be confronted and destroyed, without regard to their aims or to the reasons that they succeed in recruiting many willing members.

7. John L. Esposito, *Political Islam and U.S. Foreign Policy*, 20 FLETCHER F. WORLD AFF. 119, 126, 130, 132 (1996).

8. SINGER, *supra* note 4, at 4.

9. Telhami, *supra* note 5, at 586-87.

would invoke intelligence, protection and coercive action.<sup>10</sup> This is the *supply side*.<sup>11</sup> Proponents of the first approach argue that the U.S. is trying to combat an ideology -created in intense poverty and in a desperate environment- by using military force. Ideology can only be defeated by a similar or stronger ideology and by eliminating all the conditions where violent ideology grows. Proponents of the second approach explain that September 11 hailed primarily from an either upper or middle/well connected class in their countries.

In this article, I propose that terrorism with its two sides (demand and supply) should be tackled in international law. The first part will uncover the political and economic situations in the Middle East, and how the U.S. and Muslim World perceive each other. It will provide an analysis of how Islamic law could be useful in the war on terrorism.

#### *A. Politico-Economic Conditions in the Middle East*

A complete understanding of why terrorism has a fertile environment in the Middle East cannot take place without taking into account the political and economic framework of the countries in this region. The cultural and the historical development of the Middle East should be highlighted as well. In his article, *Origins of Terrorism*, Herbert Kitschelt described The Middle East as a region which “appears to be trapped in a vicious circle of low growth, bad institutions of governance, and resistance to economic globalization.”<sup>12</sup> President Bush in the 20<sup>th</sup> anniversary of the National Endowment of Democracy, announced that “[i]n many Middle Eastern countries, poverty is deep and it is spreading, women lack rights and are denied schooling. Whole societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines.”<sup>13</sup>

Countries in the Middle East are suffering from daunting challenges; the ability to absorb the labor force, creating jobs and the increasingly competitive nature of the global economy, particularly China, India and the Philippines,<sup>14</sup> low levels of foreign direct investment (FDI), lack of technology, industrial incompetence, high levels of government investment and ownership, and the high costs of doing business.<sup>15</sup> After the oil boom in the 1970s, the Middle East economies shifted from diverse agricultural and textile markets to single commodity exporters. Great optimism marked the economies of the Middle East in

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10. SINGER, *supra* note 4, at 4.

11. Telhami, *supra* note 5, at 586-87.

12. Herbert Kitschelt, *Origins of International Terrorism in the Middle East*, INTERNATIONALE POLITIK UND GESELLSCHAFT [INTERNATIONAL POLITICS AND SOCIETY], Vol. 1 2004, at 159, 163.

13. George W. Bush, U.S. President, Remarks by the President at the 20th Anniversary of the National Endowment for Democracy (Nov. 6, 2003), <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>.

14. MARCUS NOLAND & HOWARD PACK, THE ARAB ECONOMIES IN A CHANGING WORLD 19, 46, 48, 102-103 (2007).

15. *Id.* at 175, 177, 179, 181; Paul G. Johnson, *Shoring U.S. National Security and Encouraging Economic Reform in the Middle East: Advocating Free Trade with Egypt*, 15 MINN. J. INT'L L. 457, 459 (2006); Yousef, *supra* note 1, at 11, 20, 21, 23.

the early 1990s because gulf war ended, the Madrid conference brought Israelis and Palestinians together for the first time, and countries in the region started to adopt IMF and World Bank recommendations.<sup>16</sup> Tarek Yousef reasoned why political leaders in the region have been reluctant reformers despite the region's potential. It was obvious to the elite that pursuing economic and political reforms simultaneously threatened the existing political order.<sup>17</sup> He argued that as a result, top down management of economic reform replaced earlier efforts to generate support for economic reform by opening the political arena.<sup>18</sup> Jonathan Macey and Ian Ayres argued that the true stumbling block to economic reform in the Middle East is a divergence between the incentives of rulers and entrenched elites and the interests of potential entrepreneurs. Economic liberalization will have a democratizing effect, thus threatening the political and economic insiders.<sup>19</sup>

On the political scene, highly undemocratic and stable regimes exist at the same time.<sup>20</sup> For instance, the Arab world is unique in the prevalence of long lived, undemocratic regimes consisting largely of monarchies.<sup>21</sup> Islam with its principles of Tauheed, consultations, Ijma and Ijtehad,<sup>1</sup> possesses a strong pluralistic tradition. However, leaders in the Muslim world are disinclined to embody these ideas and principles in their political structure.<sup>22</sup> On the ground, authoritarian governments predominate in the Muslim world; moreover, most regimes in the region are apt to corruption, patronage, and clientalism.<sup>23</sup> There is no accountability of public authorities and they remain, in large part, unresponsive if not incompetent to meet public needs.<sup>24</sup> Governments in the region have used and will continue to use their talent for the co-optation of potential political opposition to consolidate their authority.<sup>25</sup> Consistently ranked among the worst regimes in the world in their refusal to uphold their citizens' political freedoms, human rights, and civil liberties, the authoritarians in this region are quite effective at clamping down on both secular and liberal opposition and Islamist groups.<sup>26</sup> Most governments in the Middle East believe in risk free democracy;<sup>27</sup> they organize

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16. Yousef, *supra* note 1, at 2.

17. *Id.* at 29.

18. *Id.*

19. Ian Ayres & Jonathan R. Macey, *Institutional and Evolutionary Failure and Economic Development in the Middle East*, 30 YALE J. INT'L L. 397, 411, 413 (2005).

20. MARCUS NOLAND, EXPLAINING MIDDLE EASTERN AUTHORITARIANISM 2 (Peterson Inst. for Int'l Econ. Working Paper No. WP 05-5, 2005), available at <http://www.iie.com/publications/interstitial.cfm?ResearchID=523>.

21. NOLAND & PACK, *supra* note 14, at 273.

22. Tassaduq Hussain Jillani, *Democracy and Islam: An Odyssey in Braving the Twenty-First Century*, 2006 BYU L. Rev. 727, 744-45 (2006).

23. See NOLAND, *supra* note 20, at 5.

24. SINGER, *supra* note 4, at 8.

25. DAVID M. MEDNICOFF, LEGALISM SANS FRONTIÈRES? U.S. RULE-OF-LAW AID IN THE ARAB WORLD 12 (Carnegie Endowment for Int'l Peace, Rule of Law Series No. 61, 2005), available at <http://www.carnegieendowment.org/files/CP61.Mednicoff.FINAL.pdf>.

26. See Ayres & Macey, *supra* note 19, at 416-17; Esposito, *supra* note 7, at 124, 125, 127; SINGER, *supra* note 4, at 8.

27. Esposito, *supra* note 7, at 124.

elections that they are not going to lose. In terms of rule of law, governments are reluctant to facilitate rule of law projects that foster real political liberalization.<sup>28</sup> When it comes to economic development, the ruling elites rationally oppose economic development because it would lead to social changes that may threaten their hold on power. Unlike developed countries, slow economic growth is compatible with the rational self interest of the leaders in the region; growth would alter the balance of power between the rulers and potential rival coalitions and increase the probability of political change.<sup>29</sup> Muslims' influence was increasingly diminished in the sixteenth century. Continuous defeats at the hands of Christian Spanish isolated Muslims from society or turned them into slaves to Christians. As the eighteenth century came to a close, Islamic civilization eclipsed.<sup>30</sup>

The breakdown of the Othman Empire brought about independent Muslim states administered by corrupt and inefficient national regimes, which were frequently subservient to the prior colonial powers or to the new neo-imperial power, the U.S. Muslim masses were oppressed by foreign powers, and continue to suffer at the hands of their own leaders, which has worsened their grievances.<sup>31</sup>

In a speech before leaving office, Bill Clinton mentioned: "we have seen how abject poverty accelerates conflict, how it creates recruits for terrorists and those who incite ethnic and religious hatred, [and] how it fuels a violent rejection of the economic and social order on which our future depends."<sup>32</sup> His words are more significant now than at any other time.<sup>33</sup>

Peter Singer,<sup>34</sup> a senior fellow at the Brookings Institute, mentioned that "[the] combination of human development gaps and broken regimes goes a long way in explaining both the failing environment in which radicals thrive and the pool of simmering anger they are able to tap into."<sup>35</sup> As an Egyptian who grew up in the Middle East, I believe that strong economic and political reform would also go a long way in uprooting the causes of terrorism in this region. Free trade agreements, with their overreaching coverage, could be one of the tools used to reform the Middle East. Suggesting that economic opportunity is part and parcel of the war on terrorism, Kevin Fandl of George Mason proposes a comprehensive development program<sup>36</sup> that addresses legal, social, and economic concerns, which some scholars believe are more needed than military operations.<sup>37</sup>

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28. See MEDNICOFF, *supra* note 25, at 15.

29. Ayres & Macey, *supra* note 19, at 417, 422.

30. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT'L L., 119, 142 (2007).

31. *Id.*

32. Kevin J. Fandl, Critical Essay, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 597 (2004).

33. *See id.*

34. Peter Singer is Senior Fellow and Director of the 21st Century Initiative at the Brookings Institute; between 2001-2006, he was the founding director of the Project on U.S. Relations with the Islamic World. SINGER, *supra* note 4, at v.

35. *Id.* at 8.

36. Fandl, *supra* note 32, at 593.

37. *Id.* at 602.

*B. How Middle Easterners Perceive the U.S.?*

In the aftermath of September 11, in response to a question about why people in the Middle East hate America, President Bush said, "they hate what see right here in this chamber, a democratically elected government... they hate our freedoms, our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."<sup>38</sup> Bush's analysis leads us to the conclusion that cultural dissonance is the driving force behind the attacks on America.<sup>39</sup> John Quigley wrote an excellent comment to this effect. In his article, he argued that the current administration failed to analyze the reasons of this attack. Moreover, he suggested U.S. foreign policy in the Middle East is the "but for" cause of these attacks.<sup>40</sup> Arunabha Bhoomik also criticized U.S. policy of employing war mentality to combat terrorism. He suggested that the U.S. government look into the root causes of terrorism.<sup>41</sup> The miscalculations in U.S. policies are reciprocated by:

[A] seemingly endless supply of recruits to Anti-American causes, unsurprisingly these miscalculations include 1) support for repressive regimes in the Middle East, including Saudi Arabia, Egypt, Morocco and Jordan. 2) unconditional U.S. support for Israel, and 3) indifference to the plight of Muslims in Chechnya, Kashmir, and the Balkans. The war on terror, including the invasion of Iraq in spring 2003, has given more grounds to the anti-American cause.<sup>42</sup>

As a Middle Easterner, Americans would find it surprising to hear that antipathy toward the U.S. and the west in general, does not flow from cultural dissonance. It is based not on who Americans are perceived to be but on what Americans are perceived to do. Muslims in the Middle East have a favorable view of the American educational system, form of government, U.S. freedom and democracy. Yet when it comes to U.S. policy in the region, the same people have a very negative opinion. Consequently, antipathy towards western norms and civilization does not emanate from religious or cultural reasons but rather a response to perceptions and judgments regarding U.S. policy in the Middle East.<sup>43</sup>

The West, in general, is perceived by the people of the Middle East as colonizers who want to exercise dominance over other developing countries.<sup>44</sup>

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38. President George W. Bush, Address on Terrorism before a joint meeting of congress, (September 21, 2001) available at <http://query.nytimes.com/gst/fullpage.html?res=9405EEDC1E3BF932A1575AC0A9679C8B63&sec=&spon=&pagewanted=2>.

39. See e.g., John Quigley, *International law violations by the United States in the Middle East as a factor behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 817 (2002).

40. *Id.* at 816.

41. Arunabha Bhoomik, *Democratic Responses To Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J. INT'L L. & POL'Y 285, 286 (2005).

42. *Id.* at 344.

43. Mark Tessler, *Arab and Muslim Political Attitudes: Stereotypes and Evidence from Survey Research*, 4 INT'L STUDIES PERSPECTIVES 175, 180 (2003).

44. Fandl, *supra* note 32, at 630.



Dropping an arsenal of bombs on these countries will only exacerbate the situation and reinforce the stereotype, which has been drawn by the people in this region during the imperialism era. The continuing war in Iraq has given more grounds to terrorist organizations. Huge majorities in the Muslim world are aware of the abuses at Abu Gharib and Guantanamo Bay.<sup>45</sup> Moreover, every student coming from the Muslim world to study in the United States has a nightmare that he/she may be held over in Guantanamo if the intelligence in the United States confuses him/her with a terrorist. The U.S. faces a difficult path in repairing its standing in the Muslim world.

Radicalization of a substantial part of Middle Eastern policy is attributed to stagnated economic and social programs coupled with a lack of political liberties, "including antipathy toward U.S. policies - which are widely perceived as the main source of support for the oppressive regimes in the region."<sup>46</sup> Five years into the war in Iraq, by and large, the U.S. has failed in this cold war of ideology: a growing number of Muslims embrace extremist views that could ultimately lead to increased terrorism. U.S. foreign policy is in a dilemma. For decades stability was the top priority in the United States' agenda towards the Middle East; however, the support for stability in the region came at greater costs to the U.S. Stability was not a cost free strategy, the cost was paid by un-free Middle Eastern people and bad democratic governance.<sup>47</sup>

Intellectuals remain at best very skeptical of U.S. intentions in the region, Mohamed Selim Elawa,<sup>48</sup> a well known Egyptian lawyer and columnist, harshly criticized the U.S. initiative in the Middle East and attributed all the mischief in the region to two things: the penetration of Americans in the region and the brutal and dictatorship regimes that continue to control the middle east.<sup>49</sup> In terms of the general populace, the most popular movie in Egypt, the largest country in the region, was "The night Baghdad fell," a black comedy that describes an American invasion of Egypt.<sup>50</sup> And in Turkey, a strong ally to the U.S., the movie "Valley of the Wolves," which fantasizes about Turkish troops inflicting revenge upon evil American troops after they bombed a mosque and shot up a wedding, was well received by the Turkish public.<sup>51</sup>

As America continues its policies of supporting corrupt and inefficient regimes in the Muslim world, blindly supporting Israel, even against the Palestinians' most elementary rights, popular anger and frustration boils over throughout the Muslim world.<sup>52</sup> To some among the downtrodden masses,

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45. Singer, *supra* note 4, at 18.

46. Khairi Abaza, *Political Islam and Regime survival in Egypt*, Policy Focus No. 51 (Washington, DC: The Washington Institute for Near East Affairs, January 2006).

47. *Id.* at 7.

48. Mohamed Selim El-Awa, a highly regarded Egyptian lawyer, called to be one of the founders of new Islamist movement which seeks a new reform in Islamic thoughts.

49. Available at <http://www.masrawy.com/new/> (Arabic language source on file with author).

50. Singer, *supra* note 4, at 2.

51. *Id.*

52. Bassiouni, *supra* note 30, at 142.

America is perceived as the source of the contemporary evils that befall upon Muslims.<sup>53</sup> Hence many Muslims consider violence as the only means of expression left to them, and leaders who claim that violent jihad is a justified course of conduct against the western invasion become popular. Many Muslims will seek violent jihad as an answer to the dilemma they are having.<sup>54</sup> Their legitimacy of purpose trumps all else—the end justifying the means. Over time, proponents of the strategy of terror-violence against the U.S. and the West have acquired credibility, not to say legitimacy, even though their strategy includes resorting to indiscriminate violence against innocent civilians, which is in violation of the very Islamic precepts. Unjustifiable as these tactics are, their proponents see them as the only way to balance the asymmetry of the forces they face in an un-just world where no other remedies are available in hand.<sup>55</sup>

Muslims have pride in their glorious history as they were –from Samarkand to Cordoba- producing intellectuals, scientists, thinkers, artists, enlightened rulers and societies that evidenced religious tolerance and economic progress at a time when Europe was still debating whether women have souls.<sup>56</sup> Muslims attribute the deterioration of their civilization to repression, backwardness, and losing our way, rather than to Islam. We strongly reject any link between Islam and the deterioration of our civilization because Islam itself was our guide in the early days to building one of the most regarded civilizations in humankind's history. Nonetheless, the values upon which the West built its progress are fundamentally universal; moreover these values have been in the fabric of the Islamic religion since its early days.

Violence, degradation and hypocrisy are three concepts that, by and large, shape how Muslims perceive the West. Violence is evident in Iraq, Afghanistan, Palestine, Chechnya, as well as in the ugly war of the summer of 2006 against Lebanon and in threats against Iran. Hypocrisy becomes evident when Tony Blair (former British PM) preaches to Arabs about democratic principles, and then visits Libya to meet Colonel Gaddafi to negotiate his re-entering the international community.<sup>57</sup> Hypocrisy is inherent in Condoleezza Rice's revision of American strategy in the aftermath of Hamas' victory in fair elections in Palestine, the Muslim brotherhood's in Egypt and Ahmedinejad's in Iran after she preached to the Egyptians about democracy in the Middle East in her speech in front of the American University in Cairo.<sup>58</sup> Degradation is conspicuous in debating pulling away American troops because of losing 4000 but not thinking of the causalities of Iraqis, in equating deaths of thousands in Lebanon with the inconvenience of relocating some northern Israeli settlers for less than three weeks, and when Hezbollah captured three Israeli soldiers, Lebanon has to pay billions of dollars to

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53. *Id.*

54. *Id.* at 143.

55. *Id.*

56. Tarek Osman, *A Liberal Muslim's letter to the West*, Daily Estimate, Apr. 12, 2007, available at <http://www.dailyestimate.com/article.asp?id=8983>.

57. *Id.*

58. *Id.*

repair what Israeli air strikes damaged.<sup>59</sup>

*C. How Americans Perceive the Middle East?*

In the post September 11th legal and political environment, anti-American sentiment in the Middle East is reciprocated by a growing anti-Arab and anti-Islam sentiment in America.<sup>60</sup> As manifestations of violence by Muslims increase in different parts of the world, so do anti-Islam sentiments, particularly in the Western world. Reciprocal negative perceptions between the Western and Muslim worlds continue to escalate, threatening peace and security in Muslim countries and elsewhere in the world. Americans understand Islam as a religion which condones killing of other people in the name of Allah (the Arabic word means God). It is too easy to equate Islam with the poverty and material backwardness of most Islamic countries.<sup>61</sup> Islam appears to be an aggressive religion to the Western writers and critics. Muslim civilization has been castigated as being backward, insular, stagnant, and unable to deal with the demands of modernization. Muslims are stereotyped as fanatics, intolerant, violent and thirsty for wars of aggression.<sup>62</sup> The average westerner thinks of Islam as fanatical, xenophobic, and a destructive force.<sup>63</sup> In his 1996 article, John Esposito warned Americans that in the post-cold war period, Islam will be seen as the next global threat, both ideologically and politically, in order to fill the threat vacuum.<sup>64</sup>

If Americans are seen as the rapists, bullies, and mindless killers in the culture of the Muslim world, Muslims are seen no better by the American mainstream media.<sup>65</sup> Villains in Hollywood movies or TV shows invariably have terrorism link back to a Muslim terrorist group or cause. William Fisher, a former U.S. diplomat, warned of an “uninformed and unreasoning Islamophobia that is rapidly become implanted in our national genetics.”<sup>66</sup> News and people from the Middle East are received with themes of hurt, fear and suspicion. The conceptualization of the threat has many fronts. In general, while the government would consider the threat from a certain organization, most Americans would consider it from a region or ideology or both. Fox News Network host Bill O’Reilly commented about writing a book about Islam, and he denounced the idea by saying it is “our enemy’s religion.”<sup>67</sup> In his famous book “Clash of Civilization”, Professor Samuel Huntington of Harvard asserts that “some westerners have argued that the West does not have problems with Islam but only with violent Islamic extremists... but evidence is lacking... the underlying problem for the west is not Islamic

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59. *Id.*

60. Singer, *supra* note 4, at 2.

61. John Carroll, *Intellectual Property Rights in the Middle East: A Cultural Perspective*, 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 555, 583 (2001).

62. Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International law*, 10 *J. CONFLICT & SECURITY L.* 321 (2005).

63. Carroll, *supra* note 61, at 583.

64. Esposito, *supra* note 7, at 131.

65. Singer, *supra* note 4, at 2.

66. William Fisher, *Bush’s Mixed Signals*, *COUNTER-CURRENTS*, April 21, 2006, available at <http://www.countercurrents.org/fisher050406.htm>.

67. Tessler, *supra* note 43, at 175.

fundamentalism. It is Islam."<sup>68</sup> He goes on to describe Islam as a religion of the sword... glorifying military virtues. In his perception, the Quran (Holy Book of Muslims) "and other statements of Muslim beliefs contain few prohibitions on violence and a concept of non-violence is absent from Muslim doctrine and practice."<sup>69</sup>

Today, intellectual westerners misconstrue Islamic principles and tenets as terrorism and fundamentalism. The media has reinforced a false stereotype of Muslims and Islam.<sup>70</sup> A researcher in the American Enterprise Institute has argued that Bin Laden is applying what he has learnt from Quran. He is fully justified to kill thousands of civilians because God in Islam asked him to do so.<sup>71</sup>

#### *D. Islamic Stance on Terrorism*

The overarching principle in Islam concerning violence is the famous verse in the Quran: "the taking of one life is like the killing of all humankind."<sup>72</sup> Islam strongly renounces the killing of innocent civilians, children and women even in war times.<sup>73</sup> Principles and tenets of Islam encourage and promote coexistence and cooperation, not confrontation and hate. From the early days of Islam, Prophet Mohamed hosted the Jewish in the first Muslim city ever in history.

Islamic law is one of the world's major non-western legal systems. Sharia (the right path in Arabic) includes a conglomeration of Islamic law principles.<sup>74</sup> As long as a substantial number of terrorist acts are perpetrated by or upon Muslims, or within Islamic lands, the proper legal focus must not be limited to an exclusively western sense of legality, Islamic legal theory has to be explored to fully understand and ultimately control international terrorism. Islam claims 20% or more of the world's population as its adherents.<sup>75</sup> A complete understanding of the stance of Sharia on international terrorism will be helpful. A brief orientation of the hierarchy of Islamic law is critical; Sharia includes two types of sources, primary and secondary sources.

The primary source of Islamic law (Sharia) is the Quran. Muslims believe that the Quran is the word of God, which Mohamed, the last prophet, relayed through revelations from 610 A.D. until 632 A.D. The Quran contains 114 suras, it is the constitution of all Muslims, a source which trumps all other sources and is regarded by Muslims as the highest authority in all facets of life, including legal,

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68. *Id.*

69. Ali & Rehman, *supra* note 62, at 329.

70. John H. Donboli and Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 418 (2005).

71. Ali Alfoneh, American Enterprise Institute, October 2007 (on file with author).

72. U.S. Inst. of Peace, *Special Report: Islamic Perspectives on Peace and Violence*, Jan. 24, 2002, at 3, available at <http://www.usip.org/pubs/specialreports/sr82.pdf>.

73. Quintan Wiktorowicz and John Kaltner, *Killing in the name of Islam: Al-Qaeda's Justification for September 11*, 10 Middle East Policy Council 2 (2003), available at [http://www.mepc.org/journal\\_vol10/0306\\_wiktorowicz Kaltner.asp](http://www.mepc.org/journal_vol10/0306_wiktorowicz Kaltner.asp).

74. Donboli and Kashefi, *supra* note 70 at 418.

75. David Aaron Schwartz, *Note: International Terrorism and Islamic Law*, 29 COLUM. J. TRANSNAT'L L. 629, 634 (1991).

social, political and economic matters.<sup>76</sup> The second source of Islamic Law is the *Sunna* or traditions of the prophet Muhammad. *Sunna* (Tradition) is the Prophet Mohamed's reported sayings, deeds, and approval of practices. Where the Quran is silent or ambiguous, *Sunna* is considered to be a supplementary or interpretative source.<sup>77</sup>

Secondary sources of Islamic law consist of *Ijma*, or agreement of jurists among the followers of the Prophet Muhammad in a particular age on a question of law.... *Ijma*, as a source of law, is supported by the *Quran* and *Sunna*, [and]... *qiyas*, translated as analogical deduction. Analogy can only be employed if no guidance is available on the point under discussion in any of the other three sources of law. Another source of law is *ijtihad*, which literally means striving [or] exerting.<sup>78</sup>

Sharia is a driving force in the Middle East, where most people are religious or reluctant to challenge religious beliefs. Sharia is the highest source of legal reference in Saudi Arabia's, Iran's and Egypt's constitutions, which are the main source of legislation.<sup>79</sup> Sharia is a complete legal system which has its own distinct characteristics and is recognized by international law.<sup>80</sup> I will examine three different doctrines of Islamic jurisprudence which bear directly on international terrorism: the role of international covenants, Jihad (a particular emphasis on this word), and forbidden acts to show that Islamic treaty law is rich with principles that renounce terrorism.

### 1. International Covenants

Muslim countries have to honor their obligations under international treaties.<sup>81</sup> This sense of legal obligation does not stem only from the sanctions which would be imposed if there is a violation of any of the treaties' provisions. Rather, a simple verse in the Quran also obliges Muslims to honor their contractual obligations: "O Believers, you have to honor your contractual agreements."<sup>82</sup> This means that every Islamic country that has entered into an anti-terrorist compact is committed under Islamic law to honor that agreement. Moreover, Muslim jurists have ruled that international covenants acceded to by Islamic countries have become a part of Islamic law.<sup>83</sup>

Multilateral covenants, compacts and agreements have long been the legal method of choice for combating terror violence. Sharia sanctions violations of these agreements; every Islamic country that has entered into an anti-terrorist compact is committed under Islamic law to honor that agreement.<sup>84</sup> Many Islamic

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76. Ali & Rehman, *supra* note 62 at 324-25.

77. *Id.* at 325.

78. *Id.*

79. Schwartz, *supra* note 75, at 636.

80. *Id.*

81. *Id.* at 637-38.

82. *Id.*

83. *Id.*

84. *Id.* at 637.

countries have signed most of the multilateral covenants that explicitly address acts of international terrorism. Schwartz found a double effect for Sharia in respect to terror violence. First, Islamic countries are authorized to enter into agreements that punish and extradite terrorists located within their jurisdiction. Second, a global agreement addressing terror violence would be welcomed by Islamic countries.<sup>85</sup> Since the inception of the UN and the prohibition of the use of force, Islamic countries have fully complied with the UN charter, renouncing terrorism, aggression and violence, in addition to maintaining their Islamic credentials, which is consistent with *As-siyar*. Moreover, the preamble of the charter of the Organization of Islamic conference affirms the commitment of Islamic countries to adhere to the principles found in United Nations charter.<sup>86</sup>

## 2. "Jihad"

"[T]he classical *jihad* ideology is often deployed to cast doubts on the compatibility of Islam with modern norms of international law as enunciated in the United Nations charter."<sup>87</sup> This misunderstood word is used to embrace the concept that Islam condones the killing of people in the name of God. On the contrary, Jihad is a very broad Arabic word, and it "does not have a singular meaning but can be qualified to suggest different things."<sup>88</sup> A literal meaning of it is "'effort,' 'attempt,' or 'exertion'... to overcome evil."<sup>89</sup> Ibn Taymiyya, a prominent Muslim scholar in the medieval centuries, explained the concept "Jihad" as a means of defensive war to protect Dar Islam (Muslim states) against invaders,<sup>90</sup> similar to the notion of self defense under international law. Islamic scholars distinguish between greater Jihad, which means the struggle one has against oneself, with lesser Jihad, which refers to fighting in the name of God.

[T]errorists use the Islamic historical division of the world into two parts, Dar al Islam and Dar al harb, to set up the framework for their offensive Jihad... However, a careful contextual reading of verses in Quran and others rebut the terrorist's interpretation. Moreover, many scholars argue that viewing Jihad as an offensive war is faulty and fails to take into account the underlying religious beliefs and responsibilities... Terrorists pick and choose certain tenets of Sharia to justify their actions... [and] use Islam as a political tool to further their specific agendas.<sup>91</sup>

Thus it would seem that Islam, unlike Christianity, justifies killing in some circumstances.

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85. *Id.* at 640-41.

86. Ali & Rehman, *supra* note 62, at 343 (internal citations omitted).

87. *Id.* at 322.

88. RACHEL SALOOM, *Comment: Is Beheading Permissible Under Islamic Law? Comparing Terrorist Jihad and the Saudi Arabian Death Penalty*, 10 UCLA J. INT'L L. & FOREIGN AFF., 221, 229 (2005).

89. John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 98 (2002).

90. See Bassiouni, *supra* note 30, at 131-34.

91. SALOOM, *supra* note 88, at 248.

Political violence has existed in every civilization. "Throughout its fifteen centuries [Islam] has witnessed political turmoil and upheavals and also periods of peace and stability, during which the sciences and the arts have made extraordinary strides and contributed significantly to other civilizations."<sup>92</sup> The Muslim world has, in the last two hundred years, suffered at the hands of Western imperial powers. Recently, the Muslim world has started to selectively strike back against the Western world, with the U.S. responding in kind, thus fueling predictions of a "clash of civilizations." The endless circle of blood between Americans and Muslims (in Iraq) may feed into the proposition that there is a conflict of civilization between the Muslim world and the Jeudo-Christian western civilization. This self fulfilling prophecy put succinctly by Cherif Bassiouni evoked Muslims to be inclined to accept a new anti-American sentiment to political Jihad as long as it is reciprocated by an increasing anti-Islam approach by Neoconservatives, the protestant Christian right and other American Pro-Israel supporters. Therefore, Bassiouni added that the modern doctrine of Jihad can only be explained by taking account of historical, social, political and economic events that surrounded and influenced Muslims.<sup>93</sup>

Nonetheless, the term "jihad" is surely one of the most powerful terms in the Muslim psyche. "It evokes the legitimate self-defense struggle of the Prophet and his followers in the glorious days of early Islam. What can be more powerful and more moving to the downtrodden masses in the contemporary Muslim world than jihad?"<sup>94</sup> In this era of global communications, these masses can see what the modern world has to offer them and of what then they are deprived. Cherif Bassiouni<sup>95</sup> argued, "if these masses could also see how frequently, how improvidently, and how dubiously the term jihad has been used by unqualified political violence proponents, their reactions may well be different."<sup>96</sup> The resort to force as part of jihad in the early days of Islam was justified by self-defense and by the fact that Muslims had no freedom to propagate Islam or to practice it freely in non-Muslim controlled areas. However, it must also be said that the history of Islam is characterized by recurring violence claimed to be justified by jihad, even when it was not. Indeed, Bassiouni correctly argued that "[w]hatever justifications may have existed throughout the history of Islam, jihad in the name of the propagation of the faith can no longer be sustained in an era where freedom of religion, practice, thought, and speech are internationally guaranteed human rights."<sup>97</sup> He added,

Thus, conflicts such as those between Palestinians and Israelis and between Chechnyans and Russians cannot be characterized as jihad, since they do not involve the religion of Islam. These conflicts are

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92. Bassiouni, *supra* note 30, at 141.

93. *Id.* at 142.

94. *Id.* at 143

95. Distinguished Research Professor of Law and President Emeritus, International Human Rights Law Institute, DePaul University College of Law.

96. Bassiouni, *supra* note 30, at 143.

97. *Id.* at 145.

controlled by other aspects of Islamic law, which also recognizes in these cases the applicability of positive law, namely, international humanitarian law.<sup>98</sup>

A mixed record is the history of Jihad in Islam.<sup>99</sup> Quite clearly, it is subject to interpretation, and has been subject to manipulations as well, essentially for political reasons or in order to achieve a political goal. Bassiouni reasoned the existence of a contemporary doctrinal approach to Jihad because of the fact that there was a mixed record and different interpretations. He further suggested that Jihad is equivalent to the international law of self-defense, and hence a doctrine subject to the same limitations on the methods and means of warfare in accordance with contemporary international humanitarian law.<sup>100</sup>

This verse and others evidence the universality of humankind, notwithstanding its diversity. Other verses of the Qur'an reveal that man was created with the spirit of the Creator. How then can a believer in Islam engage in killing, torturing, and humiliating another human being created by God and infused with His Divine Spirit? No political doctrine of jihad can override this higher religious value. And yet tragically, this higher religious and humanistic value is violated with scant reaction from the Muslim religious establishment and from knowledgeable secular Muslims intellectuals. Jihad, like many other aspects of Islam, has its theoretical and practical aspects, both being frequently quite apart from one another. In fact, both dimensions are fragmented as they reflect a much greater diversity in Islam than its proponents tend to reflect in their words. Perhaps all concerned should heed to a hadith by the Prophet: "if you see a wrong: you must right it with your hand, if you can or your words or with your stare, or in your heart, but that is the weakest of faith."<sup>101</sup>

The doctrine of jihad is central to Islamic international law. "[T]here are disagreements among jurists regarding the nature of jihad in Islam. Some argue that it is essentially defensive in nature, whereas others are inclined to consider it as offensive or aggressive element."<sup>102</sup> However, as Ali and Rehman presented in their paper, "the introduction of the *dar-al-sulh* as a third category of states in Islamic international law opens up the possibility of building upon options of peaceful settlement of disputes in the Islamic tradition."<sup>103</sup> Additionally, Islamic law, with its principles, could enrich international law in general, and in particular, could be very relevant to the current war on terrorism.

### 3. Forbidden Acts

Islamic law provides for extensive protections of diplomats, restricts the

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 145-46.

102. Ali & Rehman, *supra* note 62, at 333.

103. *Id.* at 334.



taking of hostages, and prohibits unnecessary destruction of an enemy's real or personal property. "Muslim jurists hold the rights of diplomats to be inviolable. Kidnappings or assassinations of foreign envoys have historically been prohibited by Islam... the safety and dignity of diplomats are sacrosanct."<sup>104</sup> Sharia has certain rules in respect to hostages during Muslim conquests. Exchange of hostages for Muslims is encouraged. Human life and personal property are sacred under Islam, principles of Sharia entrenched numerous rules applicable to non-combatants, fields and forests.<sup>105</sup> In addition:

Respect for human life and personal property is a fundamental principle of Shari'ah. No non-combatant may be killed, unless purposefully used to shield the enemy, or unintentionally fired during a night-time or distant catapult attack. Fields are not to be unnecessarily spoiled, and forests may not be needlessly destroyed. Most importantly, even active combatants themselves are afforded certain fundamental protections at all time.<sup>106</sup>

Islamic terrorists are no more representative of Islam than any fundamentalist terrorists are of their broader community. The U.S. should not

[F]ail to make a distinction between fanatics, with a total disregard for life, who pose threat to all of humankind—irrespective of religion, culture or ethnicity—and those who simply have different ways of organizing their lives or different cultural preferences, but share the same basic goals and aspirations of all mankind: the pursuit of life, liberty and happiness.<sup>107</sup>

Islam itself promotes raising the standard of living of Muslims, calling for peace and full submission to the will of the Almighty. Separating Islam from terrorism is a must to understand the extent of the problem; Muslims should be engaged in the war on terrorism not as enemies but as partners.

Additionally, the tenets of Islamic jurisprudence are relevant to efforts to combat international terrorism and condemn terror violence. Terrorists invoking Islam have acted illegally, and this is as abhorrent to an Islamic state as it is to the west. Sharia is almost forgotten as one of the most effective instruments against international terrorism. It provides a genuine, workable framework for countering international terrorism. It includes a wide range of interweaving legal theories, drawing together treaty making authority, military constraints, and an insistence upon human rights. Westerners can no longer overlook the importance of Sharia in combating terrorism. Up until now, international law has witnessed "little attempt to take on broad concepts of as-siyar in discussions on the law of nations, [human rights and laws of war].... [The] "rules of Islamic international law could be

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104. Schwartz, *supra* note 75, at 648-49.

105. *Id.* at 649.

106. *Id.* at 650.

107. United Nations Chronicle Online Edition, *An International Perspective on Global Terrorism*, DEPARTMENT OF PUBLIC INFORMATION, Nov. 3, 2001, available at [http://www.un.org/Pubs/chronicle/2001/issue1/0103p71\\_2](http://www.un.org/Pubs/chronicle/2001/issue1/0103p71_2).

applied to build a better and more effective international legal order.”<sup>108</sup>

## II. FREE TRADE AS A TOOL IN COMBATING TERRORISM

The globalization of the Middle East has been confronted by much resistance among the populace in the region, who accuse globalization of being a western product that has to be rejected. However the people should know that globalization already took place and that there is no way out except to be a part of this game. It is better to be inside setting the rules of international trade than outside and forced to play by them anyway. Globalization has to take place in the Middle East. “[T]he increased involvement of the WTO, multinational corporations, international aid agencies, non governmental organizations, and foreign investors focusing on the development of non-oil industries through a process of market diversification and stabilization will improve the lives of those living in the Middle East,” thus rooting out all the causes of terrorism.<sup>109</sup> Consequently, the frequency of terrorist attacks will be eliminated or at least lessened.

International trade is thus a vital engine for poverty-reducing growth. Trade liberalization is one of the few policies that virtually all economists can agree on. It creates wealth. It reduces poverty. It is a zero sum game. The countries... that have intensified their links with the global economy through trade have tended to grow more rapidly over a sustained period....<sup>110</sup>

On the legal aspect, free trade and trade liberalization in general would be a catalyst for improving the deficient legal regulatory rules and systems in the Middle East and facilitate the legal integration of the WTO as well. The Middle East will count on the U.S. to bring in free trade, as Americans are the pioneers of the creation of a global framework for free and fair trade.<sup>111</sup> However, some scholars have argued that globalization is increasing transnational terrorism and that “openness is likely to increase the vulnerability of rich target economies both directly and indirectly.”<sup>112</sup> If trade integration has a multilateral nature, terrorism also does. For example, there has been a spillover of terrorism from the U.S. to the UK and Spain as they joined the initial coalition against terrorism.<sup>113</sup>

108. Ali & Rehman, *supra* note 64, at 342.

109. Fandl, *supra* note 32, at 591.

110. Delissa A. Ridgway and Mariya A. Talib, *Globalization and Development-Free Trade, Foreign Aid, Investment and the Rule of Law*, 33 CAL. W. INT'L L.J. 325, 334 (2003).

111. See e.g., Susan C. Schwab, *The President's Trade Policy Agenda*, Mar. 1, 2007, at 25, available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Trade\\_Policy\\_Agenda/asset\\_upload\\_file629\\_10624.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file629_10624.pdf).

112. Daniel Mirza & Thierry Verdier, *International Trade, Security, and Transnational Terrorism: Theory and Empirics 25* (World Bank Policy Research Working Paper, Paper No. 4093, 2006), available at <http://ideas.repec.org/p/cpr/ceprdp/6174.html>.

113. Id.

### A. Regional Agreements in the Middle East

The Middle Eastern region represents the least integrated region in the global economy.<sup>114</sup> Yet there are few prospects for regional agreements. For the most part they are still mere projects. The Maghreb Union, GCC, Euro-Mediterranean and GAFTA are the only regional agreements currently in existence.

#### 1. The Arab Maghreb Union (AMU)

The Maghreb countries which consist of Algeria, Libya, Morocco, Mauritania and Tunisia, established the Arab Maghreb Union in 1989.<sup>115</sup> This union comprises 62 million people “within a region that is rich in oil, natural gas and minerals.”<sup>116</sup> The Union treaty calls for strengthening economic ties between the member states to allow for the free movement of goods, services and production factors.<sup>117</sup> Although the member states announced plans for a custom union by 1995, it was never achieved.<sup>118</sup>

#### 2. The Gulf Cooperation Council (GCC)

GCC was established in 1981. The Council consists of 6 member states: United Arab Emirates, Bahrain, Qatar, Saudi Arabia, Oman and Kuwait.<sup>119</sup> The aim of the establishment of the GCC can be deduced from the Charter’s preamble: “[t]o effect coordination, integration, and interconnections between them in all fields.”<sup>120</sup> GCC represents the most ambitious sub regional Arab agreement. However, there are many challenges facing the GCC. “Member states should have the necessary political will and should subordinate their systems to the Cooperation Council to build a strong regional block.”<sup>121</sup> GCC also has a very ambitious plan to create a custom union and a union currency within the upcoming years.<sup>122</sup>

#### 3. Euro-Mediterranean Partnership (EMP)

The EMP was created on November 28, 1995 in Barcelona when the Barcelona Declaration was signed by the EU and 12 Mediterranean Countries, also known as the Barcelona Process, which aims at a wide framework of political, economic and social relations between the EU and partners from the Southern Mediterranean region.<sup>123</sup> “Its stated aim is to create a new political and economic

114. Andrä Gärber, *The Middle East and North Africa: A Gridlocked Region at a Crossroads*, COMPASS 2020, Jan. 2007, at 5, available at <http://library.fes.de/pdf-files/iez/04746.pdf>.

115. Robert W. McKeon, *The Arab Maghreb Union: Possibilities of Maghrebine Political and Economic Unity, and Enhanced Trade in the World Community*, 10 DICK J. INT’L L. 263, 263 (1992).

116. *Id.* at 263-64

117. Mohamed Finaish & Eric Bell, *The Arab Maghreb Union*, INTERNATIONAL MONETARY FUND: MIDDLE EASTERN DEPARTMENT, May 1994, at 5.

118. Fandl, *supra* note 34, at 622.

119. Amr Daoud Marar, *The Cooperation Council for the Arab States of the Gulf*, 10 L. & BUS. REV. AM. 475, 475 (2004).

120. Charter of the Cooperation Council for the Arab States of the Gulf, art. 4, May 1981, available at <http://www.gcc-sg.org/eng>.

121. Marar, *supra* note 119, at 491.

122. *Id.* at 482.

123. Jacqueline Klosek, *The Euro-Mediterranean Partnership*, 8 INT’L LEGAL PERSP. 173, 173

force in the Mediterranean based on free trade and closer political cooperation.”<sup>124</sup> More than ten years after the Barcelona process, it is obvious that the economic and institutional deficits in the Arab countries are essential, and fundamental reorganizations of the structures are necessary to achieve the Barcelona goals<sup>125</sup> of increasing economic integration between industrialized European countries and neighboring developing countries in the Middle East. Given its close proximity, it is clear that the EU has a great interest in the Middle East region. The primary goal of the EMP is to foster economic growth through free trade. However, the coverage of the EMP includes “a political and security partnership aim[ing] at creating a common area of peace and stability... [and] anticipate[s] a social, cultural and human partnership designed to increase exchanges between the civil societies of the countries taking part in the EMP.”<sup>126</sup>

#### 4. Great Arab Free Trade Agreement (GAFTA)

The center-piece of the Economic integration between Arab countries,<sup>127</sup> GAFTA derives its importance from many aspects. Six decades have witnessed more failures than accomplishments in Arab economic integration.<sup>128</sup> However Arab leaders have put it on the top of their political agenda for the coming Arab summit in 2008.<sup>129</sup> GAFTA currently enjoys more political support than ever before. This agreement was limited to trade in goods when it was signed in 1997, yet the third wave of the Arab economic integration signifies a movement towards expanding the scope of the agreement to cover trade in services as well.<sup>130</sup> The challenges are enormous. Most of them are of an economic nature but economic integration remains an indispensable matter for Arab countries. Otherwise they will fall behind.

##### *B. U.S. and Free Trade Agreements in the Middle East*

The 9-11 commission report recommended that “a comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children’s future.”<sup>131</sup> U.S.

(1996), (The 12 countries are: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey and Gaza Strip/West Bank).

124. *Id.*

125. *Id.* at 176.

126. *Id.* at 175.

127. CATCHING UP WITH THE COMPETITION: TRADE OPPORTUNITIES AND CHALLENGES FOR ARAB COUNTRIES 6 (Bernard Hoekman & Jamel Zarrouk eds., The Univ. of Michigan Press 2002). Decree No. 365 called on Arab leaders to have an Arab summit to discuss the economic integration among Arab countries.

128. *See generally*, ARAB ECONOMIC INTEGRATION: BETWEEN HOPE AND REALITY 13 (Ahmed Galal & Bernard Hoekman eds., Brookings Inst. Press 2003).

129. Last Arab Summit was held in Riyadh 28/29 March, 2007, it is the 19th summit where the Arab Leaders issued a decree no 365, this decree called on convening an Arab summit devoted entirely to discuss the economic, social and development issues in the Arab world.

130. Mona Garaf, Egyptian Services Sector at the Bilateral, Regional and Multilateral Levels, presentation before the American Chamber of Commerce (July 18, 2006) (on file with author).

131. MARY JANE BOLLE, MIDDLE EAST FREE TRADE AREA: PROGRESS REPORT, CRS Report for

free trade agreements in the Middle East “pursue economic policies in a... political cauldron,” more than elsewhere in the world.<sup>132</sup> The Middle East initiative is “a systematic plan with well identified precursor economic relationships between the U.S. and 14 Middle Eastern and four North African” countries.<sup>133</sup> Robert Zoellick, former U.S. Trade Representative, mentioned that the U.S. aim is to fight terrorism “by spreading the message of prosperity and democracy throughout the world.”<sup>134</sup> The Bush Administration’s 2002 National Security Strategy identifies “free trade and free markets” as the keys to a secure America and the necessary components of the national security strategy.<sup>135</sup> The U.S. National Security Strategy pointed out that “[e]conomic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reforms, and the fight against corruption, and it reinforces the habits of liberty.”<sup>136</sup> The MEFTA initiative rests on a fundamental premise: “national security can be enhanced and terrorism can be fought with trade,” jobs, technology transfers, investment growth and modernization, which are thought to follow from the “free flow of goods, services, knowledge and capital.”<sup>137</sup>

The events of September 11, 2001, demonstrated that weak states, like Afghanistan, can pose as great a danger to U.S. national interests as strong states. Poverty does not make poor people into terrorists and murderers.<sup>138</sup> Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders. Free trade and free markets have proven their ability to lift whole societies out of poverty. Therefore, the United States must work with individual nations, regions, and the entire global trading community to build a world that trades in freedom and therefore grows in prosperity.<sup>139</sup> The international community has an enormous stake in the developments within the Middle East and has no real alternatives but to engage the region in the hope of reaching mutually beneficial outcomes. Jennifer Moore argues that the problems of poverty and underdevelopment in the Middle East have been compounded by the war on terror, and that the substantial reliance on military force as opposed to alternative means of fighting terrorism “potentially feeds

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Congress, RL32638, at 5 (2006), available at <http://vienna.usembassy.gov/en/download/pdf/mefta.pdf>.

132. Ralph Folsom, *Trading for National Security? United States Free Trade Agreement in the Middle East and North Africa*, at 1 (U. of San Diego Sch. of L., Legal Stud. Res. Paper Series No. 07-113, 2007).

133. *Id.* at 8. The Middle East countries are Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab of Emirates, and Yemen (Cyprus, the Gaza Strip and West Bank are also potential MEFTA partners). The North African countries include Algeria, Libya, Morocco and Tunisia.

134. Paul Magnusson, *A Man of Many Missions*, BUSINESS WEEK, Mar. 31, 2003, at 94-95.

135. Daniella Markheim & Anthony B. Kin, *Free Trade with the UAE Supports America’s National Security Interests*, THE HERITAGE FOUNDATION, Mar. 4, 2006, available at <http://www.heritage.org/Research/TradeandForeignAid/wm1006.cfm>.

136. *Id.*

137. Folsom, *supra* note 132, at 32.

138. Fandl, *supra* note 3, at 306.

139. Fandl, *supra* note 32, at 606.

ongoing conflicts rather than repressing them.”<sup>140</sup> Additionally, the poverty and underdevelopment that existed in the Middle East prior to recent foreign intervention may have been exacerbated by the military actions against Afghanistan and Iraq.

In his article, Kevin Fandl mentioned that “[s]ome members of the international community, while supportive of U.S. efforts in the war on terror in many respects, believe that the war is actually increasing terrorism.”<sup>141</sup> French and German attitudes toward the war on terror were surveyed by a Research center (PEW), which found that a majority of people “believed that the Iraq war had undermined the struggle against terrorists and doubted the Bush Administration’s sincerity in trying to combat terror.”<sup>142</sup> Lakdhar Brahimi, the United Nations Special Envoy to Iraq, stated in April 2004 that “there is no military solution to the problems in Iraq, and that the use of force, especially the excessive use of force, makes matters worse and does not solve the problem.”<sup>143</sup> Daniel Benjamin and Steven Simon of Georgetown University recently affirmed that the number of Jihadists increased after the last war in Iraq, thereby increasing the long-term threat of terrorism.<sup>144</sup> Further, “[i]t is simply no longer possible to maintain that the United States is winning the war on terror.”<sup>145</sup> Military intervention is often a poor preventative measure against terrorism because the military is ill-equipped to address the modus operandi of terrorists. The idea of democratizing the Middle East is good, but unlikely to succeed without the social, economic, and demographic conditions necessary for sustainability. Benjamin and Simon conclude that broad reforms and a stronger international coalition are the most effective solution to the current quagmire.<sup>146</sup> However, I find myself disagreeing with them. Democratizing the Middle East is a very naive idea, which sounds arrogant from the American side and does not relate to the cultural and historical background in this area of the world.

Fandl correctly argued that “The terrorist networks are... a significant threat to world security not only because of the suicidal methods they employ, but also because of the status of the countries where these networks recruit new members, engage in training exercises and where the leadership seeks refuge.”<sup>147</sup> He elaborated by saying that most of these countries are developing countries, lack the resources and the political structure to take preventive measures in order to sustain

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140. Jennifer Moore, *Collective Security with a Human Face: an International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 DENV. J. INT'L L. & POL'Y 43, 43 (2004).

141. Fandl, *supra* note 3, at 306.

142. Susan Sachs, *Poll Finds Hostility Hardening Toward U.S. Policies*, N.Y. TIMES, Mar. 17, 2004, at A3.

143. John F. Burns, *Iranians in Iraq to Help in Talks on Rebel Cleric*, N.Y. TIMES, Apr. 15, 2004, at A1.

144. DANIEL BENJAMIN & STEVE SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* xiv (Times Books 2005).

145. *Id.* at 126.

146. *Id.* at 197-208.

147. Fandl, *supra* note 32, at 597-98.

peace and crackdown on these organizations.<sup>148</sup> Although the Bush administration realized the link between desperate economic circumstances and terrorism, they have chosen to counter the terrorist attacks primarily by military conquest. Four years after the Iraqi invasion, many Americans support the view that using force may not be the best solution to uproot terrorist organizations. Terrorists are non-conventional actors who support their non-conventional weapons by selling ideology to seek new fellows. Osama Bin Laden's capture or even death will not end the terrorist attacks; his ideas are still there and have an enormous impact on the people who live in impoverished and desperate conditions in the Middle East.

The opening of markets in the Muslim world is desperately needed.<sup>149</sup> According to Brink Lindsey of the Cato Institute,

Trade and investment barriers are pervasive, and exports other than oil remain puny....It is now clear that Americans live in a dangerous world—and that the primary danger at present emanates from the economic and political failures of the Muslim world... Those failures breed the despair on which violent Islamic extremism feeds; no comprehensive campaign against terrorism can leave them unaddressed... The national security dimension of trade policy is once again plainly visible... It's true that scrapping protectionist policies, by itself, will not guarantee economic revitalization. But the fact is that integration into the larger world economy has been central to every developing country success story of recent times. Exposing the economy to foreign competition and capital acts as a catalyst for more systemic reforms. And over the longer term, such far-flung examples as Chile, Mexico, Taiwan, and South Korea demonstrate the interconnectedness of globalization, economic dynamism, and eventual democratization. Meanwhile,... the West can do more to facilitate Muslim countries' participation in global commerce... President Bush has made it amply clear that fighting terrorism is the overriding priority of his administration. To wage that fight with maximum effectiveness, he will need to convince Congress and the nation that promoting world trade will help to defeat the destroyers of the World Trade Center.<sup>150</sup>

Establishing free trade in this area would increase job opportunities, economic growth, cut poverty and enhance the rule of law in the Middle East; development in the Middle East should be a major component of U.S. foreign policy.<sup>151</sup> Economic development in the Middle East is the most effective means of maintaining peace and increasing normalization, thereby breaking the cycle of mistrust, violence, and instability that plagues the Middle East. A positive cycle of economic expansion would enhance the region's political stability, which would

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148. *Id.* at 598.

149. Brink Lindsey, *Free Trade and Our National Security*, WASHINGTON TIMES, Dec. 5, 2001, available at <http://www.freetrade.org/node/244>.

150. *Id.*

151. Fandl, *supra* note 32, at 617-21.

then foster economic growth by bolstering investor confidence. Economic opportunities are enormous in the Middle East.<sup>152</sup> Furthermore, "the Middle East is situated in a strategic global position featuring many dynamic trade and investment opportunities."<sup>153</sup> It has been argued that political and economic stability can be created if the U.S. and Middle Eastern countries make certain conditions conducive to the following economic measures:<sup>154</sup>

(1) Increased foreign private investment

(2) Increased free trade agreements between the U.S. and Middle Eastern countries.

For most Arab countries, trade with the EU is a multiple of trade with the U.S. However, the U.S. is far more strategically important than trade figures alone would indicate.<sup>155</sup> Moreover, the U.S. differs from the EU as the first advocates for behind the border issues including environmental and labor rights protection. These two issues rank prominently on the U.S. negotiating agenda for any FTA.<sup>156</sup> Furthermore, unlike the Euro-Med agreements that tend to be drafted in vague language, the template for American bilateral agreements is a highly specific and enforceable legal document. In general, any preferential trade agreement with the U.S. would result in more consequential commitments than an EU-Med agreement would.

### C. *The Rise and Fall of MEFTA*

MEFTA is the first attempt to increase the scope of U.S. attention towards the Middle East beyond the Israeli-Palestine, Palestine-Hezbollah and Iraq/Iran-U.S. conflict. President Bush, in a speech at the University of South Carolina, proposed creating a comprehensive free trade area between the U.S. and the Middle East (MEFTA) within a decade.<sup>157</sup> In his speech, President Bush mentioned that the "Arab world has a great cultural tradition, but is largely missing out on the economic progress of our time. Across the globe, free markets and trade have helped defeat poverty, and taught men and women the habits of liberty. So I propose the establishment of a U.S.-Middle East free trade area within a decade, to bring the Middle East into an expanding circle of opportunity, to provide hope for the people who live in that region."<sup>158</sup>

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152. Daniel Lubetzky, *Incentives for Peace and Profits: Federal Legislation to Encourage U.S. Enterprises to Invest in Arab-Israeli Joint Ventures*, 15 MICH. J. INT'L L. 405, 410 (1994).

153. John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 414 (2005).

154. Roni N. Halabi, *Stability in the Middle East Through Economic Development: An Analysis of the Peace Process, Increased Agricultural Trade, Joint Ventures, and Free Trade Agreements*, 2 DRAKE J. AGRIC. L. 275, 295-96 (1997).

155. Robert Z. Lawrence, *Recent U.S. Free Trade Initiatives in the Middle East: Opportunities but no Guarantees* 4-5 (John F. Kennedy Sch. of Gov't Fac. Res. Working Paper Series, Paper No. RWP06-050, 2006), available at <http://ssrn.com/abstract=939656>.

156. *Id.*

157. *Id.* at 2.

158. President George W. Bush, Remarks at the University of South Carolina (May 9, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030509-11.html>.



MEFTA negotiations will take place bilaterally with countries in the region, which will then be combined into single overreaching arrangements between U.S. and the region as a whole.<sup>159</sup> On the one side, the U.S.'s interest in this agreement is primarily geopolitical and security. On the other side, the interest of Arab countries is primarily economic. Robert Lawrence of Harvard summed four primary economic advantages for this free trade.<sup>160</sup> The first is increased trade and investment, second is reducing trade diversion that results from other preferential arrangements, such as EU-Med agreements by enhancing the bargaining power of Arab countries with other countries that wish to be accorded similar treatment to U.S.<sup>161</sup> Third is deepening the regional economic integration either between all Arab countries or a select group of Arab countries to launch a regional integration.<sup>162</sup> The efforts of increasing the integration of the Middle East in the global world would include the establishment of this area within a decade, reform efforts to prime countries in the region for WTO membership, trade capacity building for integration into the global trading system, reform of commercial and judicial codes, and improved transparency to fight corruption. There are certain prerequisites for participation in MEFTA. Countries in the region may have to join the WTO, enter into bilateral trade and investment framework agreement and BIT with the U.S. with an additional requirement to abandon all primary, secondary, and tertiary economic boycotts of Israel organized by the Arab league.<sup>163</sup>

Deep-integration free trade agreements are a potentially useful mechanism for leveraging and locking in domestic reforms.<sup>164</sup> Informal barriers to trade such as monopoly public sector service providers and problematic customs administration and attendant corruption significantly hamper cross border integration, and U.S.-style deep integration agreements may be useful in reforming these practices in a way that the shallow integration initiative of the Euro-Med almost surely cannot.<sup>165</sup> Yet preferential trade agreements cannot remake legal and educational systems, enhance work habits, protect environments, encourage human rights and respect for minorities, and all the other collateral benefits without shifts in how Arab governments perceive their leadership and management functions. But they can be helpful and may be sufficient for defining a workable template for low risk options that move Arab regimes with more confidence to face the severe challenges of the coming decades.<sup>166</sup>

Although MEFTA, like CAFTA, NAFTA and other U.S. FTAs, is about trade, investment and technology, some commentators have argued that MEFTA,

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159. Lawrence, *supra* note 155, at 2.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* Arab boycott is Primary in the sense that all trade with Israeli companies is banned. Secondary in the sense that doing business with firms that contributes to Israel's military or economic development is also forbidden. Tertiary in the sense those foreign companies with ties to Israel have been blacklisted.

164. *Id.*

165. *Id.* at 17-8.

166. *Id.* at 23.

because of the location and national security of U.S., "is really about terrorism and security, including oil security."<sup>167</sup>

#### *D. Recent Developments in MEFTA*

Since the invasion of Iraq, in an attempt to improve the political stability in the region, the U.S. has sought to increase trade and investment in the Middle East. "By creating trade and investment framework agreements (TIFAs), Bilateral investment treaties (BITs), and Free Trade Agreements, the United States has sought to enhance its economic stake in the Middle East in order to improve long-term diplomatic relations and stability in the region. Since the launching of the MEFTA, the Bush administration has signed [TIFAs] with Saudi Arabia, Egypt, Kuwait, Bahrain, the United Arab Emirates, Qatar and Oman. [TIFA] are intended to protect investors and intellectual property, and promote commercial transparency and efficiency."<sup>168</sup> Additionally, the U.S. has "worked to expedite accession to the WTO with nations such as Saudi Arabia and Lebanon. The Bush Administration hopes that such initiatives will eventually lead to the establishment of a Middle East free trade area by 2013. The [U.S.] is attempting to create this free trade zone by actively supporting WTO membership for countries like Saudi Arabia and Lebanon, and helping current Middle Eastern WTO members implement trade agreements."<sup>169</sup> Commentators have noted that "increased trade and investment in the region will facilitate growth, job creation, and a dynamic economy that no longer depends on oil."<sup>170</sup> In addition to the free trade agreements, the U.S. has concluded Qualified Industrial Zone agreements (QIZ) with the Palestinian Authority, Jordan and Egypt. These QIZ agreements provide for preferential access to the U.S. market for qualifying goods by meeting local content requirements specified in terms of U.S., Israeli, and the third country's input content.<sup>171</sup>

While Mary Jane Bolle of the Foreign Service, Defense and Trade division in the State Department argues for MEFTA, adding that MEFTA is a catalyst for economic development in the Middle East,<sup>172</sup> other commentators take a contrary approach and argue against MEFTA. They confirm that the current structural impediments to intra-regional economic cooperation will inhibit the prospects of an integrated Middle East economic system.<sup>173</sup> Therefore, MEFTA will create a hub and spoke relationship. A hub and spoke MEFTA could potentially divert foreign investment away from the Middle East, as investors would prefer to set up manufacturing or services facilities in the U.S. and get duty free access to all of the

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167. Folsom, *supra* note 132, at 30-31.

168. Donboli & Kashefi, *supra* note 153, at 456-57.

169. *Id.* at 458.

170. *Id.*

171. Noland & Pack, *supra* note 14, at 222-23.

172. MARY JANE BOLLE, MIDDLE EAST FREE TRADE AREA: PROGRESS REPORT, CRS Report for Congress, RL32638, at 11 (2006), available at <http://vienna.usembassy.gov/en/download/pdf/mefta.pdf>.

173. Bessma Momani, *A Middle East Free Trade Area: Economic Interdependence and Peace Considered*, 30 WORLD ECON. 1682 (2007).

Middle East spokes.<sup>174</sup>

The breakdown of FTA negotiations with the UAE signifies the strategy of the Bush administration of picking off easy partners. Morocco, Bahrain and Oman are not significant U.S. trade partners. The political firestorm which took place after the state owned Dubai ports acquired a British company operating six seaports in 2005, the Dubai ports world promised to sell the interest to an unrelated U.S. buyer after Congress, the press and a substantial portion of the U.S. public strongly opposed the takeover. Following this, free trade negotiations with UAE have been put on a back burner.

So far, MEFTA includes four members. Economically speaking, it is insignificant. Major trade partners and key players in the Middle East still fall out of MEFTA's reach; Egypt, Turkey and Saudi Arabia are examples of this. In his article, Folsom argued that trade has become a cover for U.S. national security needs and goals, and termed MEFTA as an attempt act creating a law of comparative security advantage.<sup>175</sup>

The military component of the U.S. counter-terrorism approach is aggravating the terrorism problem across the Middle East and increasing the Anti American sentiment. Thinking of alternative options to combat terrorism will remain at large through unorthodox means as the nature of international terrorism is itself unconventional. The Bush Administration has to revive the MEFTA; national security is inextricably linked to free trade and development in the Middle East. One question is whether free trade would root in the current regimes in the Middle East. This would defeat the whole purpose of an open market, and the elite will continue to control the resources of the whole country, poverty will increase, and the regimes will be more brutal in oppressing the people. However one caveat is that U.S. administration has to add a political reform component to its free trade package which will circulate across countries in the region. The link between democracy/political reform and signing of free trade agreements should not be separated. The U.S. has to support the secular opposition forces in these countries, requiring more participation in the civil society and engaging Muslim oriented political groups.

If MEFTA does not to proceed in the Middle East, one can say that a significant portion of the generation in the Muslim world will face conditions that would fulfill Al-Qaeda's dream of recruiting hundreds of thousands of poorly educated people. These generations would be living in crowded mega cities and will become attractive recruits for radical groups and organizations that are alienated from the global economic, social and political system. This generation will grow up angry and will seek someone to blame, in a political atmosphere in which their impressions of the U.S. will be largely shaped by Abu Ghraib and Guantanamo photos or stories. The war on terror will not be won through any territorial conquest or individual's capture. It will only end in the realm of perceptions, when the U.S. and the Muslim world see each other not as in conflict

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174. *Id.*

175. Folsom, *supra* note 132, at 31.

but as operating toward shared goals, mainly, development, political reform, international peace and free trade. A mutual cooperation between the Muslim world and the U.S. is the key to victory in the war on terrorism. The U.S. has to reinforce local reforms, efforts and avoid being seen as meddling in the internal affairs by supporting a certain power over another.<sup>176</sup>

### III. INTERNATIONAL LAW AND TERRORISM

This part is divided into two sub-parts. The first will examine the widely held view that international law does not provide a definition of terrorism, compares this approach with the terrorism definition in the domestic legal system of the United States and in the Middle Eastern jurisprudence, and the different international instruments that deal with terrorism. The second part suggests that the U.S. should engage the Muslim world in the war on terror and discusses how the international community can be engaged in the war on terror in the Middle East.

#### A. *Terrorism in International Law*

The war on terrorism has exposed some cracks in the foundation of international law;<sup>177</sup> a series of deficiencies in international law were demonstrated by the attacks of September 11. These include, but are not limited to: (a) The absence of a comprehensive international legal framework to address terrorism; (b) The absence of adequate international criminal law infrastructure to address massive crimes against humanity and/or acts of war, particularly by non-state actors; (c) The absence of sufficient international legal mechanisms for regulating, monitoring, prosecuting, and punishing non-state actors; and (d) The absence of international policing capacities and adequate cooperative arrangements to undertake intelligence gathering and crime prevention at the international or multilateral level.<sup>178</sup> Terrorism raises a lot of questions in international law about self-defense, the law of armed conflict, and the definition of terrorism and reprisal.<sup>179</sup> However discussing all these issues is beyond the scope of this article.

Although terrorism is the most regularly used word in the world now, still there is no consensus among the international community on the definition for this term. Nonetheless, the definition of terrorism in both U.S. and Middle East jurisprudence are the most relevant in reaching an agreement between the two worlds. The main obstacle to creating a coherent international approach for combating terrorism is the absence of an agreed definition.<sup>180</sup> The first attempt to define terrorism in the 1937 Terrorism Convention failed. Its abstract definition was not acceptable to states, at least partially due to the difficulty of implementing

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176. Lawrence, *supra* note 155, at 20.

177. Tung Yin, *Ending the War On Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 152 (2005).

178. Ved P. Nanda, *Foreword: Combating International Terrorism*, 31 DENV. J. INT'L L. & POL'Y vi, vii-viii (2002) (highlighting actions taken in the wake of 9-11 terrorist attacks).

179. See e.g., Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1408-09 (2002).

180. BARRY E. CARTER ET AL, INTERNATIONAL LAW 1020 (5th ed. 2007).

the definition in domestic legislation.<sup>181</sup> Similarly, the U.S. draft in 1972, which defined terrorism in the abstract, did not attract sufficient support to be opened for signature.<sup>182</sup> Rather than continue to attempt to establish a universal jurisdiction with respect to terrorism, the international community, through conventions and Security Council and General Assembly resolutions, opted for a system whereby states exercise domestic criminal jurisdiction over acts of terrorism. This incremental criminalization has produced a list of disparate proscribed acts reflecting those acts that most harm states' interests but upon which agreement can be reached. Historically, there have been many international conventions and agreements that have condemned terrorist acts, including hijacking, hostage taking, and terrorist bombing.<sup>183</sup> The UN, out of a recognition of the politics associated with reaching an acceptable global definition for terrorism, elected to avoid the term terrorism and have a rather piecemeal approach to terrorism.<sup>184</sup> Consequently, the UN carefully carved out very specific acts in selected international treaties to characterize as terrorism. The statement "one person's terrorist is another person's freedom fighter", still blocks a global consensus on a precise definition of terrorism.<sup>185</sup> For example, the suicide bombers who killed innocent civilians in Israel are terrorists in the west but freedom fighters in the Middle East. By the same token the use of force by Israel as a state and its killing innocent Palestinian civilians hold Israel as a state supporting terrorism in the Middle East but it has legitimacy in the west and is rarely criticized for its acts.

Despite the world's reaction to the events of September 11, 2001, there seems little chance that a comprehensive convention on terrorism will emerge from the UN in the near future. Terrorism is now used as a legal term, and thus should be accompanied by a legal definition. There are dangers in using terrorism as a legal term without defining it, as the widespread potential for (and some actual) avoidance and abuse of Security Council 1373's obligations illustrates.

Countries have responded to the terrorism question by taking matters into their own hands and fighting back with the use of armed force. These measures have proved ineffective against terrorism. International treaties are the best avenue to mobilize the international community towards certain issues such as terrorism; however, the UN has not been an effective mechanism in engineering a pragmatic solution to terrorism.<sup>186</sup>

With that in mind, elements of terrorism have to be mentioned so that we can

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181. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 36-37 (2006).

182. Ross E. Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the UN Process*, 16 B.U. INT'L L.J. 309, 317 (1998).

183. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 24-25 (1999).

184. Jeffrey F. Addicott, *Legal and Policy Implications For a New Era: The War On Terror*, 4 SCHOLAR 209, 213-14 (2002).

185. *Id.*

186. Mark Baker, *Terrorism and the Inherent Right of Self Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 27-28 (1987).

know precisely what elements spark all the differences and block every international consensus on a global definition of terrorism. Terrorism in the Middle East: Cherif Bassiouni, a prominent International criminal law professor in the U.S. and originally from Egypt, defines terrorism as “individual or collective coercive conduct employing strategies of terror violence which contain an international element or are directed against an internationally protected person” when:

- (a) The perpetrator and victims are citizens of different states or
- (b) Duly accredited diplomats and personnel of international organizations acting within the scope of their functions
- (c) International civil aviation
- (d) The mail and other means of international communications and
- (e) Members of nonbelligerent armed forces.<sup>187</sup>

In the U.S., there are nineteen definitions for terrorism; a congressional subcommittee found out that every federal agency with a counterterrorism mission uses a different definition of terrorism.<sup>188</sup> Chapter 113B of title 18 deals with terrorism. 18 USCA § 2331(1) defines international terrorism as activities involving violent acts that constitute crimes in the U.S. that appear to be intended:

- i. To intimidate or coerce a civilian population
- ii. To influence the policy of a government by intimidation or coercion; or
- iii. To affect the conduct of a government by mass destruction, assassination, or kidnapping and that occur primarily outside U.S. territorial jurisdiction or transcend boundaries in some way.<sup>189</sup>

Second, 18 USCA § 2332b, defines the federal crime of terrorism in (g)(5) as a breach of listed provisions of U.S. criminal law that are calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.<sup>190</sup>

Michael Reisman lays out three effects of terrorism: “an immediate effect of killing or injuring people; an intermediate effect of intimidating a larger number of people and influencing their political behavior of the government; and an aggregate effect of undermining public order.”<sup>191</sup> However, the victims of terrorism are always innocent civilians, consequently any successful definition of this term should “concentrate on the act and not the political, religious, or social causes which motivate the act.”<sup>192</sup>

187. M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES, at xiv (1975).

188. Young, *supra* note 181, at 76-77.

189. Federal Courts Administration Act of 1992, 18 U.S.C.A. § 2331 (West 2008) (hereinafter FCAA)

190. *Id.* at § 2332b.

191. Reisman, *supra* note 183, at 6-7.

192. Addicott, *supra* note 184, at 216.

The war on terrorism combines the elements of an international armed conflict and international criminal investigation. The creation of the legal framework for each of the hostilities is needed. Terrorism can either be treated as a criminal matter or an armed attack warranting response under the law of armed conflict.<sup>193</sup> Both approaches have some loopholes and do not fit the 9-11 attacks perfectly. The law of armed conflict does not appear to have anticipated the use of military force against non-state actors, thus the attacks are acts of war by non-state actors to be met with military force and direct application of the laws of armed conflict. This is the prevailing approach by President Bush and Congress. Wedgwood highlighted that the U.S. has failed to respond to Islamic fundamentalists' terrorism as a criminal matter and the solution is to treat terrorism as a matter of war and to be conducted within war rules, including humanitarian law.<sup>194</sup> This approach acknowledges that terrorism poses a new challenge to international rules relating to armed conflict, which also invokes a demand for the development of new legal regime effectively capable of addressing the threat of global terrorism.<sup>195</sup> By the same token, Mark Baker proposed rewriting article 51 of UN charter. He argues that the self-defense term has been stretched beyond any acceptable interpretation of article 51 in order to respond to terrorism. Consequently, he called on the UN and international community to adopt a stance against terrorism beginning with recognizing the legitimacy of the use of self-defense against terrorist attacks.<sup>196</sup> Or terrorist attacks constitute criminal acts to be addressed through international cooperation and the criminal justice system; however a meaningful prosecution of terrorists would have required that the U.S. gain physical custody of them. Abi Saab argues that 9/11 is not an act of war, but a criminal matter.<sup>197</sup> It should be dealt with in the framework of existing international law, largely the realm of international criminal law, and by addressing its root causes.

Some commentators have argued that terrorism should be included in the law of nations.<sup>198</sup> "The law of nations has recently been expanded to include war crimes. This inclusion is in response to international condemnation of the war criminal. With war crimes, numerous international agreements condemning war criminals exist[]." <sup>199</sup> "When conduct is universally condemned, the perpetrators of such conduct are subject to the principles of universal jurisdiction, which allows courts to prosecute offenders regardless of the situs of the event."<sup>200</sup>

International law has traditionally limited this category of offenses to

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193. See *Id.* at 216, 219-20.

194. See Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103-19, (Andrea Bianchi ed., 2004).

195. Addicott, *supra* note 184, at 219.

196. Baker, *supra* note 186, at 45.

197. Georges Abi-Saab, *The Proper Role of International Law in Combating Terrorism*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM xiii, (Andrea Bianchi ed., 2004).

198. Michael Rosetti, *Terrorism as a Violation of the Law of Nations after Kadic v. Karadzic*, 12 ST. JOHN'S J. LEGAL COMMENT. 565, 582-84 (1997).

199. *Id.* at 591.

200. *Id.*

the most heinous of crimes in an effort to prevent nations from subjecting their arbitrary rules on foreign nationals. The law of nations is the doctrine encompassing these violations. Courts look to the scope of the international community's condemnation and the work of jurists on the subject in making a determination of whether an activity violates the law of nations. Recent developments also indicate that private individuals as well as states can violate the law of nations.<sup>201</sup>

I believe that the UN should be energized to address the issue of reaching a consensus on a definition for terrorism. This definition should be a compromise between the definitions in the U.S. and Muslim world where little differences appear. With its spreading of democracy, development and free trade in the Middle East would be the best avenue to promote war and terrorism avoidance. The international community has to stress one legal anti-terrorist norm, "building through the drafting and ratification of international anti-terrorist initiatives and human rights...."<sup>202</sup> These international instruments like treaties have to be balanced and based on justice and acknowledge and absorb different perspectives.

*B. Terrorism is an International Problem, not only an American Problem*

After the attacks, the U.S. was expected to go for a more multilateral approach. Instead the U.S. felt it had to do its own work. However, terrorism should not be a subjective epithet which allows any one country to assert an absolute right to attack any other country or group that it dislikes. The UN remains the best forum for an objective and universally agreed definition. In his article, *Terrorism is the World's Problem*, Egyptian Ambassador Fahmy called on Americans to consider terrorism as a global not an American problem.<sup>203</sup> This conclusion and its consequences implies that Americans have to understand the global context of the war on terrorism.<sup>204</sup> The United Nations should be on the hook; international law should be used more frequently and developed by the state players to counter terrorism. The U.S. is a global power which has global opportunities and responsibilities and terrorists are individuals who attacked not only America but also who attacked other countries like Egypt, Spain, the UK and Indonesia.<sup>205</sup> Establishing a dialogue between the Muslim World and the U.S. is urgent, not only for securing peace in the Middle East, but also for making cultural adjustments and strengthening globalization. Since terrorism has taken place, moderate Muslims have not had the chance to either renounce the terrorist attacks or to express what they think about these attacks against innocent civilians. Americans have to realize that they can not win this war without the full engagement of moderate Muslims. Unilateral and one sided view of the problem will only aggravate the situation. This has been happening so far in Iraq.

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201. *Id.*

202. Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 367 (2003).

203. Nabil Fahmy, *Terrorism is the World's Problem*, 16 DUKE J. COMP. & INT'L L. 157, 160 (2006).

204. *Id.*

205. *Id.* at 158-59.



In the first global reaction to September 11, 2001, the UN passed Resolution 1368, which specifically recognized America's inherent individual rights and collective self defense in accordance with the Charter and specifically called on states to work together "to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks."<sup>206</sup> Shortly thereafter, the Security Council passed another resolution, invoking its authority under Chapter VII of the United Nations charter, reaffirming the need to combat by all means terrorist acts that threaten international peace and security, requiring states to take steps to block terrorist finances and end any state support for terrorism, and calling on states to increase cooperative intelligence gathering and law enforcement efforts.<sup>207</sup> The U.S. failed to use the resources of the Security Council, thus "undermin[ing] the view that the council and the UN as a whole should be the primary vehicle to respond to threats to and breaches of the peace...."<sup>208</sup> The invasion of Iraq created a precedent that states may freely act outside the UN system.<sup>209</sup> Jonathan Charney warned the U.S. about being involved in the war on terror without seeking the support of the Security Council. He went on to explain how the Security Council's involvement "could help build durable and broadly supported defenses against this threat."<sup>210</sup> Otherwise, the U.S. will fail to build a stable, long term coalition in support of its stated objective of suppressing international terrorism worldwide. A Commercial law Professor in Cairo Law School suggested the closing of Public International Law department at the law school and said that experts in international law should turn to other fields of law as international law no longer exists in the aftermath of the invasion of Iraq.<sup>211</sup> Kofi Annan announced that "we must never lose sight of the fact that any sacrifice of freedom or rule of law within states—or any generation of new tensions between states in the name of anti-terrorism—is to hand the terrorists a victory that no act of theirs alone could possibly bring."<sup>212</sup>

"Terrorists today have become more global because of freedom of movement, free flow of information and communications, and the ability to exploit loopholes in the spectrum of domestic laws between countries."<sup>213</sup> A lot of loopholes exist in domestic laws; these loopholes have to be filled by escalating domestic issues like money laundering, transfer of money on an international level. A transnational problem that spans virtually the entire world, terrorism is an international phenomenon which represents the downside of globalization. It requires a

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206. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

207. S.C. Res. 1373, ¶¶ 1-3 U.N. Doc. S/RES/1373 (Sept. 28, 2001).

208. Jonathan Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 837 (2001).

209. Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CAL. L. REV. 2295, 2338 (2007).

210. Charney, *supra* note 208, at 838.

211. Dr. Mokhtar Brairy, Cairo University, August 2004 (on file with author).

212. Press Release, Secretary-General, Menace of Terrorism Requires Global Response, Says Secretary-General, Stressing Importance of Increased United Nations Role, U.N. Doc SG/SM/8583 (Jan. 20, 2003).

213. Fahmy, *supra* note 203, at 168.

concerted, consistent and coordinated international cooperative framework to sustain a chance of eliminating this threat.<sup>214</sup> International law is the only mechanism to provide coordinating strategies and integration across countries rather than military collations and a binary division of states between good and evil. The latter would run the risk of aggravating the very international divisions that can most easily be exploited to coordinate further underground criminal and terrorist enterprises. “‘Terrorism’ no longer describes state conduct. It now refers to the acts of sub-state actors. Similarly, its function is no longer just a term expressing moral condemnation.”<sup>215</sup> Furthermore, the international community needs to work together quickly and consistently on the world war on terrorism, a far reaching perspective of what the international community does by way of resolving these issues. America is the most powerful country in the world; however, it is not powerful enough to confront the new global challenges alone – the UN has to be more engaged. Strengthening norms that hold states accountable for criminal acts committed by terrorists operating from its territory, passing resolutions prohibiting the targeting of civilians, signing a treaty which will mandate a strong collective response to attacks on civilians are among the proposals. For the most part, the U.S. has so far been focusing on what Telhami termed the supply side of terrorism rather than the demand side. Ambassador Fahmy again mentioned that “terrorism is an international phenomenon that will only be defeated by collective efforts.”<sup>216</sup>

On a related front, international law norms and principles have to be developed in combating terrorism, strengthening multilateral treaties and international legal instruments, engaging the Muslim world with the force of Sharia and cementing development and free trade projects in the Middle East, which would combine together to make headway in winning the war on terrorism. I completely believe that defusing terrorism should be a major topic in U.S. foreign policy. My theory is that terrorism will be eliminated only when countries deal with both the demand and supply side of terrorism. International trade law norms can be the most efficient tool to deal with the demand side of terrorism, while current international law norms have to be strengthened to deal with the supply side as well. The two sides complement each other. The U.S. along with the international community will have to go far in dealing with the supply side, while the current status of international trade is enough to deal with the demand side.

#### CONCLUSION

Winning the war on terrorism will only be feasible if the Muslim world and the U.S. realize that they have one common enemy. The U.S. -as a super power-strategically opted for a more unilateral approach which has proved to be a failure in combating terrorism. Moving back towards more a multilateral approach and

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214. Asli Bali, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT'L & COMP. L. 403, 416 (2002).

215. Young, *supra* note 181 at 101.

216. Nabil Fahmy, *Perspectives On Terrorism From Asia, The United States, and The Middle East: The Global Challenges in the Middle East Region: An Egyptian Perspective*, 28 FLETCHER F. WORLD AFF. 145 (2004).

engaging the Muslim world would effectively contribute to this war. Addressing the root causes of terrorism is equally important as fighting terrorist organizations with military might. International law remains the mechanism which both the U.S. and the Muslim world could work together to enrich and develop.

The U.S. is clearly failing the cold war of ideology in the Middle East. A growing proportion of the Muslim youth embrace extremist views that could ultimately lead to increased terrorism. Although the CRS report acknowledges this, the report failed to highlight the best course in combating terrorism. The idea of bringing war to the enemy has unfortunately aggravated the situation in the Middle East. The Bush Doctrine of preemptive self defense has not appealed to the international community in general, let alone to the Muslim world. The report suggests that the military component is the primary tool in the nation's portfolio for combating terrorism; public diplomacy and economic inducement have received little attention in the report even though it is clear now that they are the best course to deal with the terrorism problem in the Middle East. I believe that the U.S. portfolio has to include a military component to disarm and fight terrorists; however, I largely disagree with the set of priorities which have been put in the report. This article is advocating for a change in the set of current priorities of the U.S. administration. Free trade, development, dialogue with the Muslim world and increasing globalization in the Middle East have to be the top priorities of U.S. portfolio of combating terrorism.

