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Keywords

Israel, States, Terrorism, Comparative Law, Legislation, Democracy, Human Rights Law, Politics

DEMOCRATIC RESPONSES TO TERRORISM: A COMPARATIVE STUDY OF THE UNITED STATES, ISRAEL, AND INDIA

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I. INTRODUCTION

On September 11, 2001, nineteen men hijacked four planes, crashing one each into the Twin Towers of the World Trade Center, the Pentagon, and in Shanksville, Pennsylvania.¹ Approximately three-thousand people from eighty-seven countries were killed.² That evening President Bush addressed the nation, stating that the full resources of the intelligence and law enforcement communities would be devoted to finding those responsible for the attacks.³ The President further stated that, "We will make no distinction between the terrorists who committed these acts and those who harbor them."⁴ On September 20, the President addressed a joint session of Congress, declaring, "[o]n September the 11th, enemies of freedom committed an act of war against our country."⁵ The war against terrorism was soon in full swing.⁶

Terrorism is of course not a new problem. Many have noted that history is replete with instances of groups using violence to achieve political objectives.⁷ Modern terrorism, with its emphasis on "liberty and self-determination" can be traced to the Britain's Glorious Revolution, and the use of violence for symbolic purposes was later legitimated by the French Revolution.⁸ Others have noted that terrorism was an effective tool of national liberation movements after the Second

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1. N. R. Kleinfeld, *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon In Day Of Terror*, N.Y. TIMES, September 12, 2001, at A1.

2. Ruth Wedgwood, *Al Qaeda, Terrorism and Military Commissions*, 96 AM. J. INT'L L. 328, 328 (2002).

3. President George W. Bush, Address to the Nation (Sept. 11, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (last visited Nov. 10, 2004).

4. *Id.*

5. President George W. Bush, Address to a Joint Session of Congress and the American Public (Sept. 20, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Nov. 13, 2004).

6. Dana Milbank, *Bush Disavows Hussein-Sept. 11 Link; Administration Has Been Vague on Issue, but President Says No Evidence Found*, WASH. POST, Sept. 18, 2003, at A18.

7. See, e.g., Ramsey Kleff, *Terrorism: The Trinity Perspective*, in TERRORISM AND POLITICAL VIOLENCE: THE LIMITS AND POSSIBILITIES OF LEGAL CONTROL 15 (Henry. H. Han ed., 1993) (noting evidence of terrorism by the Israelites in the Old Testament).

8. *Id.* at 16.

World War.⁹ During the 1970s and 1980s, the frequency of terrorist attacks substantially increased. The U.S. Department of State, for example, recorded 13,572 incidents of international terrorism between 1968 and 1991.¹⁰ In 2002, the State Department recorded 199 incidents of international terrorism.¹¹ Furthermore, there is good reason to believe that terrorist activity will persist in coming years. Yonah Alexander, for example, notes that terrorism will increase because 1) it has been successful in attracting publicity, 2) resources such as weapons, financing, and communication are readily available, and 3) an international network of groups and states supporting terrorism already exists.¹² More importantly, many of the underlying causes of terrorism, including the ideological roots of terrorist movements, remain.¹³

Given these trends, it is clear that all governments need a comprehensive strategy for effectively combating terrorism. This paper takes a comparative approach to studying strategies implemented by various countries to combat terrorism. I first examine what we mean by "terrorism." Next, I will examine three models for dealing with terrorism: the "criminal justice" model, the "intelligence" model, and the "war" model. Next, I will examine the counterterrorism approaches employed by the United States, Israel, and India. Using a functional approach, I will attempt to place each country's counterterrorist policy within one of the three models discussed. Particular attention will be paid to the civil liberties implications of counterterrorist policies in each country. Specifically, I argue each country has adopted a war-model of counterterrorism, and except in the case of India, has increased its application since the September 11 attacks. The "war on terror" terminology is more than just a rhetorical device. Rather, it reflects a new model for both U.S. counterterrorism policies and those of other countries—policies which have increasingly encroached on the civil liberties and human rights, while at the same time ignoring the underlying causes of terrorism and therefore exacerbating the terrorist threat.

9. See PAUL WILKINSON, *TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE* 21 (2000).

10. A.J. Jongman, *Trends in Terrorism, 1968-1988*, in *WESTERN RESPONSES TO TERRORISM* 34 (Alex P. Schmid & Ronald D. Crelinsten eds. 1993).

11. U.S. DEPARTMENT OF STATE, 2002 *Patterns of Global Terrorism* 1. The State Department notes that this is a 44% decline from the 355 attacks in 2001, and the number of deaths from attacks decreased from 3,295 to 725. *Id.* However, the 2001 number includes the deaths resulting from the September 11 attacks. The vast majority incidents of international terrorism in 2002 occurred in the Middle East and Asia. No attacks were recorded in North America. *Id.* at xviii. Of course, the State Department's report does not include the large numbers of acts of purely "domestic" terrorism. See WILKINSON, *supra* note 9, at 45.

12. YONAH ALEXANDER, *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES* 7 (2002).

13. *Id.*

II. THEORETICAL FRAMEWORK

A. *Defining the Problem*

Terrorism is not simply the act of madmen. It is “a calculated move in a political game.”¹⁴ Actors engage in terrorism with objectives in mind. Moreover, terrorism is an important means for non-state actors who lack resources to achieve these objectives.¹⁵ Violence is perceived to advance objectives, most typically by inciting fear and bringing attention to the terrorist’s cause, and by increasing the bargaining power of groups engaged in terrorism.¹⁶ Terrorism, therefore, is not merely an act of violence; it is “propaganda by deed.”¹⁷

Beyond these observations, however, defining “terrorism” is problematic. First, terrorism is not a monolithic concept.¹⁸ Wilkinson, for example, notes that a typology of terrorism would include distinctions between “state” and “factional” terrorism, international and domestic terrorism, and distinctions based on politics.¹⁹ Ideological underpinnings may include nationalism (as in the case of the Irish Republican Army), ideological (Germany’s Red Army Faction), religio-political terrorists (Hamas in the Middle East), and single issue terrorists (such as anti-abortion groups).²⁰

Second, the term terrorism has a significant negative connotation. One condemns something by calling it terrorism.²¹ As a result, many have noted that the terms “terrorist” and “terrorism” have become so overused that they have lost much of their significance.²² At the same time, this continuous expansion of the definition of the word exaggerates the threat posed by terrorism and influences public reaction, and therefore government policy.²³ For example, some have noted that compared to traffic accidents, drug crimes, or domestic violence, terrorism is a minor problem.²⁴ Yet large amounts of resources are devoted to the terrorist threat.²⁵ As a result, terrorists have disproportionate power over policy relative to their threat.²⁶ More importantly, the implicit condemnation of the word

14. PHILLIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* xi (1998).

15. RICHARD J. CHASDI, *TAPESTRY OF TERROR: A PORTRAIT OF MIDDLE EASTERN TERRORISM, 1994-1999* 3 (2002).

16. See ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 79 (2002).

17. L. Paul Bremer III, *The West’s Counter-Terrorist Strategy*, in *WESTERN RESPONSES TO TERRORISM*, *supra* note 10, at 256.

18. Thomas H. Mitchell, *Defining the Problem*, in *DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM* 13 (David A. Charters ed., 1991).

19. WILKINSON, *supra* note 9, at 19.

20. *Id.* at 19-20.

21. Mitchell, *supra* note 18, at 13.

22. See, e.g., Kleff, *supra* note 7, at 17.

23. Grant Wardlaw, *The Democratic Framework*, in *THE DEADLY SIN OF TERRORISM: ITS EFFECT ON DEMOCRACY AND CIVIL LIBERTY IN SIX COUNTRIES* 6 (David A. Charters ed., 1994).

24. Jongman, *supra* note 10, at 26.

25. See Jongman, *supra* note 10, at 26.

26. PHILLIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* 4

“terrorism” ignores the accurate if cliché observation that, “one man’s terrorist is another man’s freedom fighter.”²⁷ The German occupying force during the Second World War, for example, referred to the Dutch resistance as “terrorists.”²⁸ In 1948, several prominent American clergymen condemned Menachem Begin for leading “a terroristic band.”²⁹ Begin, repeatedly asserted, however, that members of his organization were “freedom fighters” rather than terrorists.³⁰

Statutory definitions have tended to ignore this terrorist/freedom-fighter ambiguity. The United States defines terrorism as “violent acts” or acts “dangerous to human life” that appear to be intended to i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) affect the conduct of a government by mass destruction, assassination, or kidnapping.³¹ Similarly, the British Prevention of Terrorism Act of 1974 defined terrorism as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”³² Such definitions are unsatisfying because they are the creation of policymakers, for whom acts that constitutes “terrorism” are often self-evident.³³ In addition, in marginal cases, the ability of executive officials to use discretion in the enforcement of statutory provisions, allows legislators to be over-inclusive in their definitions of terrorism. Statutory definitions are therefore not useful frameworks for understanding terrorism, and may also be poor mechanisms for understanding a country’s counterterrorist policy.

In contrast, moral ambiguities considerably curtail the ability of academics to settle on a single definition of terrorism. In 1988, Schmid and Jongman reported 109 different definitions currently in use among leading academics.³⁴ Eventually, and based on comments from the academic community, Schmid put forth his own definition:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of the violence are not the main targets. The immediate human victims of violence are generally chosen at randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat - and violence-based communication processes between terrorist (organisation), (imperiled) victims, and main targets

(2003).

27. Mitchell, *supra* note 18, at 9.

28. Alex P. Schmid, *The Response Problem as a Definition Problem*, in WESTERN RESPONSES TO TERRORISM, *supra* note 10, at 11.

29. ROBERT KUMAMOTO, INTERNATIONAL TERRORISM AND AMERICAN FOREIGN RELATIONS, 1945-1976 12 (1999).

30. *Id.*

31. 18 U.S.C. § 2331 (2000).

32. HEYMANN, *supra* note 14, at 3.

33. See Mitchell, *supra* note 18, at 12.

34. *Id.* at 15.

are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.³⁵

While Schmid's definition is comprehensive, the definition of terrorism I will employ will differ in several ways. First, while States may engage in terrorism, I will only be concerned with terrorism committed by sub-state actors. State terrorism will typically involve conduct by a state against its own citizens, as was the case in the Soviet Union under Stalin.³⁶ In such situations, a state's "counterterrorist" policy is irrelevant. In situations where a state engages in direct acts of violence against citizens of another State, such acts would constitute acts of war. The models of counterterrorist policy that are the focus of this paper are irrelevant in both situations.³⁷

Second, terrorism in this paper will only refer to activities which have the purpose of effectuating political change. Idiosyncratic or purely "criminal" terrorism, for example when organized crime actors use violence to prevent prosecution, can most likely be dealt with through standard law enforcement techniques because such terrorists will typically not have the resources of State sponsorship or popular support that would require a state to choose between the models discussed in this paper. In short, idiosyncratic, criminal, and state terrorism, do not present the interesting dilemmas for democratic states that does political sub-state terrorism.

Finally, Schmid's definition does not address the moral ambiguities of terrorism. As mentioned earlier, policymakers perhaps do not need to concern themselves if their definitions are over-inclusive because political forces will dictate when they decide to employ their counterterrorist policies. However, employing counterterrorist policy based on political preferences may lead to accusations of hypocrisy. An over-inclusive definition may also allow a government to use a terrorism statute to prosecute those whom legislators never intended to come under the statute (for example, if the USA Patriot Act was used to investigate animal rights groups). It may even be argued that such an approach is antithetical to the rule of law.

The opposite approach is to simply condemn all terrorism. This approach is advocated by Benjamin Netanyahu, who argues that "*nothing* justifies terrorism... it is evil *per se*."³⁸ But such an approach is equally unsatisfactory because it does not take into account the complexity of many of the world's conflicts. Where is

35. Schmid, *supra* note 28, at 8. However, Schmid acknowledges that his definition is too lengthy for policymakers. *Id.* Eventually, Schmid asserts a legal definition of terrorism as the peace-time equivalent of war-crimes (in other words, activities, which if committed during war time, would be considered war-crimes).

36. See, e.g., Kleff, *supra* note 7, at 17-18.

37. State terrorism, here, is distinguished from state-sponsored terrorism. State-sponsored terrorism refers to terrorism by sub-state groups which are supported by States. Unlike state terrorism, state sponsored terrorism does raise interesting questions of which models of counterterrorist policy a State should apply, and therefore is important to this analysis.

38. HEYMANN, *supra* note 14, at 4.

the line between terrorism and self-defense? Moreover, many of those who would condemn all terrorism would agree that violence by States is often necessary.³⁹ To argue that members of groups may not resort to violence simply because they do not have a State, smacks of circularity – often groups resort to terror *because* they do not have their own State. A workable definition of terrorism therefore requires sufficient flexibility to take into account the moral ambiguity of terrorism, while not having so much flexibility so as to collapse into the quagmire of deconstructionist nihilism.

Taking into account the idea that terrorism is the result of political marginalization, I would therefore propose the following solution to the terrorist-freedom-fighter dilemma: violence against a state constitutes “terrorism” when that State is a well-working democracy. In a well-working democracy, groups would have mechanisms to achieve political change without resorting to violence. Under this definition, many groups which have been regarded as both “terrorists” and “freedom-fighters,” such as the African National Congress, would no longer be considered terrorists because they were incapable of achieving their objectives through political processes. In contrast, group which resorts to political violence when, as an objective matter, alternatives are available, deserve the condemnation of the term “terrorist.”⁴⁰

Many ambiguities are avoided under this definition because the merits of terrorists’ claims are not at issue. Instead, moral ambiguities are collapsed into questions of whether a set objectively verifiable procedural conditions generally viewed as essential to democracy (e.g., free speech and press, secret ballots, multi-party elections, rule of law, etc.) were met. Political responsiveness is also something that is already measured by political scientists, albeit imperfectly. In addition, while there is not complete agreement on what is a “democracy”, there is substantially more agreement on this than on what constitutes the differences between terrorists and freedom-fighters .

The definition of terrorism for the purposes paper will therefore be: the use of violence, or threat of violence, by sub-state actors, with or without the support of some State actor, against a democratic State,⁴¹ which has the purpose of achieving political change by instilling fear in the public or government of the target state.

B. Democracies and Terrorism

As a theoretical matter, stopping terrorism ought not be too difficult. Phillip Heymann notes that to execute an act of terrorism, the terrorist needs a set of definable things, such as access to the target, resources, and popular support.⁴² Prevention of terrorism merely requires denying the terrorist one of these

39. *Id.* at 70.

40. See also *id.* at 9 (noting that defining terrorism as “violent domestic politics” directed at democratic regimes retains “moral clarity” for the definition).

41. I do not mean to imply that citizens of an autocratic state who are victims of political violence do not fear or suffer. One suffers equally as the victim of violence regardless of whether that act was an act of terrorism.

42. HEYMANN, *supra* note 14, at 84.

conditions.⁴³ Given that the problem and solution are definable, the problem facing governments today is not preventing terrorism *per se*; it is preventing terrorism within a democratic framework.⁴⁴

There are several reasons why democracies will be particularly vulnerable to terrorist attacks. First, democracies generally offer a wide degree of freedom of movement, both within a country and across borders.⁴⁵ This allows access to targets,⁴⁶ a means of escape, and the ability to seek shelter in foreign countries.⁴⁷ Second, free speech rights allow organizations to criticize leaders and institutions to gain popular support,⁴⁸ facilitating access to resources and recruits. This problem is exacerbated by free association rights in democracies.⁴⁹ Third, the constraints of democratic legal systems, with their emphasis on rights for the accused, may make it difficult to investigate and prosecute terrorists.⁵⁰ Finally, in addition to allowing the discussion of ideas, the free press which is necessary to democracies allows for the uncontrolled dissemination of information about a terrorist attack.⁵¹ A free media in a democracy therefore facilitates the very attention that terrorist organizations seek.

Exacerbating this vulnerability is the fact that political pressures in democracies can affect the way democracies respond to terrorist incidents. Heymann, for example, suggests that responses to terrorism can be analyzed based on three criteria: effectiveness, infringement of civil liberties, and political expediency.⁵² A significant danger exists when policies infringe on civil liberties and are also politically expedient (more so if the policy is also ineffective). The biggest threat posed by terrorism may therefore be that the "interplay of terrorism, public reaction, and governmental response... may severely undermine the nation's democratic traditions."⁵³

Several authors have engaged in comparative studies of how different countries have responded to terrorism. Christopher Hewitt (1984) approaches his comparative analysis as an objective empiricist, with the purpose of determining which policies have been most effective against urban terrorism.⁵⁴ Five cases are selected for his study: the IRA in Northern Ireland (1970-81), ETA in Spain (1975-81), the Red Brigades/Frontline in Italy (1977-81), the Tupamaros in Uruguay (1968-73) and EOKA in Cyprus (1955-58).⁵⁵ Using time-series analysis, Hewitt examines the effectiveness of six counterterrorist policies: (1) ceasefires and

43. *Id.*; see also HEYMANN, *supra* note 26, at 40 (2003).

44. HEYMANN, *supra* note 26, at 159.

45. Schmid, *supra* note 28, at 18.

46. *Id.* at 19.

47. See HEYMANN, *supra* note 14, at 19.

48. WILKINSON, *supra* note 9, at 23.

49. Schmid, *supra* note 28, at 18.

50. *Id.* at 19.

51. *Id.* at 22-23.

52. See HEYMANN, *supra* note 26, at 88.

53. See HEYMANN, *supra* note 14, at 2.

54. CHRISTOPHER HEWITT, *THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES* xi (1984).

55. *Id.* at 1-25.

negotiations with terrorists, (2) improving economic conditions, (3) making reforms, (4) collective punishments, (5) emergency powers and other anti-terrorist legislation, and (6) the use of security forces.⁵⁶

In assessing ceasefires and negotiations, Hewitt concludes that ceasefires result in a significant decline in violence. However, negotiations are unlikely to result in conflict resolution because terrorist demands are often radical and inflexible. As result, Hewitt concludes that negotiating truces with terrorist organizations is a "short-sighted" policy that, if the truce is extended, will benefit terrorists by giving them the opportunity to rebuild strength.⁵⁷

In assessing the efficacy of improving economic conditions, Hewitt notes that there is considerable evidence to suggest a connection between poverty and violence.⁵⁸ Economic conditions were a significant cause of violence in three of five cases studied.⁵⁹ Measuring the effect of specific government policies to improve economic conditions is difficult because only in Northern Ireland was any affirmative attempt to improve conditions made, and because it is always difficult to tie specific governmental policies to economic effects. But Hewitt does compare general economic conditions to violence rates.⁶⁰ Counter-intuitively, his results show that there is no significant link between poor economic conditions and terrorism, and terrorist activity may in fact be higher during good economic times. Hewitt therefore concludes that general improvements in economic conditions should not be expected to decrease rates of terrorism.⁶¹ However, Hewitt does argue that improving conditions *before* terrorist campaigns begin may prevent violence before it starts, and that improving the condition of *specific groups* may help reduce violence.⁶²

In assessing the effect of reforms on terrorism, Hewitt notes that if terrorism is the result of grievances, addressing those grievances should reduce violence.⁶³ However, measuring the effect of reforms may be difficult because often reforms occur in phases. Hewitt therefore breaks down "reforms" into two phases: (1) ending the old regime, and (2) establishing new institutions. Based on this analysis, Hewitt concludes that concessions made by governments "from a position of weakness" will likely increase violence in the short term during the creation of new institutions. It is only after several years that violence rates will begin to decline.⁶⁴

56. *Id.* at 35.

57. *Id.* at 40-41.

58. *Id.* at 43.

59. *Id.* at 43-46. Northern Ireland, Italy, and Uruguay. Hewitt argues that economic conditions were not depressed in either Cyprus or Spain, and notes that Basque (home to the ETA) was one of richest regions of the latter.

60. *Id.* at 46.

61. *Id.* at 47.

62. *Id.* at 43-47.

63. *Id.* at 47.

64. *Id.* at 54.

Collective punishments were only undertaken in one of the cases in Hewitt's study (Cyprus), and even there, they were used sparingly. The effect of collective punishments is complicated because the level of generality upon which the punishment is based may affect the deterrent effect of the punishment. Punishing a large area assumes an equal distribution of terrorists within that area (which was untrue in the case of Cyprus). Punishing a smaller area will reduce terrorism from that area, but may simply shift it to other areas. Taking these considerations into account, however, Hewitt concludes that collective punishments do result in a generalized decline in terrorist activity.⁶⁵ But this decline was a mere 1.7 percent.⁶⁶ Collective punishments are a significant aspect of this study, and it is important to note that even if this decline were applicable to other situations, the small size of the decline calls into question the benefits of collective punishment as compared to the human rights implications. In addition, the effect of collective punishments declines with each successive punishment.⁶⁷

Emergency or anti-terrorist legislation was undertaken in each case in Hewitt's study. Hewitt examines six types of legislation in his study: (1) firearms control; (2) requiring the population to carry identity cards; (3) increasing investigatory powers of security forces (allowing searches of homes, arresting people without charge); (4) the establishment of special courts and procedures; (5) draconian penalties for terrorist offences; (6) the restriction of political rights such as free speech or assembly.⁶⁸ Hewitt concludes that such legislation has no discernable impact on violence.⁶⁹ However, he does concede the impact may be difficult to ascertain, most importantly because while legislation may grant certain powers, the use of these powers by the executive will determine their effect.⁷⁰

Finally, Hewitt studies two ways in which the use of security forces may decrease terrorism. First, military forces may engage in patrols, mass searches, and counterinsurgency tactics.⁷¹ These tactics lead to no decline in violence rates. They are in fact highly correlated with increases in violence, though Hewitt argues that this may be because an increase in violence causes increased patrols, rather than the reverse.⁷² The second tactic that security forces may take is to arrest terror suspects. Hewitt finds a significant relationship between arrests and decreases in violence.⁷³

Like Hewitt, Crelinsten and Schmid engage in cross-national study of counterterrorist policies. Their study compares counterterrorist policies in eight European countries: the Netherlands, Spain, France, Germany, Italy, the United Kingdom, Switzerland, and Austria. Crelinsten and Schmid's study differs from

65. *Id.* at 55-60.

66. *Id.* at 59.

67. *Id.*

68. *See id.* at 35.

69. *Id.* at 66-67.

70. *Id.* at 67.

71. *Id.* at 82-84.

72. *Id.* at 86.

73. *Id.*

Hewitt's in two ways. First, Crelinsten and Schmid do not attempt empirical assessment of each country's approach, instead relying on descriptions and qualitative assessments of experts from each country.⁷⁴ In addition, Crelinsten and Schmid are concerned with analyzing counterterrorist policies through the lens of both effectiveness and democratic acceptability.⁷⁵

Crelinsten and Schmid ultimately do not create a set of "best practices," but rather discern a set of trends for counterterrorist policies. They first place counterterrorist policies into two categories: *conciliatory*, meaning either negotiation, or reform; and *repressive* (criminal justice and military).⁷⁶ Other axes of classification discussed by Crelinsten and Schmid are short-term versus long term responses, the proactiveness of responses, and whether the action deals with the coercive (i.e. violent) capabilities or political capabilities (i.e., ability to gain attention and support) of terrorists.⁷⁷ Finally, Crelinsten and Schmid differentiate between "domestic" and "international" responses to terrorism.⁷⁸

By comparing counterterrorist policies of different countries, Crelinsten and Schmid discern several trends. First, the authors observe that while counterterrorist policies in the 1970s emphasized the use of criminal justice ("legal-repressive") mechanisms and international legal instruments, there has been a modern trend towards the use of the military because of weaknesses in the criminal justice model.⁷⁹ This trend is demonstrated by the Reagan administration during the 1980s, which culminated in the bombing of Tripoli in April 1986.⁸⁰

Second, in comparing the criminal justice and war models through the lens of democratic acceptability, Crelinsten and Schmid note that, counterintuitively, it is through the criminal justice model that Western countries have shifted away from democratic acceptability.⁸¹ This is due to common measures adopted in the criminal justice model, including special legislation, the creation of special courts, rules of evidence or procedure, and increased police powers. One particularly common power is a prolonged ability to detain suspects without charge and without access to counsel. In addition, it is in the domestic response to terrorism that the movement away from democratic principles has been most evident.⁸²

Finally, Crelinsten and Schmid suggest two changes to counterterrorist policy. First, they suggest the adoption of a definition of terrorism as the "peacetime

74. Alex P. Schmid & Ronald D. Crelinsten, *Editor's Introduction: Western Responses to Terrorism*, in WESTERN RESPONSES TO TERRORISM, *supra* note 10, at 4-5 [hereinafter Editor's Intro].

75. *Id.* at 5.

76. Ronald D. Crelinsten & Alex P. Schmid, *Western Responses to Terrorism: A Twenty-Five Year Balance Sheet*, in WESTERN RESPONSES TO TERRORISM, *supra* note 10, at 309 [hereinafter Twenty-Five Year Balance].

77. *Id.* at 310.

78. *Id.* at 312.

79. *Id.* at 332-35.

80. *Id.* at 315-16.

81. *Id.* at 334.

82. *Id.* at 335.

equivalent of war crimes.”⁸³ Schmid argues that while such a definition would be under-inclusive, it is more likely to achieve consensus because there is a consensus on the definition of war crimes.⁸⁴ Moreover, such a definition would reflect the criminality of terrorism while acknowledging its political dimension.⁸⁵ Second, Crelinsten and Schmid suggest increased emphasis on addressing the political capabilities of terrorist groups rather than simply their violent activities.⁸⁶ In practical terms, this means more emphasis on delegitimation of terrorists as opposed to a singular focus on preventing terrorist acts. Crelinsten and Schmid argue that such methods may enable governments to find new ways of addressing terrorism which are more compatible with a democratic framework.⁸⁷

Charters (1994) examines counterterrorist policies in six countries: the United Kingdom, Germany, Italy, France, Israel, and the United States.⁸⁸ Like Crelinsten and Schmid, Charters engages in a comparative study of counterterrorist policies using assessments from authors from each country examined.⁸⁹ However, rather than discerning trends in policies like Crelinsten and Schmid, Charters’ tends to focus predominantly on the civil liberties implications of counterterrorist policies.⁹⁰

Charters first observes that while terrorism is not by itself a threat to democracy, it does pose several threats to the democratic systems.⁹¹ Most importantly, Charters notes that in most countries, terrorist activity was met with public desire and government acquiescence in harsher counterterrorist policies that undermine democratic values.⁹² The threat of domestic terrorism was a particularly strong inducement to such policies. Only in the United States, for example, were severe measures favored for use outside the country, presumably because the threat to the United States remained overseas for the most part.⁹³

Next, Charters measures the effectiveness of several counterterrorist tactics relevant to his study. First, he notes that negotiation was generally an ineffective strategy because terrorists generally regarded deals as temporary ploys, not permanent prohibitions on the use of force.⁹⁴ Second, Charters notes that every country introduced some form of target hardening (decreasing access to targets) as counterterrorist tactic, but it was generally introduced as a reaction to attack rather

83. *Id.* at 336.

84. Schmid, *supra* note 28, at 11-12.

85. Editor’s Intro, *supra* note 74, at 336.

86. *Id.*

87. *Id.* at 337.

88. David A. Charters, THE DEADLY SIN OF TERRORISM: ITS EFFECT ON DEMOCRACY AND CIVIL LIBERTY IN SIX COUNTRIES, *supra* note 23, at 1.

89. *Id.* at 1-2.

90. *Id.*

91. *Id.* at 212.

92. *Id.* at 212-13.

93. *See id.* at 13. Most laws passed by Congress, for example, dealt with federal authority overseas.

94. *Id.* at 215.

than as a proactive measure.⁹⁵ Charters argues that target-hardening may have some deterrent effect, but its real value may lie on its psychological benefits.⁹⁶ Most importantly, however, target hardening demonstrates an important point: democratic societies cannot both provide total security and maintain the openness requisite to democracy.⁹⁷ Third, Charters argues that although military reprisals lead to some attrition in terrorist ranks, it was generally an ineffective deterrent to terrorist activity, often leading to increased hostility.⁹⁸ As a result, Charters argues that the role of the military should be limited to hostage rescue operations which are morally defensible, defined, and can be conducted within a constitutional framework.⁹⁹

As for the civil liberties implications of counterterrorist policies, Charters argues that there was no "wholesale rush to restrict freedoms" despite rhetoric about the need to "stamp out terrorism."¹⁰⁰ Charters does note several infringements common to counterterrorist measures, including: expanded search and arrest powers, increased periods of detention, proscription of terrorist organizations, and expanded deportation of powers.¹⁰¹ However, given the apparent resilience of democracies in the face of terrorism, and the success in countering terrorist attacks, Charters argues that effectiveness and liberty are compatible (though, as noted earlier, total eradication is impossible while maintaining democratic openness).¹⁰² Charters, like Heymann, concludes that the greatest threat comes from public reaction to the threat, not the threat itself.¹⁰³ Fear reduction measures (such as crisis management) may therefore be some of the most important counterterrorist measures a government should take.¹⁰⁴

Finally Yonah Alexander (2002) compares counterterrorist policy in ten countries: the United States, Argentina, Peru, Colombia, Spain, the U.K., Israel, Turkey, India, and Japan.¹⁰⁵ Like prior studies, Alexander relies on assessments of policymakers in each country, with the specific intention of offering a "comprehensive 'best practices' strategy."¹⁰⁶ However, Alexander's study is unique in that the individual assessments and his findings are informed by the September 11 attacks.

Alexander divides his conclusions into two areas. First, Alexander argues that the political and legal dynamic, reflecting the government policies vis-à-vis

95. *Id.* at 218.

96. *Id.* at 219.

97. *Id.*

98. *Id.* at 219-20.

99. *Id.* at 220.

100. *Id.* at 221.

101. *See id.* at 222.

102. *See id.* at 223.

103. *Id.* at 224.

104. *Id.* at 224.

105. Yonah Alexander, *Introduction to COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES*, *supra* note 12, at 2 [hereinafter Introduction].

106. *Id.*

terrorism is crucial to explaining the success or failure of policies.¹⁰⁷ He argues that positive political environment is critical to a successful counterterrorist policy.¹⁰⁸ For example, Peru was successful in its counterterrorist campaign because the military did not substantially “interfere with the lives of the people,” and in fact, with them, forged constructive ties.¹⁰⁹ Alexander also argues that Turkey’s changing of its criminal procedure laws to comport with international human rights norms aided its counterterrorist policy.¹¹⁰

Second, Alexander notes several “best practices” which aid counterterrorist policy. Alexander first notes the importance of intelligence to operational success in counterterrorism.¹¹¹ Next, Alexander argues for a limited military role in counterterrorist policy, and like Charters, cites hostage rescue as the archetypal military role in counterterrorism.¹¹² Finally, citing success in Northern Ireland, but failure in the Spanish and Israeli cases, Alexander cites “mixed results” for negotiation with terrorist groups.¹¹³

C. Models of Counterterrorist Policy

As noted earlier, Crelinsten and Schmid, in describing “repressive” models of counterterrorist policy, distinguish between the “criminal justice” and “war” models.¹¹⁴ Repressive models stand in contrast to “conciliatory” models, which seek to prevent terrorism either through negotiation or reform. Conciliatory models change the rational calculation of terrorism by addressing grievances. They prevent violence by reducing the benefits, thereby altering the calculus of the terrorists’ cost-benefit analysis. In contrast, repressive models seek to prevent violence by either punishing terrorists for their acts, or physically preventing them acting in the first place (for example by destroying a terrorist base), thereby increasing the cost of terrorist acts.

The purpose of this section is to compare three models of a repressive counterterrorist policy: the criminal justice model, the intelligence model, and the war model. I will first discuss the key characteristics, foreign and domestic, of each model. Next, I will discuss the advantages and disadvantages of each model. Third, I will compare each model based on three variables: accountability, collectivity, and timing. Accountability (open or secret) refers to the extent to which state’s preventative activities are open to public scrutiny. Collectivity (individual or group) refers to the specificity of a state’s counterterrorist policy, i.e., the extent to which a state’s counterterrorist policy is directed at large groups, as opposed to being directed at individuals (or organizations) who are suspected of being terrorists. By timing, I mean whether a policy is exclusively reactive, or

107. Yonah Alexander, *Conclusion to COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES*, *supra* note 12, at 390 [hereinafter *Conclusion*].

108. *Id.*

109. *Id.*

110. *Id.* at 391.

111. *Id.* at 391.

112. *See id.*

113. *Id.* at 391-92.

114. *See Twenty-Five Year Balance*, *supra* note 76, at 309.

whether proactive measures are utilized by the government.

Three caveats should be mentioned at this point. First, the three models are not mutually exclusive. There is, for example, a widespread consensus on the importance of intelligence, regardless of the approach of a government¹¹⁵, and it seems that every government will have to use force to some extent. These models are therefore not meant to be exhaustive set of options available to states employing them, but rather are merely analytical tools for understanding the implications of policies and legislation adopted. Second, there are options available to governments (for example, training hostage rescue specialists) that this analysis is not concerned with because they have no civil liberties implications, nor do they reflect choices being made among the models discussed. Finally, the descriptions of the models below (and later the classification of the different countries counterterrorist policies) will be functional in nature. For example, the use of special operations personnel or undercover law enforcement agents may come under the intelligence model, even though they technically may be military or police units, if their use is more akin to the intelligence model when analyzed based on the axes discussed above. The functions and implications of the activity or policy are more important than its official classification.

Criminal Justice

The criminal justice model refers to a model in which terrorism is primarily treated as a crime, and "the onus of response is placed upon criminal prosecution and punishment within the rule of law."¹¹⁶ The criminal justice model therefore prevents terrorism in the same manner as any other crime—by deterring would be terrorists through the threat of punishment, by communicating society's condemnation of the act, and detaining terrorists, thereby preventing them from committing further acts of terrorism. The paradigmatic use of the criminal justice model will involve the capture and prosecution of a suspect after a terrorist act. With regard to collectivity, therefore, the criminal justice model focuses on individuals rather than groups. In addition, the rule of law in liberal democracies depends on the public trials, which makes the criminal justice model open on the accountability axis. Finally, since criminal statutes generally have an act requirement, the criminal justice model will depend on the prosecution after the fact, making it reactive as opposed to proactive.¹¹⁷

Since almost all terrorist acts would be criminal regardless of motivation,¹¹⁸ the domestic security features of the criminal justice model resemble standard security in a liberal democratic state. Such features include clearly defined

115. David A. Charters, *Counterterrorism Intelligence: Sources, Methods, Process, and Problems*, in DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 18, at 227.

116. Twenty-Five Year Balance, *supra* note 76, at 333.

117. See A. Stuart Farson, *Criminal Intelligence vs. Security Intelligence: A Reevaluation of the Police Role in the Response to Terrorism*, in DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 18, at 193 (noting that law enforcement is generally reactive in nature because an investigation only begins after there is cause to believe a crime has been committed).

118. WILKINSON, *supra* note 9, at 69-70.

criminal statutes, a police force which investigates breaches of the law, and punishment after individualized determination of guilt in a public trial. Beyond these default features, a state applying a criminal justice model may supplement its legal system with mechanisms designed specifically for the terrorist threat. For example, a state may enhance penalties if a crime is deemed to be a terrorist act.¹¹⁹ A state may also change rules of evidence and procedure in terrorist trials, or create special courts for dealing with terrorism.¹²⁰ Finally, a state may create "advocacy crimes" which criminalize advocacy of violence,¹²¹ or criminalize membership in certain organizations.¹²²

The international aspects of the criminal justice model are limited. First, a state employing a criminal justice model may increase cooperation with foreign law enforcement agencies to aid in the capture and extradition of terrorist suspects.¹²³ Second, the criminal justice model will involve cooperation among countries to disrupt terrorists' access to finances by criminalizing the financial support of terrorist groups (this of course can also occur at the domestic level). Finally, the criminal justice model may involve the use of sanctions against states which do not cooperate in counterterrorist efforts. While this last example does not intuitively seem like "criminal justice" (and is also collective in nature), this strategy is commonly discussed in conjunction with the criminalization of terrorism.¹²⁴ In addition, the use of sanctions is more compatible with the rule of law than the use of force inherent to the intelligence and war models.

The criminal justice model has several advantages. First, the criminalization of terrorism communicates moral condemnation. Though this effect may be negligible in many instances, in marginal cases such moral condemnation ought to deter some terrorism. This effect can be amplified by the legitimacy of the government criminalizing the act. Second, the prosecution of terrorists pursuant to criminal statutes is less subject to political preferences, and is therefore more consistent with the rule of law that is essential to democracy.¹²⁵ For example, the prosecution of a terrorist pursuant to a pre-existing criminal statute, as opposed to assassination based on determinations made by executive officials, is less vulnerable to charges of hypocrisy. In addition, the criminalization of terrorism is an implicitly less violent solution, and is therefore more consistent with democratic values. Both of these in turn increase legitimacy of the state, and consequently the moral condemnation of criminalization. Third, the openness of the criminal justice system increases the legitimacy of the criminal justice model, and makes it less prone to abuses of human rights.¹²⁶ Finally, Hewitt notes that the prosecution of

119. See HEWITT, *supra* note 54, at 63.

120. Twenty-Five Year Balance, *supra* note 76, at 334; *see also*, HEYMANN *supra* note 14, at 122.

121. See DERSHOWITZ, *supra* note 16, at 111; HEYMANN, *supra* note 26, at 106.

122. See HEYMANN, *supra* note 14, at 99; HEYMANN, *supra* note 26, at 108-09.

123. See WILKINSON, *supra* note 9, at 113.

124. *See, e.g.*, STANSFIELD TURNER, TERRORISM AND DEMOCRACY 234 (1991); Philip C. Wilcox, Jr., *United States, in* COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES, *supra* note 12, at 46.

125. WILKINSON, *supra* note 9, at 115.

126. *But see* Twenty-Five Year Balance, *supra* note 76, at 333-34. Crelinsten & Schmid argue that

terrorists has had a significant impact on the reduction of violence.¹²⁷ However, it is unclear whether this is merely the result of the incapacitation of the individual terrorist, in which case incapacitation outside the criminal justice framework ought to have the same effect.

The criminal justice model has several drawbacks. First, terrorism as defined here is different from ordinary crime.¹²⁸ Terrorism is more organized than most criminal activities, making punishment more difficult. This leads to a decreased deterrent effect for the punishment relative to other crimes. In addition, since terrorists are politically motivated, people are more likely to be sympathetic to their cause than in the case of profit-motivated organized crime. This may translate to greater resources, access to recruits, and increased difficulty in detaining suspects because they can seek shelter among sympathetic groups. Terrorism also arouses greater public fear than other organized crime, and the stakes may be significantly higher.¹²⁹

Second, the use of criminal punishment to deter terrorism is hindered in several ways. The deterrent effect of *any* criminal statute is of course hard to measure. In addition, as I just mentioned, greater organization in the case of terrorism leads to greater difficulty in capture, and can therefore lead to an under-enforcement problem. Finally, and perhaps most crucially, in the case of suicide terrorist attacks, it is impossible to increase penalties to increase deterrence.¹³⁰ Moreover, to the extent the squalid economic conditions are one of the causes of terrorism, it is arguably impossible to increase deterrence in the case of non-suicide terrorism as well.

Third, in the case of terrorism, it may be difficult to achieve the moral condemnation which is essential to criminal enforcement because of popular support that the terrorist's cause enjoys.¹³¹ The fourth problem with the criminal justice model is almost the opposite: to the extent that moral condemnation is achieved, the criminal justice model precludes later reconciliation with terrorists.¹³²

Finally, and perhaps the most significant, the criminal justice model tends to be reactive in nature. Given the scale that modern terrorism *might* take, this may make the criminal justice model simply irrelevant in combating the terrorist threat.¹³³ Reactive forms of enforcement make sense in cases where the risk of

it is primarily via the criminal justice model that Western responses to terrorism have moved away from democratic acceptability. However, under my model, a move away from democratic acceptability (for example by reducing due process rights, would move a states response away from the criminal justice model (because it is less accountable for example) and into one of the other models.

127. See HEWITT, *supra* note 54, at 86.

128. HEYMANN, *supra* note 14, at 7.

129. *Id.* at 113.

130. *Id.* at xi.

131. *Id.* at 47.

132. See Wilcox Jr., *supra* note 124, at 36; but see WILKINSON, *supra* note 9, at 101 (arguing that reconciliation and criminalization are not incompatible in that criminalization can be limited to those in the terrorist groups who are unwilling to work toward peace).

133. See HEYMANN, *supra* note 14, at 154 (noting that the threat of terrorism using weapons of

harm for each individual incident is small, and is repeated, because penalties and enforcement techniques can be adjusted overtime to the optimal level. In contrast, reactive enforcement is obsolete in large scale terrorist attacks, where the penalty cannot be increased beyond punishment for a small attack. More importantly, punishment may be irrelevant because, frankly, the damage is done.

In conclusion, the criminal justice model has the primary advantage of being consistent with democratic values of openness and rule of law. It does, however, have significant drawbacks, the most significant of which are the difficulty of increasing deterrence and its predominantly reactive nature. It may therefore be an effective tool to combat low yield terrorism where the actors are repeat players, but it will be obsolete in efforts to combat high yield attacks.

Intelligence

The intelligence model involves the use of the intelligence apparatus of a state as the primary mechanism of counterterrorist policy. Under this model, terrorism is not viewed primarily as a criminal activity, but rather as a threat to the security of the state.¹³⁴ Terrorists act in small organizations, and once this security issue is recognized, policymakers need to know the capabilities, plans, and objectives of these groups.¹³⁵ The goal of intelligence investigations is therefore not condemnation and punishment (and thus general deterrence) as in the case of the law enforcement model, but rather to “acquire information which will allow those with coercive capacity to prevent an undesirable outcome from taking place.”¹³⁶ The paradigmatic application of the intelligence model, therefore, is the use of intelligence officers or informants to infiltrate an organization to gain information about a group, and to then use that information to thwart an attack.¹³⁷ Like the law enforcement model, therefore, the intelligence model focuses on individuals and organizations rather than on collective populations. However, unlike the criminal justice model the intelligence model tends to be preventive rather than reactive.¹³⁸

In addition to this paradigm several common counterterrorist policies can be classified as part of an intelligence model. First, a state may expand the investigatory powers of law enforcement beyond the investigation of criminal activity. Typically, this will involve lower (or no) warrant requirements.¹³⁹ While these searches may be conducted by law enforcement, I have classified them under an intelligence model because they do not require a suspicion of a crime, but rather a threat to security.¹⁴⁰ Closely connected to lower warrant requirements is the

mass destruction is qualitatively different than other forms of terrorism).

134. See FARSON, *supra* note 117, at 193.

135. WILKINSON, *supra* note 9, at 105-06.

136. FARSON, *supra* note 117, at 222.

137. See HEYMANN, *supra* note 26, at 101.

138. See HEYMANN, *supra* note 14, at 129; FARSON, *supra* note 117, at 193.

139. See, e.g., HEWITT, *supra* note 54, at 62; HEYMANN, *supra* note 14, at 125-26 (noting expansive search authority in Northern Ireland under amendments to the Emergency Provisions Act, and in the United States under the Foreign Intelligence Surveillance Act (FISA)).

140. In the case of FISA, a threat to security is in the form of foreign intelligence agents or terrorists. See 50 U.S.C. § 1801 (2004).

availability of involuntary confessions,¹⁴¹ the use of which would also tend to push a state away from the criminal justice model towards an intelligence model. Lower search requirements and the use of involuntary confessions reflect a key feature of the intelligence model: the need to prevent violence, rather than merely punish it, leads to more lenient rules than in the case of criminal investigation.¹⁴² Both of these features may be folded into a third intelligence model feature: the use of domestic intelligence agencies rather than law enforcement for internal security.¹⁴³ Such agencies manifest the same notions as the lower warrant and confession requirements: treating security and criminality as distinct problems with different solutions. A fourth feature of the intelligence model is the use of deadly force against specific targets.¹⁴⁴ Such force would of course occur outside the protection of traditional notions of due process, and is therefore antithetical to the criminal justice model.¹⁴⁵ Finally, an intelligence model may involve the use of secret tribunals to try terrorist suspects. Such tribunals may come under the auspices of the military, but I have classified them under the intelligence model because of their secretive nature and the specificity of their targets.¹⁴⁶

The primary advantage of the intelligence model is that it compensates for a key weakness in the criminal justice model: that terrorism is a more difficult problem than ordinary crime and therefore procedural rules should not constrain counterterrorist policy.¹⁴⁷ At the same time, the intelligence model recognizes that sub-state terrorism is also not best handled by conventional military forces.¹⁴⁸ In addition, the proactive nature of the intelligence model makes it better suited than the criminal justice model for dealing with rare and high yield terrorism. Finally, proponents of targeted assassination under the intelligence model argue that it is easier, less costly, and more certain than law enforcement.¹⁴⁹

There are several disadvantages to the intelligence model. The activities of intelligence agencies are often secret. Not only are intelligence agencies given expansive powers of search, and for taking confessions, they are also not limited in what they can investigate (law enforcement are limited by the definitions of crimes), and have no burden of proof for their findings.¹⁵⁰ In addition, the use of targeted assassinations, while efficient, effectively allows for the punishment of

141. See HEYMANN, *supra* note 26, at 109.

142. HEYMANN, *supra* note 14, at 129.

143. See HEYMANN, *supra* note 26, at 134-35.

144. See Wilcox Jr., *supra* note 124, at 38; HEYMANN, *supra* note 14, at 115.

145. The use of deadly force in self-defense by law enforcement is qualitatively different than targeted assassinations being discussed here.

146. When special courts are not secret and afford substantial procedural rights to defendants, they may come under the criminal justice, rather than intelligence model. See, e.g., HEYMANN, *supra* note 14, at 122 (discussing procedures for the British "Diplock" courts which tried suspected terrorists in Northern Ireland).

147. See Twenty-Five Year Balance, *supra* note 76, at 333.

148. William V. Cowan, *Intelligence, Rescue, Retaliation and Decision Making, in TERRORISM AND POLITICS 5* (Barry Rubin ed., 1991).

149. Wilcox Jr., *supra* note 124, at 38.

150. HEYMANN, *supra* note 26, at 138.

individuals through executive, rather than judicial findings. Assassinations are “lawless.”¹⁵¹ Furthermore, even where the judiciary plays a role in the intelligence model, it is in the form of secret courts which have the same accountability problems. Such secrecy, while useful in counterterrorism policy, is antithetical to democratic values. In short, because of a lack of openness and the potential for arbitrary enforcement, the intelligence model undermines the rule of law.¹⁵²

War

The final model is the war model, under which counterterrorist policy relies on the use of the military and retaliatory strikes rather than law enforcement or intelligence operations.¹⁵³ Use of the war model increased during the 1980s because of policymakers’ increased attention to the problem of state-sponsored terrorism.¹⁵⁴ The use of military force was therefore justified under the international laws of self-defense.¹⁵⁵ The paradigmatic example of this model is the use of the military against the government and population of another state in response to a state’s sponsorship or inaction vis-à-vis a terrorist organization. Like the intelligence model, the war model views terrorism as a security problem rather than a criminal one. But the distinguishing feature of the war model in comparison to the criminal justice and the intelligence model is that it relies on the use of force against large groups in order to achieve counterterrorist objectives. With regard to accountability, the war model is mixed. While less accountable than the criminal justice model (for which ultimate decision making occurs in the full light of public accountability), the war model is inherently less secretive than the intelligence model because the scope of the government’s action (e.g., attacking a foreign country) cannot occur without some public knowledge and therefore political accountability. With regard to timing, the military model is also mixed. Military retaliation is reactive, but recent U.S. policy in the area of pre-emptive strikes indicates a move toward a proactive war model. In addition, since many of the domestic measures I will discuss in the war model are preventative, I will classify the war model as a proactive rather than reactive model.

Intuitively, in the international arena, the war model generally employs large scale attacks against foreign states¹⁵⁶ in order to effectuate counterterrorist policy. By definition these attacks lack precision and may involve significant collateral

151. DERSHOWITZ, *supra* note 16, at 120.

152. See Wilcox Jr., *supra* note 124, at 38.

153. Twenty-Five Year Balance, *supra* note 76, at 333. Crelinsten & Schmid argue that the use of special forces also comes under the war model, but, as mentioned earlier, I treat such forces as part of the intelligence model because their use indicates specific rather than collective targets.

154. *Id.* at 314.

155. See generally Oscar Schachter, *The Lawful Use of Force By a State Against Terrorists in Another Country*, in *TERRORISM AND POLITICAL VIOLENCE: LIMITS AND POSSIBILITIES OF LEGAL CONTROL* 243-66 (Henry H. Han ed. 1993) (discussing the international legal framework for the use of force by states in response to terrorist attacks).

156. “Foreign state” is used loosely here to include areas under the control of organizations legally distinct from the State employing the war model, such as the Occupied Territories in the Middle East, or Jammu and Kashmir in South Asia.

damage.¹⁵⁷ Such attacks can serve several purposes. First, they can be used preventatively to destabilize foreign governments that are considered terrorist threats. Because we are only concerned with sub-state groups, the threat can come from, and the response is directed against, states which sponsor terrorism, or against states who may sell arms to terrorists (both of which were part of the justification for the U.S. led invasion of Iraq in the spring of 2003).¹⁵⁸ Second, military action can be used against a foreign state as retaliation for a terrorist attack (as was the case in the U.S. led war against Afghanistan in the fall of 2001).¹⁵⁹

In the domestic arena, the war model is less clear because war is generally seen as an act taken by a state against another state. Based on the framework developed earlier, several collective-preventative measures taken by states (in what is sometimes called a "security model"¹⁶⁰) can be considered part of the war model. These measures include so called "target hardening" measures which seek to prevent access to potential targets.¹⁶¹ A variation of this target hardening measure is to generally restrict the freedom of movement, for example across sub-national boundaries, or by requiring identification cards.¹⁶² In addition, a state may place severe restrictions on immigration in order to prevent terrorist infiltration.¹⁶³ Finally, a state may engage in profiling, based on some "cheaply identifiable" characteristics (such as ethnicity or country of origin) in order to facilitate the prevention of attacks.¹⁶⁴ These measures while on their face have little to do with war, are similar to other aspects of the war model in that they apply tactics against a set of persons which is larger than set of actual targets, because it is more efficient to go after the larger set, and it is assumed that the larger set will include the actual target. In other words, like collateral damage in war, these measures force innocents to bear the costs of a policy because it is more efficient than being precise. In addition, these measures resemble actual measures taken against groups in times of war, such as the internment of Japanese-Americans in the United States during World War II. As such, the inclusion of these domestic measures in a "war" model is entirely appropriate.

There are several advantages to the war model. Like the intelligence model, the availability of proactive measures affords the war model a significant advantage over the criminal justice model. In addition, the (reactive) use of

157. Maurice Tugwell, *Military and Paramilitary Measures*, in DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 18, at 340.

158. Barton Gellman & Dafna Linzer, *Afghanistan, Iraq: Two Wars Collide*, WASH. POST, Oct. 22, 2004, at A1.

159. William T. Baker & Mark L. Evans, *The Year in Review 2001*, U.S. NAVY'S NAVAL AVIATION NEWS, July-Aug., 2002, at 1.

160. See Ronald D. Crelinsten & Iffet Ozut, *Counterterrorism Policy in Fortress Europe: Implications for Human Rights*, in EUROPEAN DEMOCRACIES AGAINST TERRORISM: GOVERNMENTAL POLICIES AND INTERGOVERNMENTAL COOPERATION 258 (Fernando Reinares ed. 2000).

161. See HEYMANN, *supra* note 14, at 92.

162. See DERSHOWITZ, *supra* note 16, at 114-15.

163. HEYMANN, *supra* note 14, at 92.

164. Symposium, *Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002).

military strength in retaliation for a terrorist attack is entirely consistent with both moral “just war” requirements and international law. In this way, military retaliation accomplishes the same general and specific deterrence, and incapacitation, that the criminal justice model accomplishes.¹⁶⁵ Furthermore, as mentioned earlier, terrorism draws tremendous public attention relative to its actual dangers. A terrorist act will be followed by tremendous public pressure on governments to “react.”¹⁶⁶ The use of military strength in response to a terrorist attack satisfies this need, and therefore has a tremendous political advantage. Arguably, such reaction may prevent retaliation by the public against minority groups within the state by satiating the public’s need for revenge. Finally, the war model addresses a significant weakness in both the criminal justice and intelligence models in that the deterrent effect is limited. Under both the criminal justice and intelligence models, coercive action is limited to terrorists themselves. The deterrent effect of retaliation is capped at the lives of the terrorists, and is therefore limited since the punishment for killing one person is the same as for killing one-hundred. In the case of suicide terrorists, the deterrent is non-existent. The collectivity of the military models allows States to increase the penalty for a terrorist act to include retaliation against states and civilians.¹⁶⁷

The war model has several disadvantages. First, like the intelligence model, the main disadvantage of the war model is its effect on civil liberties. War creates a sense of urgency and priority which belittles democracy.¹⁶⁸ Moreover, domestic aspects of the war model, such as profiling, are archetypal civil rights violations. Many have also argued that policies such as profiling are not only unjust, they are ineffective because of the risk of false positives, wasting resources, and because profiling may cause security officials to ignore threats that don’t fit their profile.¹⁶⁹

Second, repressive policies such as profiling may anger minority groups, leading to mistrust of government officials, decreasing the likelihood of collaboration with minority groups in order to prevent attacks.¹⁷⁰ This is part of a broader theme of the war model: both on the domestic level, and the international level, the war model angers target populations, and may lead to increased terrorism.¹⁷¹ Many have argued that often the purpose of terrorist attacks is to provoke just such a response.¹⁷²

165. See HEYMANN, *supra* note 14, at 68-69.

166. Twenty-Five Year Balance, *supra* note 76, at 314.

167. See HEYMANN, *supra* note 14, at xi.

168. HEYMANN, *supra* note 26, at 114.

169. Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 177-78 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); HEYMANN, *supra* note 26, at 99.

170. See, e.g., AS’AD ABUKHALIL, BIN LADEN, ISLAM, AND AMERICA’S “WAR ON TERRORISM” 25-26 (2002).

171. *Id.* at 93; Heymann, *supra* note 14, at 100; Wilcox Jr., *supra* note 124, at 45; HEWITT, *supra* note 54, at 86.

172. Twenty-Five Year Balance, *supra* note 76, at 317; D.P. SHARMA, *COUNTERING TERRORISM* 68 (1992).

Third, the deterrent effect of the war model is also questionable. Heymann notes that military strikes against foreign states may fail because the target state of the retaliation may not have the capability to stop the terrorist, the strikes may create united opposition against the retaliating state, and the state may continue to support the group in secret.¹⁷³ Heymann therefore argues that a State is likely to exaggerate the deterrent effect of its military strikes.¹⁷⁴ The same is true of collective actions against populations rather than states. Some, such as Alan Dershowitz, have argued in favor of collective punishments (such as the destruction of Palestinian villages in response to terrorist attacks).¹⁷⁵ Such policies are folly. As in the case of actions against states, collective action against groups assumes that the groups can stop terrorists' acts (or that the terrorist cares about the rest of the population). Moreover, the deterrent effect of destroying a village is unclear. Assume that terrorists are rationale, and a government makes terrorists aware of its collective punishment policy. Terrorists would take this danger into account before deciding to attack. They would further not bank on their group not being identified since terrorists often claim responsibility for their attacks. Assume now that the terrorists do engage in an attack. Clearly, since they were aware of the policy, and they did not assume they would not be caught, the destruction of a village was not enough to deter the attack.¹⁷⁶ Now further assume that the terrorists are contemplating a second attack, after a village has been destroyed. What, now, is the deterrent effect of the collective punishment policy? The terrorists now merely have *less* to fear because they have one less village to fear destruction. In other words, after each successive attack, the terrorists' incentives are the same, but their costs are decreasing. A state may of course increase the collective penalty after each attack, but there is still a finite amount of punishment a state can dole out. The deterrent effect of collective punishments such as these would therefore decrease consistently after the first instance of punishment—a point which is empirically verified by Hewitt, though it is unclear whether this is the underlying reason.¹⁷⁷

Finally, the war model makes international cooperation more difficult. War is a political choice, and the war model implies terrorism is a *political* rather than criminal act.¹⁷⁸ As such, international cooperation would require political agreement, as opposed to the *criminal* act of terrorism for which international cooperation would be easier.¹⁷⁹ Second, war breeds mistrust in the international

173. HEYMAN, *supra* note 14, at 73.

174. *Id.*

175. See DERSHOWITZ, *supra* note 16, at 176-77.

176. Of course, to counter this point by arguing that the terrorists may not be rational would undermine the very notion of a deterrence theory to begin with, and would make collective punishments an act of revenge.

177. See HEWITT, *supra* note 54, at 59. *See also* Bryan Brophy-Baermann & John A.C. Conybeare, *Retaliating Against Terrorism: Rationale Expectations and the Optimality of Rules versus Discretion*, 38 AM. J. POL. SCI. 196 (1994) (noting that rational expectations of retaliation to terrorist attacks will undercut the deterrent effect of retaliation).

178. See Twenty-Five Year Balance, *supra* note 76, at 333.

179. Malcolm Anderson, *Counterterrorism as an Objective of European Police Cooperation*, in

community, regardless of circumstance. Many in Europe, for example, fear that after September 11, the United States is using the war against terrorism as an excuse to pursue other foreign policy goals.¹⁸⁰

To summarize, the war model, while possibly useful with regard to state sponsored terrorism, and politically expedient, has significant drawbacks. Most importantly, the war model has significant consequences for human rights, domestically and internationally. These infringements breed support for terrorist causes. Moreover, the deterrent effect of the war model is questionable. Finally, the war model strains the possibility of international cooperation in counter terrorist efforts.

D. Conclusion

There is always a tension between liberty and security. Current trends indicate that terrorism is not a temporary phenomenon, but one that will continue and perhaps increase in the future. As a result, the effect of counterterrorism policies on civil liberties will be a substantial concern in coming years.

An understanding of the effect of counterterrorist policies on civil liberties must begin with understanding what we mean by terrorism. A comprehensive definition of terrorism, however, is difficult to derive. A definition which is under-inclusive is vulnerable to charges of hypocrisy, as is an over-inclusive definition which is enforced selectively. Moreover, standard definitions of terrorism may not take into account the moral ambiguities involved when individuals choose to engage in violence to achieve their goals. To argue that terrorism is wrong *per se* is overly simplistic, and assumes a definition with which to begin. Perhaps terrorism *is* always wrong, but if this is the case, a definition must include all condemnable acts, and exclude acts which are not necessarily condemnable. To this end, I have argued terrorism should be defined as political violence against a democracy. Political violence against a democracy is unnecessary (and therefore immoral given the costs) because of the ability to achieve political ends through non-violent means. Moreover, there is less ambiguity in this definition because defining a "democracy" is more objective than defining what political causes are "worth" violent means and which are not.

In an effort to balance security and liberty, democracies have employed various models of counterterrorist policy: the criminal justice model, the intelligence model, and the war model. Each model treats terrorism as a different type of problem, and the resulting policies can be analyzed based on three variables: collectivity (how large to target group of the policy is relative to the class of terrorists), accountability (how open the policies are to public scrutiny), and timing (whether the model is predominantly reactive or proactive). These variables reflect the security and liberty implications of each model. Table 1

EUROPEAN DEMOCRACIES AGAINST TERRORISM: GOVERNMENTAL POLICIES AND INTERGOVERNMENTAL COOPERATION, *supra* note 160, at 239-40.

180. Paul Gallis, *European Counterterrorist Efforts Since September 11: Political Will and Diverse Responses*, in *EUROPE AND COUNTERTERRORISM* 36 (Kristin Archick ed., 2003).

summarizes the characteristics of each model based on these variables. In the next section, I will discuss the history and development of the counterterrorist policies in the United States, Israel, and India paying attention to how the policies employed by these countries reflect the choices they make between these models.

Model	Key Features	Collectivity	Accountability	Timing
Criminal Justice	Legal definitions, criminal prosecution, statutory penalties, changes in evidentiary rules Extradition, diplomatic sanctions	Specific	Open	Reactive
Intelligence	infiltration of groups, disruption of plans, targeted assassination, secret trials	Specific	Secret	Proactive
War	pre-emptive or retaliatory strikes, profiling, immigration control	Group	Secret decision-making; public awareness	proactive

Table 1

III. COMPARING APPROACHES TO COUNTERTERRORISM

Earlier, I discussed the criminal justice, intelligence, and war models of counterterrorism. Each model reflects choices that a country makes about the nature of the terrorist threat, the risk of harm, and choices of how to balance the need for security with the desire for liberty. In addition, the models are not mutually exclusive, nor do all of their features fit neatly into the variables of accountability, collectivity, and timing. However, these models are a useful analytical tool for categorizing a country's approach. In this section, I discuss the counterterrorist policies of the United States, Israel, and India. I will begin each analysis with a history of the conflicts underlying the terrorism. Next I will discuss counterterrorist polices adopted by each country, including statutory provisions. Finally, I will discuss any changes in each country's policy since the attacks of September 11, 2001.

A. United States

In many ways, the United States is not a good case for studying counterterrorist policy. The United States is different from the other examples in this study in several ways, which affect the way its counterterrorist policies should be viewed. First, although terrorist organizations have a specific set of grievances, anti-American terrorism cannot be traced to a specific conflict in the same way that the other cases in this study can. Terrorism in India is facet of various ethnic and

regional conflicts. Anti-Israel terrorism is the result of either Israel's existence (which upon creation, it is argued, forced Palestinians from their rightful lands), or Israeli policy in the Occupied Territories, depending on one's point of view. In contrast, anti-American international terrorism is at best defined as the result of a "clash of civilizations", a concept which was described by Samuel Huntington in 1996.¹⁸¹ Under this view, anti-American terrorism is an assault against the West, with America as its hegemon. A variation on this argument is that anti-American terrorism is the result of globalization, with the United States as the leader in a neo-liberal Westernization at the hands of multinational corporations.¹⁸² But even if one does not subscribe to this assessment, anti-American terrorism is the result of a set of grievances that while definable, is best described as a vague notion of "American foreign policy."¹⁸³ The United States is the only country in this analysis, therefore, where terrorism is not a facet of another discreet conflict. Second, anti-American terrorism is unique because of the American role in world politics. Because of American power, its counterterrorist policies play a significant role in influencing the way other perceive U.S. counterterrorist policies. American action sets precedent, thereby legitimating otherwise unjustified acts.¹⁸⁴ Finally, and perhaps most importantly, terrorism does not pose the same threat to the state as does terrorism in India and Israel. In the case of Israel, terrorist organizations such as Hamas have asserted that their objective is not merely the end of a set of discrete Israeli policies, but rather then elimination of Israel itself.¹⁸⁵ In the case of India, while terrorist organizations have not sought the destruction of the State, Indian government policies in Jammu and Kashmir are the result of Indian fears about the destruction of secularism which is at the core of Indian identity.¹⁸⁶ In contrast, while terrorism is a threat to the safety of Americans, few would argue that the State itself is threatened by anti-American terrorism. Rather, in the case of the United States, the threat to the State comes not from terrorism, but the response to terrorism.

History

Anti-American terrorism first became a concern of the U.S. government in the 1970s when terrorists began engaging in hijackings, assassinations, bombings, and hostage takings aimed at U.S. interests.¹⁸⁷ Between 1968 and 1986, the number of

181. See generally, SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996). See also DOUGLAS KELLNER, *FROM 9/11 TO TERROR WAR: THE DANGERS OF THE BUSH LEGACY* 28 (2003).

182. See KELLNER, *supra* note 181, at 29; see also Wedgwood, *supra* note 2, at 329.

183. This should not however, be taken imply that the terrorists grievances are ill-defined or illegitimate.

184. See, e.g., DERSHOWITZ, *supra* note 16, at 44.

185. See generally, Hamas, *Charter*, in *ANTI-AMERICAN TERRORISM AND THE MIDDLE EAST* 54 (Barry Rubin & Judith Colp Rubin eds., 2002).

186. See SUMANTRA BOSE, *KASHMIR: ROOTS OF CONFLICT, PATH TO PEACE*, 8 (2003); see also *infra* note 418 and accompanying text (noting that the secession of the Muslim majority Jammu and Kashmir would be to concede that a secular India is not possible). The same argument can be extended to separatists in other areas such as Punjab.

187. Wilcox Jr., *supra* note 124, at 23.

anti-American attacks increased from 54 to 139.¹⁸⁸ However, as mentioned earlier, unlike in the case of Israel and India, anti-American terrorism cannot be traced to a discrete conflict. Rather is the result of a more vague policy orientation of the U.S. government. Anti-American terrorism can be broken down into two categories: domestic and foreign.

First, anti-American domestic terrorism generally refers to a wave of anti-government terrorism that grew and then faded away in the 1990s. Such domestic terrorist groups generally subscribed to extreme right-wing philosophies, and sought to destroy the power of the federal government of the United States.¹⁸⁹ These philosophies were interwoven with millennial fears and also involved white-supremacist and isolationist ideologies.¹⁹⁰ In 1998, total membership in these militias was estimated to be between ten and fifteen million, with 100,000 active members.¹⁹¹ Public awareness of such groups peaked in the mid-1990s after the bombing of the Alfred R. Murrah Federal Office Building in Oklahoma City in April, 1995.¹⁹² After an initial backlash against Arab-Americans, it was discovered that the bombing was perpetrated by domestic terrorists who were subsequently arrested and charged criminally.¹⁹³ Today, however, domestic terrorism is seemingly an insignificant threat, because the events of September 11 have overshadowed the domestic terrorist threat. But while domestic terrorism is of minor significance today, it does provide context for some of the legislation discussed in this study, while also providing a useful point of comparison for policies adopted since September 11.

Of more interest to this analysis is the history of foreign terrorism against the United States. Such foreign terrorism has predominantly come from extremist Islamist groups, who many argue are reacting to a history of intervention in the affairs of the Muslim world.¹⁹⁴ First, as Kellner notes the United States intervened in Afghanistan in the late 1970s and in the 1980s after the Soviet invasion.¹⁹⁵ After providing billions of dollars of support to the Afghan resistance, however, the U.S. government under George H.W. Bush withdrew entirely from Afghanistan, allowing a civil war to ensue that subsequently led to the rise of the Taliban.¹⁹⁶ Second, U.S. tolerance for the authoritarian regime in Saudi Arabia in pursuit of oil interests has caused significant Muslim anger at the United States.¹⁹⁷ Third, the role of the U.S. government in imposing sanctions against Iraq after the 1991 Gulf War, which subsequently led to a significant humanitarian crisis, has

188. *Id.* at 24.

189. *See, e.g.*, HEYMANN, *supra* note 14, at xxvii.

190. *Id.*; *see also* Wilcox Jr., *supra* note 124, at 32.

191. *See* HEYMANN, *supra* note 14, at xxvii.

192. *See, e.g.*, John Kifner, *Terror In Oklahoma City: The Overview*, N.Y. TIMES, Apr. 20, 1995, at A1.

193. *See* Youssef M. Ibrahim, *Terror In Oklahoma: Arab Reaction; Bitterness Over Early Fingerprinting Toward the Middle East*, N.Y. TIMES, Apr. 24, 1995, at B10.

194. Caleb Carr, *A War on all Terrorism*, PITTSBURGH POST-GAZETTE, Aug. 1, 2004, at J-3.

195. KELLNER, *supra* note 181, at 118.

196. *Id.* at 31-33.

197. *Id.* at 37.

also been cited as a cause of significant anti-American sentiment.¹⁹⁸ Fourth, American support for Israel over the matter of Palestine is widely cited grievance of terrorists groups which target the United States.¹⁹⁹ While President George W. Bush had refused to meet with Yasir Arafat,²⁰⁰ for example, Israel continued to receive more foreign aid than all of sub-Saharan Africa.²⁰¹ Finally, some have argued that U.S. inaction (or late action) in the Balkans, Chechnya, and Kashmir is widely seen as the result of a hypocritical U.S. foreign policy which is indifferent to the concerns of Muslims.²⁰²

Islamist terrorist groups engaged in several acts of terrorism in the 1970s and 1980s. For example, 1979, revolutionaries seized the U.S. Embassy in Teheran and took 52 diplomats hostage.²⁰³ Other incidents during the 1980s include the bombing of Marine barracks in Beirut in 1983,²⁰⁴ the hijacking of the *Achillo Lauro* in the Mediterranean in 1985,²⁰⁵ and the bombing of Pan Am Flight 103 over Scotland in 1988.²⁰⁶ Major incidents continued in the 1990s, including: the first World Trade Center bombing in February 1993,²⁰⁷ the bombing of the Khobar towers in Saudi Arabia in 1996,²⁰⁸ and the simultaneous bombings of U.S. embassies in Nairobi, Kenya, and Dar al Salaam, Tanzania in 1998.²⁰⁹ In October 2000, terrorists bombed the U.S.S. Cole while it was at port in Yemen.²¹⁰ Finally, on September 11, 2001, terrorists hijacked four airliners over the United States and crashed them into the World Trade Center, the Pentagon, and outside Shanksville, Pennsylvania.²¹¹

198. ABUKHALIL, *supra* note 170, at 45.

199. *Id.* at 40.

200. *Id.* at 39.

201. *Id.* at 34. Since the passing of Yasir Arafat, the Bush Administration has made greater efforts to work with the new elected Palestinian leader, Mahmoud Abbas. See "Ariel Sharon Meets with America's George Bush", *The Economist*, April 16, 2005.

202. See, e.g., Symposium: *Islam, Muslims and Terrorism: Secret Evidence and Guilt by Association*, 10 MICH. ST. U. J. INT'L. L. 589 (2001).

203. John Kifner, *Hostage Deal: Gap is Narrow*, N.Y. TIMES, Dec. 31, 1980, at A1.

204. Thomas L. Friedman, *Beirut Death Toll At 161 Americans*, N.Y. TIMES, Oct. 24, 1983, at A1.

205. Robert D. McFadden, *Terror In 1985: Brutal Attacks, Tough Response*, N.Y. TIMES, Dec. 30, 1985, at A1.

206. Sheila Rule, *Powerful Bomb Destroyed Pan Am Jet Over Scotland, British Investigation Finds*, N.Y. TIMES, Dec. 29, 1988, at A1.

207. Robert D. McFadden, *Explosion at the Twin Towers: The Overview*, N.Y. TIMES, Feb. 27, 1993, at 1.

208. Philip Shenon, *23 U.S. Troops Die in Truck Bombing at Big Saudi Base*, N.Y. TIMES, June 26, 1996, at A1.

209. James C. McKinley Jr., *Bombings in East Africa: The Overview*, N.Y. TIMES, Aug. 8, 1998, at A1.

210. John F. Burns & Steven Lee Myers, *The Warship Explosion: The Overview*, N.Y. TIMES, Oct. 13, 2000, at A1.

211. N.R. Kleinfield, *U.S. Attacked: Hijacked Jets Destroy Twin Towers And Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

Legislation

A complex array of statutes have governed U.S. counterterrorist policy. Notably, through the 1970s and 1980s, Congress enacted a series of acts which strengthened the ability of federal agencies to fight terrorism. In 1974, Congress passed the 1984 Antihijacking Act and the Air Transportation Security Act which gave the FAA authority over aircraft terrorism.²¹² In 1984, Congress passed the Act to Combat International Terrorism, giving the Department of Justice and the Federal Bureau of Investigation (FBI) more direct authority to investigate and prosecute those who commit crimes against Americans abroad.²¹³ In addition, the Omnibus Antiterrorism Act of 1986 made terrorist acts against Americans abroad a federal crime, permitting arrest overseas for trial in U.S. courts.²¹⁴

Congress also passed several acts which were designed to deal with the problem of state sponsored terrorism. In 1979, Congress passed an amendment to the Export Administration Act, “[which] call[ed] for the secretary of state to annually designate states that consistently support terrorism.”²¹⁵ This law, combined with others, allowed the U.S. to impose sanctions against “state sponsors” of terrorism.²¹⁶ The Anti-terrorism and Arms Export Amendments Act of 1989 prohibits arms exports to states designated as state sponsors of terrorism.²¹⁷ States designated as state sponsors of terrorism include Libya, Iran, Syria, Sudan, North Korea, and Cuba.²¹⁸

With regard to investigation of terrorist organizations domestically, the Foreign Intelligence Surveillance Act (FISA), allows investigators to seek warrants from a secret FISA court when the purpose of the warrant is to gather foreign intelligence.²¹⁹ Unlike criminal warrants, which were governed by standards promulgated in the Omnibus Crime Control and Safe Streets Act of 1968,²²⁰ FISA warrants can be issued without probable cause of a crime as long as the government can show probable cause that the primary purpose of the warrant is to

212. J. Brent Wilson, *The United States' Response to International Terrorism*, in *THE DEADLY SIN OF TERRORISM: ITS EFFECT ON DEMOCRACY AND CIVIL LIBERTY IN SIX COUNTRIES*, *supra* note 23, at 186.

213. *Id.*; see 1984 Act To Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706.

214. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 3071(a)-(c), 100 Stat. 853.

215. Wilcox Jr., *supra* note 124, at 29.

216. *Id.*

217. Wilson, *supra* note 212, at 187.

218. U.S. DEPARTMENT OF STATE, STATE SPONSORS OF TERRORISM, available at www.state.gov/s/ct/c14151.htm (last visited April 18, 2005).

219. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783.

220. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 2516, 2518(4)-(5), 82 Stat. 197, 212 (codified as amended at 18 U.S.C. §§ 2510-2522 (1994)).

gather intelligence against a foreign power including foreign terrorist organizations.²²¹ Since its inception in 1978, this court has issued more than ten thousand FISA warrants, and has denied only one.²²²

After the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).²²³ The Act has several provisions not directly related to counterterrorism policy, including provisions amending habeas corpus procedures generally.²²⁴ With respect to counterterrorist efforts, AEDPA first had several provisions which were designed to discourage state support of terrorist groups.²²⁵ For example, the statute establishes jurisdiction in U.S. courts for civil suits against states that sponsor terrorism by creating an exception to the general rule of sovereign immunity.²²⁶ In addition, the Act prohibits military and other assistance to state sponsors of terrorism.²²⁷ Second, the Act requires the Secretary of State to designate certain groups as "Foreign Terrorist Organizations" (FTOs).²²⁸ Among other things, such a designation allows the government to freeze the assets²²⁹ and criminalize support to such organizations.²³⁰ Third, the act provides for a procedure for removal, exclusion, and denial of asylum to alien terrorists.²³¹ Finally, the act contains significant criminal provisions related to counterterrorist efforts. These include the

221. The ability of the government to use FISA warrants against terrorist groups has substantially increased via the USA-Patriot Act because FISA was amended to require a "significant" purpose of gathering foreign intelligence rather than a primary purpose. See *infra* notes 267-276 and accompanying text.

222. Philip Shenon, *Traces of Terror: Counterintelligence*, N.Y. TIMES, Aug. 27, 2002, at A1. The lone denial occurred in a ruling made public in August 2002, where the court ruled that amendments to FISA under the USA-Patriot Act were unconstitutional. This ruling was later overturned by a secrete FISA appellate court in an ex parte proceeding. See generally, Ann Beeson, *On the Home Front: A Lawyer's Struggle to Defend Rights after 9/11*, in THE WAR ON OUR FREEDOMS, *supra* note 169, at 307-11 (discussing that the lone denial occurred in a ruling made public in August 2002, where the court ruled that amendments to FISA under the USA-Patriot Act were unconstitutional. This ruling was later overturned by a secret FISA appellate court in ex parte proceedings.)

223. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].

224. *Id.* §§ 101-108.

225. *Id.* §§ 310-330.

226. *Id.* § 221.

227. *Id.* §§ 325-327.

228. *Id.* § 302(a)(1).

229. *Id.* § 302(a)(2)(C).

230. *Id.* § 303(a)(1).

231. *Id.* §§ 401, 411, 413-14.

prohibition on providing assistance to FTOs,²³² engaging in financial transactions with state sponsors of terrorism,²³³ criminal sanctions related to developing biological weapons²³⁴ and plastic explosives,²³⁵ and a range of enhanced penalties related to acts of or conspiracies to engage in terrorism.²³⁶

Executive Action

While of course always present, use of the military and intelligence apparatus in American counterterrorist efforts was limited through the 1990s. For example, former President Richard Nixon employed a "collective security" approach which relied on cooperation with other states to encourage extradition and prosecution of suspects.²³⁷ The administrations of former Presidents Gerald Ford and Jimmy Carter followed a substantially similar approach,²³⁸ with the latter focusing substantially on root causes of terrorism.²³⁹ The Reagan Administration focused slightly more on a military approach, however, with CIA director William Casey referring to international terrorism as a "war without borders."²⁴⁰ This policy most notably included the bombing of Tripoli in 1986.²⁴¹ Former President Ronald Reagan also established a policy of pre-emptive military action.²⁴² Ultimately, however, use of the military through the Reagan Administration was limited, with former Presidents Lyndon Johnson, Nixon, and Carter launching no punitive military attacks, while former Presidents Ford and Reagan launched only one each.²⁴³

President William Jefferson Clinton Administration's use of force, while greater, was also limited. After it was discovered that Iraqi intelligence officials were responsible for an assassination attempt on President George H.W. Bush, President Clinton launched missile attacks against Iraqi military installations.²⁴⁴ President Clinton launched another missile attack against Sudan after the 1998 embassy bombings.²⁴⁵

The emphasis of the Clinton administration in the 1990s was on the use of legal mechanisms to deter terrorism. In describing U.S. counterterrorist policy, for example, Phillip C. Wilcox Jr., former U.S. Coordinator for Counterterrorism

232. *Id.* § 303(a)(1).

233. *Id.* § 321(a).

234. *Id.* § 511.

235. *Id.* §§ 604, 605(c).

236. *Id.* §§ 701-704.

237. *See* Twenty-Five Year Balance, *supra* note 76, at 315; *see also* Wilson, *supra* note 212, at 183-84.

238. *See* Wilson, *supra* note 212, at 184-85.

239. *See* Twenty-Year Balance, *supra* note 76, at 315.

240. *Id.* at 316.

241. *Id.*

242. National Security Decision Directive 138 (Apr. 26, 1984); Wilcox Jr., *supra* note 124, at 44.

243. Turner, *supra* note 124, at 228.

244. Douglas Jehl, *Iraqi Tells F.B.I. He Led Attempt to Kill Bush*, *U.S. Officials Say*, N.Y. TIMES, May 20, 1993, at A1; Wilcox Jr., *supra* note 124, at 44.

245. Steven Lee Myers, *Bin Laden Plot Reported Against U.S. Sites in the Gulf*, N.Y. TIMES, Dec. 16, 1998, at A3; Wilcox, *supra* note 124, at 44-45.

under the Clinton Administration argues that the seven pillars of U.S. policy include a substantial focus on terrorism as a crime, the use of apprehension of terrorists for deterrence, the use of diplomacy to bring terrorists to justice, and the use of sanctions to isolate states that harbor terrorists.²⁴⁶ For example, in 1997 the Clinton Administration issued Presidential Decision Directive 39, which stated that the United States will support counterterrorist efforts by increasing cooperation with foreign governments and effectuating deterrence through arrest and criminal prosecution.²⁴⁷ Notable prosecutions during the Clinton Administration include: the perpetrators of the first World Trade Center bombing, such as Sheik Omar Abdel Rahman²⁴⁸ and Ramsi Youssef, with the latter being prosecuted after considerable efforts to arrest him in Pakistan;²⁴⁹ and the indictment of fourteen members of the Saudi Hizballah in June 1996 for the bombing of the Khobar Towers.²⁵⁰ Finally, although FISA substantially lowered the burden of proof required when investigators sought warrants intended to gather intelligence on foreign terrorist organizations, the Clinton Administration continued to employ a higher criminal standard when choosing to apply for those warrants.²⁵¹ Thus, even when it was not required to do so, the Clinton Administration emphasized counterterrorist efforts within traditional criminal justice principles.

Post – September 11 Developments

September 11 changed counterterrorist policies in many countries, and nowhere is this more apparent in the United States. The scale of the attacks was without precedent in the realm of sub-state terrorism, and occurred on American soil. It was widely reported that the flights that crashed in Pennsylvania and into the Pentagon were intended to crash into the Whitehouse and Capitol.²⁵² President Bush spent most of the day flying to and from secure locations, and Vice President Cheney subsequently resided in an undisclosed location so as to keep the President and Vice President in separate places.²⁵³ In short, the United States entered a crisis mode from which in some ways it has yet to come out. Congress enacted several pieces of legislation in the months following the attacks. These include: the Aviation and Transportation Security Act,²⁵⁴ the Bioterrorism Response Act of

246. Wilcox, *supra* note 124, at 25.

247. PDD-39, June 21, 1999, in *SUPERTERRORISM* 211-13 (Yonah Alexander & Milton Hoenig eds., 2001).

248. See Richard Bernstein, *Bomb Trial Transcripts of Phone Calls Add Pieces to Evidence Pile*, N.Y. TIMES, Dec. 26, 1993, § 1 at 35.

249. James C. McKinley Jr., *Bomb Plot, Chapter 3: Enter an Accused Master of Terrorism*, N.Y. TIMES, Oct. 3, 1995, at B1.

250. Neil MacFarquhar, *Package Bomb Kills American in Saudi Arabia*, N.Y. TIMES, Oct. 7, 2001, at A6.

251. See NATIONAL COMMISSION ON TERRORISM, *COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM*, 12 (2000) [hereinafter *Bremer Commission Report*].

252. Roy Eccleston, *Terrorists had Bush in Their Sights*, THE AUSTRALIAN, Sept. 14, 2001, at 3; Anastasia Hendrix, *Flight Delay Gave Passengers Time to Act*, S.F. CHRON., Sept. 20, 2001, at A3.

253. Mike Allen, *Cheney's Vanishing Act Sparks Curiosity*, WASH. POST, Oct. 13, 2001, at A4.

254. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (establishing the Transportation Security Administration within the Department of transportation and providing for additional enhancements to transportation security).

2001,²⁵⁵ the Enhanced Border Security and Visa Entry Reform Act of 2002,²⁵⁶ the Terrorist Bombings Convention Implementation Act of 2001,²⁵⁷ and the Victims of Terrorism Relief Act of 2001.²⁵⁸ The most important piece of legislation, however, was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot).²⁵⁹ Due to a fear of further attacks, the bill was considered on an accelerated timetable, bypassing both the committee process and floor debate, and was ultimately passed by wide margins (357-66 in the House and 98-1 in the Senate).²⁶⁰

USA Patriot has several components that are intended to improve the ability of the domestic security apparatus to prevent further attacks. First, the Act attempts to remove barriers to cooperation between the intelligence and law enforcement communities.²⁶¹ Historically, due to legal and political barriers, law enforcement and intelligence agencies in the United States did not sufficiently cooperate in furthering counterterrorist efforts.²⁶² While political barriers could not be resolved legislatively, USA Patriot seeks to remove legal barriers to cooperation by authorizing increased information sharing between agencies.²⁶³ For example, the Act modifies grand jury rules to allow disclosure of historically secret grand jury testimony to federal officials without a court order.²⁶⁴ It also more generally allows information sharing between law enforcement, intelligence, immigration, and national security officials.²⁶⁵

Second, the Act has several provisions which increased the domestic surveillance capabilities of law enforcement and intelligence officials.²⁶⁶ For example, the Act includes provisions which expanded the use of FISA to include the use of pen registers, trap and trace devices,²⁶⁷ and roving wiretaps.²⁶⁸ These

255. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, §§ 101, 321-36, 116 Stat. 594 (providing for improvements to readiness levels for bioterrorist threats, including training for emergency responders, and protection of the drug supply).

256. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 201-204, 301-309, 116 Stat. 543 (making miscellaneous improvements to information sharing between federal agencies regarding visa applications).

257. Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721 (implementing the International Convention for the Suppression of Terrorist Bombings to strengthen criminal laws relating to terrorist bombings and the financing of terrorism).

258. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, §§101-105 115 Stat. 2427 (amending the Internal Revenue code to provide tax relief for victims of the terrorist attacks against the United States).

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

260. See Michael T. McCarthy, *The USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 n.7 (2002).

261. Patriot Act § 203.

262. McCarthy, *supra* note 260, at 440.

263. *Id.* at 439.

264. Patriot Act §§ 203(a)(1)(C)(i)-(iii).

265. *Id.* at § 203(b).

266. *Id.* at §§ 201-202, 204, 206, 209, 214, 216-217, 225.

267. *Id.* § 214; McCarthy, *supra* note 260, at 446 (explaining that pen registers and trap and trace devices record the date time, and telephone numbers of incoming and outgoing calls, but not the content

provisions are uncontroversial, however, because many of these capabilities were already available for criminal investigations.²⁶⁹ Of greater controversy is the expansion of the definition of pen registers, and trap and trace devices to include devices which allow the tracking of e-mail and Internet usage.²⁷⁰ Civil libertarians argue that this is a significant expansion in the government's surveillance authority, which requires a significant faith in the government not to use such information for improper purposes.²⁷¹ Moreover, although the monitoring authority was not extended to the "content" of an e-mail, "content" remained undefined (for example in the case of e-mail subject lines).²⁷²

The surveillance capabilities of the government were also substantially increased through an expansion of the ability of investigators to obtain FISA warrants.²⁷³ As discussed earlier, FISA authorized wiretaps where the purpose of the tap was to obtain intelligence about a foreign power (including a terrorist organization).²⁷⁴ USA Patriot changed the word "purpose" to "significant purpose" in the FISA warrant requirement.²⁷⁵ As a result, the lower standards of the FISA requirement could be applied where the government intended the information to be used in a criminal investigation, as long as there was also a "significant purpose" of gaining intelligence information.²⁷⁶ On October 31, 2001, Attorney General Ashcroft ruled that the government may also eavesdrop on phone calls between lawyers and clients if there was "reasonable suspicion" to justify such an action.²⁷⁷

Third, the Act also increases the surveillance capabilities of the government in the area of financial transactions. Prior to September 11, international financing and money laundering for terrorist networks was widely regarded as a significant problem.²⁷⁸ To correct for this, USA Patriot requires banks to monitor and report suspicious transactions.²⁷⁹ Such reports are to be shared by the Treasury Department to the intelligence and law enforcement communities.²⁸⁰ The Act also provides for government access to credit records without notification.²⁸¹

of the calls).

268. Patriot Act § 206; see McCarthy, *supra* note 260, at 445 (explaining that roving wiretaps authorize wiretaps on any phone that a target may use, making individuals, not the equipment the object of a warrant).

269. See McCarthy, *supra* note 260, at 445.

270. Patriot Act § 216(a)(3).

271. McCarthy, *supra* note 260, at 444-46.

272. *Id.* at 446.

273. *Id.* at 444-45.

274. *Id.* at 445.

275. Patriot Act § 218.

276. See generally Beeson, *supra* note 222, at 307-11 (noting that this provision of FISA was found constitutional by an appellate FISA court in November 2002; it was the first time a FISA court opinion was released to the public).

277. KELLNER, *supra* note 181, at 101.

278. McCarthy, *supra* note 260, at 447.

279. *Id.* at 448.

280. Patriot Act § 358.

281. *Id.*

Finally, USA Patriot greatly expands the ability of the government to detain individuals who have not been convicted of criminal or immigration violations. Under the AEDPA of 1996 legislation, the government was authorized to detain and remove aliens convicted of certain crimes.²⁸² Where their home countries would not accept them, these *convicted* persons were detained indefinitely.²⁸³ USA Patriot expands power of the government to detain non-citizens *suspected* of terrorism for seven days, after which criminal or immigration charges must be brought.²⁸⁴ However, since the 1996 legislation, indefinite detention is allowed where the country of origin will not accept a detainee; in effect, USA Patriot allows for the indefinite detention of aliens suspected of terrorism.²⁸⁵

USA Patriot is only one facet of a greater move of the U.S. government away from the democratic principles in counterterrorist efforts. While USA Patriot allows for the indefinite detention of aliens suspected of terrorism where their country of origin will not accept them, in several cases, the government has exerted this authority in the case of U.S. citizens suspected of terrorist activity. For example, Yasser Hamdi is an American citizen who was captured on the battlefield in Afghanistan and is currently being detained in a military brig, having been designated an "enemy combatant" by the government.²⁸⁶ In another case, Jose Padilla (an American citizen born in Brooklyn), was arrested by federal agents in May 2003 at O'Hare International Airport in Chicago.²⁸⁷ Padilla stands accused of planning to detonate a "dirty bomb" on American soil.²⁸⁸ The U.S. government has held Padilla in solitary confinement, without trial and without access to a lawyer.²⁸⁹ The case of Mr. Padilla demonstrates the worst fears of civil libertarians: a citizen, born in the United States, accused of committing a crime in the United States, and arrested on American soil, cannot avail himself of the criminal justice system because the government accuses him of being a terrorist.²⁹⁰

282. AEDPA §§ 422-423

283. *See Zadvydas v. Davis*, 533 U.S. 678, 688-89 (2001).

284. Patriot Act § 412.

285. *See* McCarthy, *supra* note 260, at 449. The indefinite detention of those suspected of terrorism is in fact exactly what the Bush Administration originally proposed under USA Patriot. *See* Patriot Act § 412.

286. *See* Neil A. Lewis, *Court Affirms Bush's Power to Detain Citizen as Enemy*, N.Y. TIMES, July 10, 2003, at A16. In July 2003, the Fourth Circuit held that Hamdi could not challenge his designation as an enemy combatant. *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), *vacated and remanded*, 124 S. Ct. 2633 (2004). The court stated that because a wartime president was due great deference in conducting a fight against terrorism, courts should not question Hamdi's detention as a result of his designation as an "enemy combatant." *Id.* at 463 n3. The Supreme Court subsequently vacated and remanded the Fourth Circuit's opinion, holding that *under Mathews v. Eldridge*, 424 U.S. 319 (1976), Hamdi was entitled to notice as to the factual basis for his designation as an enemy combatant, and to rebut the Government's factual assertions.

287. *See* William Glaberson, *Judges Question Detention of American*, N.Y. TIMES, Nov. 18, 2003, at A19.

288. *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d. Cir. 2003).

289. *Id.* at 700.

290. In 2003, the Second Circuit held that the President's constitutional powers "do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat." *Id.* at 724. Furthermore, the court held that the detention of Padilla was in violation of

Moreover, even in cases where criminal charges have been brought, the government has indicated that where it is convenient, it is willing to move prosecution outside the auspices of the criminal justice system. For example, Ali Saleh Kahlah Al-Marri, a Qatari student, was charged with lying to the FBI and credit card fraud.²⁹¹ Al-Marri was later designated an enemy combatant and moved into military custody.²⁹² This case represents the first time an individual who originally faced criminal charges has been moved into enemy combatant status.²⁹³ In the case of Zacarias Moussaoui the alleged “20th hijacker” in the September 11 attacks, the U.S. government has indicated a willingness to move the criminal prosecution to a military tribunal if the courts upheld the Moussaoui’s Sixth Amendment right to prepare a defense by speaking with suspected al-Qaeda members being held by the government.²⁹⁴ These examples are consistent with the Bush administration policy, announced on November 13, 2001, that foreign terrorists would be tried in military tribunals, rather than criminal courts.²⁹⁵ Such tribunals would be made up of military officers and members of the executive branch rather than an independent judiciary. Rules of evidence are substantially relaxed, and the identity of witnesses hidden.²⁹⁶ No civilian judicial review is available.²⁹⁷

Finally, the administration has used other executive rules to increase its ability to detain persons in furtherance of its war on terror. For example, the executive branch has wide discretion in the administration of immigration laws. Since September 11, the U.S. government has used this discretion for the purposes of interrogation or incapacitation; for example, by delaying hearings or deportations for persons who have technically violated visa regulations.²⁹⁸ Another technique involves the use of material witness warrants to detain individuals who are a part

the Non-Detention Act, which provides that, “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” *Id.* at 718. The Second Circuit specifically rejected the argument that the Congress authorized the detention in its authorization of the use of force following the September 11 attacks. Padilla, 352 U.S. at 724; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)(hereinafter “AUMF”). The 4th Circuit, however, used the AUMF to justify Hamdi’s detention in light of the Non-Detention Act. Hamdi, 316 F.3d at 467-68; 18 U.S.C. § 4001(a) (2004). This position was subsequently adopted by the Supreme Court in the *Hamdi* case. 124 S.Ct at 2640. In March 2005, a federal judge held that Mr. Padilla’s detention was not authorized by the AUMF, and order Mr. Padilla released. *See Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 (February 28, 2004).

291. Eric Lichtblau, *Man Held as ‘Combatant’ Petitions for Release*, N.Y. TIMES, July 9, 2003, at A18.

292. *Id.*

293. *Id.*

294. *See* Philip Shenon, *U.S. to Appeal Ruling on 9/11 Terror Suspect*, N.Y. TIMES, Oct. 8, 2003, at A28.

295. Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1410 (2002). *See also* Wedgwood, *supra* note 2, at 331 (noting the benefits of using military tribunals to try suspected al Qaeda terrorists, and the legal basis for doing so).

296. Dickenson, *supra* note 295, at 1415.

297. *Id.* at 1417-18.

298. *Id.* at 1414.

of a large and indefinite class of prospective grand jury witnesses.²⁹⁹ Both of these techniques have been used to reach a broad class of individuals who *may* be connected to terrorism, in order to reach a narrow class of individuals for whom probable cause exists. Using these techniques, the Bush Administration had arrested or detained over 1200 persons, mostly Muslim or Arab, by November 2001.³⁰⁰

Internationally, the policy of the U.S. government since the September 11 attacks has been to emphasize the proactive use of military force to deter and prevent terrorist attacks.³⁰¹ With regard to the specific class of terrorists, the Government has engaged in several actions which demonstrate a move away from the use of law to prevent terrorism. First, as discussed already, President Bush signed an executive order providing for the trial of terrorists in military tribunals.³⁰² In the case of combatants captured in Afghanistan, the United States detained these combatants at the U.S. Naval Base in Guantanamo Bay, Cuba.³⁰³ These combatants were, according to the Bush Administration, “unlawful combatants,” occupying a gray area between laws—neither prisoners of war protected by the Geneva Conventions, nor criminals subject to the benefits of the U.S. criminal justice system.³⁰⁴ Second, the United States has captured terrorists off the battlefield, via efforts on the part of the intelligence community along with cooperation with foreign governments. For example, the United States captured Khalid Sheikh Mohammad, a top Al-Qaeda operative in Pakistan in March 2003.³⁰⁵ However, in contrast to terrorists captured in very similar circumstances in the 1990s, such as Ramzi Yousef (participant in the 1993 World Trade Center Bombing), Mohammad remains in the custody of the intelligence community, and has yet to be charged with a crime.³⁰⁶ Finally, in some cases, the United States has engaged in a policy of targeted assassination of terrorists suspects. For example, in November 2002, it was widely reported that a Predator drone had been used to assassinate al Qaeda operatives in Yemen.³⁰⁷ While prior to September 11 there was a substantial debate within the U.S. government as to the merits of such action,³⁰⁸ apparently that debate was resolved in favor of assassination.

299. *Id.* The grand jury has historically been controlled by prosecutors with limited judicial oversight. See, e.g., *Costello v. United States*, 350 U.S. 359 (1956).

300. KELLNER, *supra* note 181, at 101.

301. See Wilcox Jr., *supra* note 124, at 57.

302. Dickinson, *supra* note 295, at 1410.

303. *Id.* at 1415.

304. KELLNER, *supra* note 181, at 178. See also *Al Odah v. United States*, 321 F.3d 1134, 1142-43 (D.C. Cir. 2003).

305. David Johnston, *Raid on Feb. 13 Smoothed Way in Qaeda Arrest*, N.Y. TIMES, Mar. 4, 2003, at A1.

306. Kamran Khan, *Al-Qaida Strategist Arrested*, *ContraCostaTimes.com*, (Mar. 2, 2003), at <http://www.contracostatimes.com/mld/cctimes/5300268.html>.

307. David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

308. Wilcox Jr., *supra* note 124, at 38.

More generally, the United States has declared a policy of pre-emptive military strikes in order to deter future attacks. The administration first employed a broad based military operation as part of the war on terrorism in Afghanistan. President Bush's statement to the public on the day that war began made it clear that this conduct was part of the "war on terror."³⁰⁹ Later, the administration announced the so called "Bush Doctrine" of pre-emptive military strikes on states that pose an imminent threat to the United States.³¹⁰ Subsequently, the United States launched an invasion of Iraq to topple the regime of Saddam Hussein. The justifications for this pre-emptive war were varied. The administration discussed Saddam Hussein's support for terrorist groups (though never specifically stating that Saddam Hussein was connected to the September 11 attacks).³¹¹ The administration also discussed the repressive regime of Saddam Hussein, under which hundreds of thousands of Iraqis had been killed.³¹² Most notably, the administration argued that the Iraqi regime had continuously tried to develop weapons of mass destruction in defiance of U.N. Security Council Resolutions.³¹³ Such weapons posed an "imminent risk" to American security because they could be provided to terrorists targeting the United States.³¹⁴ Subsequent to the end of major fighting in Iraq, the Bush Administration declared that Iraq was now the "central front" in the war on terror (seemingly because international terrorists who descended upon Iraq oppose the U.S. presence there).³¹⁵ Thus, while the connection between Iraq and terrorism is debatable to many, the war in Iraq was almost certainly a part of the U.S. government's "war on terror."³¹⁶

B. Israel

Terrorism has plagued the territory that is today Israel since before the creation of that State. Particularly after the September 11 attacks, Israeli policy is viewed by many as a useful model for emulation.³¹⁷ However, the Israeli terrorism experience differs from the American experience in several ways. First, and most importantly, unlike the United States, since its creation, counterterrorist policy has been a critical aspect of Israel's security structure.³¹⁸ This is because, unlike in other countries, the object of many groups that target Israel is to destroy the state

309. Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, (Oct. 7, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/10/print/20011007-8.html>.

310. The National Security Strategy of the United States of America, (Sept. 17, 2002) at 15, *available at* <http://www.whitehouse.gov/nsc/nss.html>.

311. Address Before a Joint Congress on the State of the Union (Jan. 28, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/01/print/20030128-19.html>.

312. *Id.*

313. *Id.*

314. *Id.*

315. Progress Report on the Global War on Terrorism, 5 (Sept. 2003), *available at* <http://www.whitehouse.gov/homeland/progress/full.html>.

316. Whether it *should* have been part of that war is, of course, another question.

317. Noemi Gal-Or, *Countering Terrorism in Israel*, in THE DEADLY SIN OF TERRORISM, *supra* note 23, at 146.

318. *Id.*

itself.³¹⁹ Second, while the United States has confronted issues of state sponsored terrorism, the role of other Arab states in anti-Israel terror is particularly poignant. Anti-Israel terror by Palestinian militants was often a low-cost proxy war being waged by Arab states against Israel, in which Arab states could attack Israel, while avoiding risking the lives of their own nationals.³²⁰ Finally, while there is a steady stream of attacks against both the United States and Israel, the United States has not faced a situation comparable to the *Intifada* which rose in 1987, or more recently the 2000 *al-Aqsa Intifada*.³²¹ Many argue that such conditions resemble insurrections,³²² or a war between two states,³²³ rather than terrorist campaigns. As a result, unlike in the American case, anti-Israel terrorism is merely a facet of a wider conflict. These factors, and the geography of the Middle East itself, yield an Israeli terrorist experience which is drastically different from that of the United States.

History

While anti-American terrorism is a response to globalization, or a set of conditions believed to constitute American foreign policy, anti-Israeli terrorism can be traced to a discrete issue, namely, the establishment of the state of Israel in the Middle East. This grievance has since been expanded to include the allegedly illegal occupation of Arab lands, and Israeli treatment of Palestinians under their authority.³²⁴

After World War I, and the fall of the Ottoman Empire, Palestine was entrusted to Great Britain.³²⁵ The British opened Palestine up to Jewish immigration, the subsequent influx of whom led to periodic violence between the two groups.³²⁶ After years of conflict, including violence perpetrated by Jewish rebel groups such as the Irgun Zvai Leumi (Irgun gang) and the Lohamy Heruth Israel (LEHI, or Stern Gang), the State of Israel was established on May 14, 1948.³²⁷ Immediately, members of the Arab league declared war on the newly established Jewish state.³²⁸ Conflicts followed in 1956-57, 1967, 1969-1970, 1972,

319. *Id.* at 145. An *Al-Fatah* publication, for example, argues that the "The liberation action is not only the removal of an armed imperialist base, but more important – it is the destruction of a society." *Id.* at 13-40 (citation omitted).

320. See Gary C. Gambill, *The Balance of Terror: War by Other Means in the Contemporary Middle East*, 28 J. PALESTINE. STUD. 56, (1998). See also, Gal-Or, *supra* note 317, at 139.

321. See Al-Aqsa Intifada, at http://en.wikipedia.org/wiki/Al-Aqsa_Intifada (last modified Nov. 9, 2004) (offering a brief description of the term).

322. Gal-Or, *supra* note 317, at 141.

323. Shlomo Gazit, *Israel*, in COMBATING TERRORISM, *supra* note 12, at 256.

324. See Kleff, *supra* note 7, at 18.

325. See British Mandate of Palestine, at http://en.wikipedia.org/wiki/British_Mandate_of_Palestine (last modified Nov. 9, 2004) (offering a brief explanation).

326. *Id.*

327. See generally TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 11-53 (Henry H. Han ed., 1993).

328. Matthew H. James, *Keeping the Peace--British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 DICK. J. INT'L L. 405, 428 (1997).

and 1982.³²⁹

During the 1950s, Palestinians based in Syria, Egypt, and Jordan staged cross-border attacks against Israel, which were met with Israeli military operations against the host governments.³³⁰ The Palestinian Liberation Organization was founded in 1964, and during the subsequent decades, anti-Israeli terrorism, at the hands of organizations such as *Al-Fatah*, or the Popular Front for the Liberation of Palestine (PFLP) became regular phenomena.³³¹ Attacks were directed both internally and externally, most memorably involving the killing of eleven Israeli athletes at the Munich Olympics in 1972.³³²

The conflict was complicated by the Israeli occupation (after their victory following a pre-emptive strike in the 1967 war), of the Sinai Peninsula, the Gaza Strip, the West Bank, East Jerusalem, and the Golan Heights.³³³ From 1967 to 1974, the Labor government and its Defense minister Moshe Dayan, engaged in a policy of limiting the Israeli presence in the Occupied Territories in order to curb animosity towards the occupying force.³³⁴ However, with the rise of a government of the right-wing Likud party in the late 1970s, this policy was reversed in favor of increased visibility of the Israeli occupation. It included less attention paid to the treatment of residents of the territories, and the creation of a policy of Israeli settlements in the West Bank and Gaza strip, which involved expropriation of uncultivated Arab lands in those territories.³³⁵ These policies eventually culminated in the first *Intafada* (popular uprising) in 1987.³³⁶

In the 1990s, beginning with talks in Madrid in 1991, a series of peace agreements nurtured the hope of an end to the Palestinian-Israeli conflict. In 1993 Prime Minister Yitzhak Rabin and Foreign Minister Shimon Peres from Israel and PLO Chairman Yasser Arafat signed the Declaration of Principles (the Oslo Agreement).³³⁷ This along with subsequent agreements such as Oslo I in 1994, Oslo II in 1995, the Hebron agreement in 1995, the Wye River Memorandums of 1998 and 1999 established and implemented a framework for a lasting peace.³³⁸ During this time, the Israeli Defence Ministry reported a greater than 90 percent decline in terrorism in Israel and the Occupied Territories.³³⁹ In September 2000, with peace talks at a critical juncture, Likud Knesset member Ariel Sharon visited the Temple Mount, setting of the new *Al-Aqsa Intafada*.³⁴⁰ The peace talks were

329. *Id.*

330. Gal-Or, *supra* note 317, at 140.

331. *Id.* at 141.

332. Gazit, *supra* note 323, at 231.

333. James, *supra* note 328, at 428 n123.

334. *See* Gazit, *supra* note 323, at 234.

335. *Id.* at 234-35.

336. *Id.* at 235.

337. CHASDI *supra* note 15, at 289.

338. *Id.* at 287.

339. Gazit, *supra* note 323, at 238. The number of attacks decline continuously from 3,142 in 1993, to 242 in 1999. The greatest decline was from 1994 (2198) to 1995 (560). *Id.*

340. *See Things Fall Apart*, *ECONOMIST*, Oct. 21, 2000, at 29-30.

subsequently tabled by Prime Minister Barak in October 2000.³⁴¹ Sharon was elected to Prime Minister in February 2001.³⁴²

Legislation

Like any country, Israel's Penal law is one mechanism to punish terrorism when the act in and of itself would be criminal,³⁴³ and Israeli law permits the death penalty in cases of terrorism.³⁴⁴ In addition, unlike American law, Israeli law makes failure to prevent a felony a misdemeanor punishable by up to two years imprisonment.³⁴⁵ Such a statute allows for the prosecution of those who do not directly participate in terrorist acts. Other provisions of the penal law also provide Israeli courts with extraterritorial jurisdiction in the cases of crimes against humanity, against the State of Israel, or against Israeli residents or national.³⁴⁶

The most significant legislation, however, is Israel's Prevention of Terrorism Ordinance, enacted in 1948.³⁴⁷ While terrorism is not defined in the Ordinance, management or membership in a terrorist organization is punishable by imprisonment up to 20 years or 5 years, respectively.³⁴⁸ The act also criminalizes support for a terrorist organization, such as providing money, resources or a place for a meeting.³⁴⁹ Significantly, the act differs from U.S. law by making advocacy on behalf of a terrorist organization or the possession of propaganda from a terrorist organization, criminal offenses punishable by up to a 1000 pound fine and three years imprisonment.³⁵⁰ A 1980 amendment to the Ordinance also makes public displays of support, such as displaying a flag or slogan, a criminal act.³⁵¹ Finally, the 1948 Ordinance granted broad authority to the military to enforce many of its provisions.³⁵² For example, the military was granted the authority to confiscate any property of a terrorist organization,³⁵³ and to close down any facility

341. *See id.* at 31.

342. *Sharon's Famous Victory, Barak's Crushing Defeat*, ECONOMIST, Feb. 10, 2001, at 47.

343. James, *supra* note 328, at 435.

344. Gazit, *supra* note, 323 at 250.

345. Penal Law, 1977, art.262, Laws of the State of Israel Article 262 states: "Every person who, knowing that a person designs to commit a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanor and is liable to imprisonment for two years.

346. James, *supra* note 328, at 435-36.

347. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948).

348. Prevention of Terrorism Ordinance, §§ 2, 3. Membership in a terrorist organization may be presumed if a person is present "in a place serving a terrorist organization or its members as a place of action, meeting or storage." § 9(b).

349. *Id.* §§ 4(d),(e).

350. *Id.* §§ 4(a)-(c). Such incitement offenses are extremely limited under U.S. law. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). (noting that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

351. Prevention of Terrorism Ordinance Amendment, § 1, 1980, S.H. 187.

352. Prevention of Terrorism Ordinance, § 6(a).

353. *Id.* §§ 5(a)-(b).

which services a terrorist organization or their members.³⁵⁴ Furthermore, offenses under the statute were to be prosecuted by military tribunals,³⁵⁵ under the procedures of military courts.³⁵⁶ Judgments of the military tribunals were reviewed by the Minister of Defense,³⁵⁷ but not subject to civilian judicial review.³⁵⁸ However, the military role was removed when these provisions were repealed in the 1980 Amendments to the Ordinance.³⁵⁹

The final consideration for understanding Israeli anti-terrorist legislation is the Proclamation on Law and Administration which was made at the time of Israeli occupation of the West Bank and the Gaza Strip. The Proclamation is a continuation of the British Mandate Defense (Emergency) Regulations which were enacted in 1945.³⁶⁰ These regulations granted broad authority to the military to detain and try suspected terrorists.³⁶¹ In addition, to serve as a deterrent to a person who would give shelter to terrorists, the military was given the authority to demolish homes or dwellings of terrorists caught or killed.³⁶² The legal obligations in the occupied territories were complicated, however, given the concurrent applications of Israeli, military, and local law.³⁶³ In practice, this led to two justice systems based on the nationality of the accused, with Jewish Underground terrorists being tried in Israeli courts, and others being tried in military tribunals.³⁶⁴

Executive Action

The primary responsibility for Israeli counterterrorist policy is placed in one of Israel's three intelligence services: the General Security Service (GSS, or SHABAK), the Israeli Defense Forces Intelligence Branch, and the Mossad (Israeli intelligence services).³⁶⁵ In addition to the measures discussed earlier, several aspects of Israel's domestic security apparatus are worth mentioning here. First, like in the United States, Israeli investigators have broader investigative capabilities than are available in regular criminal investigations. For example, Israel allowed for "investigative arrests" and prolonged interrogations in cases of political violence.³⁶⁶ Until recently, these measures were generally not available in the United States. Moreover, Israel allows its intelligence agencies to act outside the rules that generally restrict law enforcement personnel as long as the fruits of their investigation are used by policymakers, rather than as evidence in criminal

354. *Id.* § 6(a).

355. *Id.* § 12(a).

356. *Id.* § 12(d).

357. *Id.* § 15(a).

358. *Id.* § 16.

359. See Prevention of Terrorism Ordinance (Amendment), § 5, 1980, S.H. 187.

360. James, *supra* note 328, at 436.

361. Gazit, *supra* note 323, at 251.

362. *Id.* Israeli courts have ruled that such detention and demolitions are subject to judicial review. See Heymann, *supra* note 26, at 95-96. In the U.S., the availability of judicial review for such detentions is an open question. See *e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

363. Gal-Or, *supra* note 317, at 151.

364. *Id.*

365. Gazit, *supra* note 323, at 235.

366. HEYMANN, *supra* note 14, at 111.

trials.³⁶⁷ This practice comports with U.S practice prior to September 11, but as discussed earlier, under USA-Patriot, American investigators now operate under relaxed rules, even if they intend the information to be used in criminal trials.

Related to this is the use of torture by Israeli intelligence officials. The GSS took primary responsibility in internal security. While their operations were generally secret, in 1987, their procedures came under scrutiny through an internal government investigation that became known as the Landau Report.³⁶⁸ Among other things, the report found that the GSS had used force to extract information and confessions from terrorist suspects.³⁶⁹ The report also found that GSS officers, with the assistance of military attorneys, had deliberately deceived judges when suspects had claimed that their confessions were extracted by illegal means.³⁷⁰ The report ultimately legitimized psychological tactics, and moderate physical pressure to extract information, but specifically prohibited torture.³⁷¹ Israeli courts have also banned the use of torture in investigations.³⁷²

The Israeli security apparatus is also subject to substantially less oversight than in the American case. As already mentioned, oversight in the case of torture was made difficult by GSS officers deliberately misleading judges about the use of torture.³⁷³ In another case, in 1984, the government had actively covered up the role of GSS officers in the killing of two terrorists in their custody.³⁷⁴ The government took steps to censor press reports of the incident, and the subsequent internal GSS investigation was classified.³⁷⁵ Eventually, GSS officers were cleared by an internal disciplinary committee, despite the fact that they were guilty of murder.³⁷⁶ After the Prime Minister was told of the events, he reprimanded the officials for giving him information he did not want to hear.³⁷⁷ Eventually, after the attorney general launched an investigation into the events, four senior GSS officials were pardoned for their role.³⁷⁸ In contrast, in 1995, the CIA under President Clinton fired two senior officials and reprimanded others after it was discovered that one of their sources had been involved in the murder of a U.S. citizen and the husband of another citizen.³⁷⁹

367. *Id.* at 140.

368. H.C. 5100/94, Pub. Comm. Against Torture v. State of Israel, P.D. 28.

369. *Id.* at 6-10.

370. *See generally id.* at 5-10.

371. *Id.* at 14.

372. H.C. 5100/94, Pub. Comm. Against Torture v. State of Israel (Sept. 6., 1999). The Supreme Court of Israel held that the prohibition against torture is absolute under both Israeli and International law, noting that there are few exceptions. However, the court did leave open the question whether investigators subjected to criminal prosecution for torturing a suspect (in order to prevent the loss of human life, as in the case of a "ticking bomb") may assert a necessity defense. *See id.* at 29-31, 39.

373. *See generally, id.* at 5-10.

374. HEYMANN, *supra* note 14, at 118-19.

375. *Id.*

376. *Id.* at 118-19.

377. *Id.* at 119.

378. *Id.*

379. *Id.* at 29-30.

Finally, internal counterterrorist measures have often led to a visible and large scale security state in Israel. This policy has already been discussed in the context of Likud policy in the Occupied Territories in the 1970s.³⁸⁰ The policy has also included significant target hardening, such as the development of an extensive security apparatus to protect air traffic to and from Israel.³⁸¹ In situations where Israel has found itself with insufficient information to thwart specific attacks, it has often resorted to “lock-down” mechanisms, involving security screenings in public places, and the limiting of the freedom of movement, especially the movement of Palestinians to and from the Occupied Territories.³⁸² As a result of these measures, it has been argued that these measures have turned the State of Israel into a “garrison-police state.”³⁸³

Israel’s counterterrorism policy in the occupied territories was developed and is implemented primarily by the IDF.³⁸⁴ The policy has generally invoked the use of maximum force, and involved three general principles:

- 1) Israeli territory must be sealed up against terrorists; 2) Israel will hit back at the terrorists no matter where they are; and 3) neighboring and enemy states, including their civilian populations, that host, tolerate on their soil, and shelter anti-Israel terrorists cannot evade responsibility and escape being drawn into this violent circle.”³⁸⁵

This policy manifested itself first in Jordan, where Israeli reprisals led to the expulsion of Palestinian terrorists in 1970.³⁸⁶ Later retaliations against Syria led to restrictions by the Syrian government on attacks by Palestinians from within Syria or the Golan Heights.³⁸⁷ Finally, after the inability of Lebanon to control attacks from within its borders (due to civil war in that country), Israel invaded Lebanon in 1982.³⁸⁸ However, some have argued that while this military approach was understandable in the first decades of Israel’s existence (when terrorism was a part of hostile relations with Arab states), it has been more the result of intuition and inertia than strategic calculation in recent years.³⁸⁹

Recent Developments

As discussed earlier, in September 2000, a new *Intafada* erupted in the

380. See Gazit, *supra* note 323, at 234 and discussion, *supra* part III.B. “History”.

381. Gazit, *supra* note 323, at 242.

382. *Id.* at 243.

383. CHASDI, *supra* note 15, at 288.

384. *Combating Terrorism: How Five Countries Are Organized to Combat Terrorism*, U.S. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-00-85 (April 2000), at 16-17; see also Gal-Or, *supra* note 317, at 147.

385. Gal-Or, *supra* note 317, at 156.

386. Gazit, *supra* note 323, at 236. This event, known as “Black September,” involved a confrontation between the Jordanian Army and PLO militias, and included Syrian incursions into Jordan with the assistance of PLO rebels. See *id.* at 416.n3.

387. Gazit, *supra* note 328, at 236.

388. See *Why Did Israel Invade Lebanon in 1982?*, PalestineFacts.com, (last visited Nov. 15, 2004), available at http://www.palestinefacts.com/pf_1967to1991_lebanon_198x_backgd.php.

389. Gal-Or, *supra* note 317, at 147.

Occupied Territories after then Knesset member Ariel Sharon visited the Temple Mount, angering the Arab population.³⁹⁰ This *Al-Aqsa Intafada* has changed the nature of the threat faced by Israel, predominantly in scale. The new threat, it has been argued, more closely resembles a war between states than a terrorist threat.³⁹¹ As a result of these events, peace negotiations ended in October 2000 and Sharon was elected to Prime Minister in February 2001.³⁹² The immediate effect of these events from the security perspective is the reversion to the security state apparatuses referred to earlier. For example, using the military, Israel has created a large-scale defensive security system throughout the settlements, and transportation routes to and from them, in the Occupied Territories.³⁹³ In addition, the Israeli Defense Ministry, along with other agencies, has deployed large numbers of security guards in public areas inside Israel.³⁹⁴

Given this escalation in the year prior, it would perhaps be understandable if the events of September 11 did not significantly alter the situation in Israel. Alternatively, decreased American pressure on Israel in light of its own experiences, may have allowed for an escalation in the Israel. In other words, the American government was less likely to criticize Israel for responding harshly to terrorist attacks, either because (a) it substantively “understood” Israel’s action; (b) the American public would not tolerate criticism of Israel as a kindred victim of terrorist attacks; (c) in light of the Bush Administration’s “us/them” binary, criticism of Israel would be viewed as “siding with the terrorists”; or (d) because American pressure would have appeared hypocritical in light of America’s response to September 11.

There is some evidence of these escalations in the two years since September 11. For example, after a series of attacks in the spring of 2002, Israel launched one of its most extensive forays into the Occupied Territories in years.³⁹⁵ The incursion involved significant casualties on both sides, and included a siege on the headquarters of Palestinian Authority President Yasir Arafat.³⁹⁶ The incursions also involved a significant attack on a Palestinian refugee camp in Jenin, which was surrounded by rumors of a massacre of up to 500 Palestinian civilians there.³⁹⁷ Ultimately, a United Nations investigation found that there had in fact been no “massacre” – total casualties numbered 52, with civilian casualties of about 14-20.³⁹⁸ Additionally, in spring 2003 after a series of terrorist acts, Israel launched air strikes against terrorist camps in Syria— the first time Israel forces had attacked Syria in 30 years.³⁹⁹ Israel has also continued a policy of pre-emptive

390. See *Things Fall Apart*, *supra* note 340, at 29-30.

391. See *Gazit*, *supra* note 323, at 256.

392. See *Sharon’s Famous Victory, Barak’s Crushing Defeat*, *supra* note 342, at 47-48.

393. *Gazit*, *supra* note 323, at 256-57.

394. See *id.* at 257.

395. See *After the Assault*, *ECONOMIST*, Apr. 27, 2002, at 43.

396. See *id.*

397. *Naught for your comfort*, *ECONOMIST*, Aug. 10, 2002, at 11.

398. *Id.*

399. *Israeli Frustration Versus Syrian Impotence*, *ECONOMIST*, Oct. 11, 2003, at 47.

military strikes on the Occupied Territories in order to thwart potential terrorist attacks.⁴⁰⁰ Finally, as an extension of its security state apparatus, in recent months, the Israeli government finalized plans for a “security fence” to protect Israel against terrorist attacks.⁴⁰¹ While the Israeli government has argued that the fence would keep out terrorists, the fence has been criticized as being a significant infringement on Palestinian liberty and economic well-being.⁴⁰² In addition, rather than respecting pre-1967 borders, the fence expropriates large tracts of Arab land in the Occupied Territories in order to fence in Jewish settlements there.⁴⁰³ In sum, while September 11 did not change Israeli policy, a lack of pressure, combined with distractions due to the American invasion of Iraq in the spring of 2003, have allowed the Israeli government to escalate its responses to terrorist attacks against Israel.⁴⁰⁴

C. India

Although receiving less media attention in the United States than anti-American and anti-Israeli terrorism, anti-Indian terrorism is one of the most significant threats in the world today. With over one-hundred thousand casualties, terrorism has taken more lives in India than any other country.⁴⁰⁵ This threat exacerbates the seemingly intractable tensions between India and Pakistan, which have fought three wars since the countries obtained independence in 1947. The Indian government has repeatedly asserted that anti-Indian terrorism has been both covertly and overtly supported by Pakistan.⁴⁰⁶ As in the case of Israel and Palestine, therefore, terrorist attacks against India have repeatedly subverted the Indo-Pak peace process.⁴⁰⁷ With the presence of nuclear weapons in both India and Pakistan, there is a significant threat that terrorist attacks in India may escalate conflict between India and Pakistan, leading to the possibility of nuclear war on the Indian sub-continent (a situation which occurred in late 2001 after terrorists bombed the Indian parliament).⁴⁰⁸ It is for this reason that President Clinton once remarked that South Asia is “the most dangerous place on Earth.”⁴⁰⁹ An additional consideration when thinking about terrorism in India is its relationship to broader

400. Greg Myre, *Israelis Kill 3 Hamas Militants and a Young Boy in Ramallah*, N.Y. TIMES, Dec. 2, 2003, at A8.

401. *A Safety Measure or a Land Grab? - Israel's Security Barrier*, ECONOMIST, Oct. 11, 2003, at 26.

402. *Id.*

403. *Id.*

404. Since the passing of PA Chairman Yasir Arafat, there appears to have some progress towards a negotiated settlement in the Middle East. Israeli Prime Minister Sharon recently called for the elimination of Israeli settlements in Gaza, while the newly elected Palestinian leader Mahmoud Abbas has continued efforts to clamp down on anti-Israeli terrorist organizations. See generally, *Ariel Sharon Meets America's George Bush*, THE ECONOMIST, April 16, 2005.

405. See Ved Marwah, in *COMBATING TERRORISM*, *supra* note 12, at 301.

406. *Id.* at 302.

407. See, e.g., *Hope at Last*, ECONOMIST, Jan. 10, 2004, at 10 (commending recent progress in talks between Pakistan and India, but noting possibility of deterioration as a result of terrorist attacks).

408. See *Eyeball to Eyeball*, ECONOMIST, Jan. 5, 2002, at 33.

409. Jeffrey Weiss, *India and Pakistan - A Cautionary Tale for Israel and Palestine*, 18 CONN. J. INT'L L. 455, 472 (2003).

tensions of Indian society. Unlike the predominantly external threat of terrorism in the United States and Israel, terrorism in India is generally related to separatist movements resulting from the significant ethnic and religious cleavages within Indian society.⁴¹⁰ These movements, India argues, is in tension with the secular essence of Indian society.⁴¹¹ As a result, the threat of terrorism is more than a threat to human life—it is seen as a threat to the very core of the Indian identity.

History

The major threat of terrorism in India today is that within and related to the disputed states of Kashmir and Jammu, discussed below. In addition, I will be discussing terrorist activity related to separatist movements in the state of Punjab in the 1980s. While this movement is no longer a significant threat in India, it was the impetus for some of the anti-terrorist legislation discussed. The Punjabi case also provides a useful point of comparison to current Indian policy.⁴¹²

Terrorism in Punjab is related to separatist intentions of Sikhs in Punjab. Upon independence from Great Britain, India was partitioned into the majority Hindu state of India and the majority Muslim state of Pakistan (East and West, with East Pakistan becoming Bangladesh in 1971).⁴¹³ Smaller religious groups, including the Sikhs, were not considered in this partition.⁴¹⁴ As result, partition resulted in approximately 2.5 million Sikhs being displaced from their homes in West Punjab (today part of Pakistan).⁴¹⁵ The Indian constitution was also a cause of significant grievances in the Sikh community because it defined Sikhism as part of the Hindu religion.⁴¹⁶ This clause was viewed as a threat to the separate Sikh identity.⁴¹⁷ In addition, the Indian central government was seen as placing significant economic burdens on Sikhs, which included the expropriation of land, the diversion of water, and a reduction in government investment in Punjab.⁴¹⁸ After the dismissal of the government of Punjab in 1980, in which the Sikh party Akali Dal held a majority, the movement turned to terrorism.⁴¹⁹ In 1984, following series of escalating steps, including Akali Dal's preventing the shipping of Punjabi wheat and withholding taxes to the central government, India deployed 100,000 troops in Punjab.⁴²⁰ In addition, in June, 1984, the Indian government launched Operation Blue Star a large scale assault against alleged terrorists in Punjab, and included an attack on the Golden Temple complex (a Sikh religious site), which

410. Marwah, *supra* note 405, at 301-02.

411. *Id.* at 311.

412. Although I will not discuss them specifically, additional terrorist movements in India include separatist movements in Northeast India (in Nagaland, Manipur, Assam, and Tripura), and in South India (in Tamil Nadu). Marwah, *supra* note 405, at 326.

413. BOSE, *supra* note 186, at 8 & 30.

414. Marwah, *supra* note 405, at 304.

415. *Id.*

416. INDIA CONST. art. 25, available at <http://www.constitution.org/cons/india/const.html>.

417. Jaskaran Kaur, *A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India*, 15 HARV. HUM. RTS. J. 269, 270 (2002).

418. *Id.*

419. Marwah, *supra* note 405, at 305.

420. Kaur, *supra* note 417, at 271.

the Indian government alleged was being used as the headquarters for the terrorist movement.⁴²¹ In response, Prime Minister Indira Gandhi was killed by her Sikh bodyguard in October 1984.⁴²²

Following the death of Indira Gandhi, attempts were made at a political solution to the problems in Punjab.⁴²³ On July 25, 1985 a peace accord was signed by Indian Prime Minister Rajiv Gandhi and Akali Dal president Harchand Singh.⁴²⁴ However, after the Akali Dal came to power as a result of statewide elections, the central government once again dismissed the state government in 1987.⁴²⁵ More violence followed, and the Indian government responded with a second assault on the Golden Temple complex in 1988.⁴²⁶ This latter assault, named Operation Black Thunder, was far more successful, however, and resulted in no civilian deaths.⁴²⁷ Nevertheless, terrorist attacks continued into their worst phase after Black Thunder, with nearly ten thousand persons killed from 1988 to 1992.⁴²⁸ In 1992, the Indian government revived the political process and held statewide elections. This resulted in a significant decline in terrorist activity, which ended for the most part by 1995.⁴²⁹

The rise and decline of terrorism related to Sikh separatism stands in stark contrast to terrorism related to Jammu and Kashmir. The region, which has significant strategic and symbolic value, has been the source of seemingly endless hostilities between India and Pakistan, both of which claim the territory.⁴³⁰ The dispute was caused by the undecided fate of Jammu and Kashmir at the time of partition.⁴³¹ While the Hindu states of India were partitioned into secular India, the predominantly Muslim portion of the country was carved into the Islamic state of Pakistan. However, the status of 562 princely states were left undecided.⁴³² These included Jammu and Kashmir, which had a predominantly Muslim population, but a Hindu prince, Maharajah Hari Singh.⁴³³ Several states had Muslim rulers and Hindu majorities as well, but the accession of these states, indeed most states, to either India or Pakistan was uncontroversial due to territorial contiguity.⁴³⁴ Kashmir, however, shared borders with both India and Pakistan, though its ties to Pakistan were arguably stronger.⁴³⁵ Before the final disposition of the state could

421. *Id.*

422. *Death of an Empress*, *ECONOMIST*, Nov. 3, 1984, at 9.

423. *India: Is it Peace?*, *ECONOMIST*, July 27, 1985, at 27.

424. *Id.*

425. Marwah, *supra* note 405, at 309.

426. *Id.*

427. *Id.*

428. *Id.* at 306.

429. *Id.* at 310.

430. See Sumit Ganguly & Kanti Bajpai, *India and Crisis in Kashmir*, 34 *ASIAN SURV.* 401, 402 (1994).

431. BOSE, *supra* note 186, at 31.

432. *Id.* at 30.

433. See *id.* at 16 (describing origins of the Kashmir conflict).

434. *Id.* at 16, 30.

435. *Id.* at 31.

be decided, violence broke out when Pakistani militants launched an incursion into western Kashmir in October 1947.⁴³⁶ In an exchange that evidently foreshadowed the language of the conflict decades later, the government of Kashmir protested, arguing that Pakistan was supporting the militants, while Pakistan denied support, arguing that the militants were responding to atrocities perpetrated against the Muslim population in Kashmir.⁴³⁷ Maharajah Singh sought the assistance of India in resisting the invasion, and in return, assented to Indian annexation of the territory.⁴³⁸

Since 1947, the status of Jammu and Kashmir has been contested by both parties. India and Pakistan have fought three wars over Kashmir during that time, the most recent of which occurred in 1999 after Pakistan launched an incursion into the Kargil region of the territory.⁴³⁹ In addition, since the late 1980s, Kashmiri terrorist groups have committed almost continuous acts of violence against Indian targets.⁴⁴⁰ According to the Indian Ministry of Home Affairs, from 1989 to 1999 terrorist incidents and Jammu and Kashmir averaged over 3700 incidents per year, and resulting in an average of over 2100 deaths per year.⁴⁴¹ Significant incidents during this time included the kidnapping of the daughter of the Indian Home Minister in December 1989,⁴⁴² the kidnapping of Indian Oil Company executive K. Doraiswamy in 1991,⁴⁴³ and the burning down of a Sufi Shrine in Srinagar in December 1995.⁴⁴⁴ In 1996, parliamentary elections were revived in Kashmir, and again in 1998 and 1999. The elections corresponded with some decrease in violence, though the number of terrorist incidents remains high.⁴⁴⁵

Legislation

With ethnic and social cleavages imposing strong pressures on the state, it is unsurprising that the India has established a complicated legislative and constitutional framework for dealing with terrorism. Prior to the recent Prevention of Terrorism Act, enacted in 2002 (discussed later), the most significant anti-terrorism legislation enacted by the Indian parliament was the Terrorist and Disruptive Activities (Prevention) Act.⁴⁴⁶ An additional consideration for understanding the Indian response to terrorism is its preventative detention legislation, most notably the National Security Act of 1980.⁴⁴⁷ The Indian design

436. *Id.* at 33.

437. *Id.* at 34.

438. *Id.* at 35-36.

439. *Klasmir Again*, *ECONOMIST*, June 12, 1999, at 16.

440. See Marwah, *supra* note 405, at 311.

441. *Id.* at 312.

442. *Id.* at 311.

443. *Id.* at 312.

444. *Id.* at 313.

445. *Id.*

446. C.I.S. Supp (1987), *The Terrorist and Disruptive Activities (Prevention) Act of 1987 of the Indian Parliament*, New Delhi, 3 Sep. 1987 [hereinafter TADA].

447. *The National Security Act of 1980 of the Indian Parliament*, New Delhi, Dec. 27, 1980, available [at http://indiacode.nic.in/cgi/nph-bw.cgi/BASIS/indweb/all/actretr/DDW?W%3DSHTITLE%20%20PH%20IS%20%27National%20Secu](http://indiacode.nic.in/cgi/nph-bw.cgi/BASIS/indweb/all/actretr/DDW?W%3DSHTITLE%20%20PH%20IS%20%27National%20Secu)

is draconian in comparison to the American, and reflects the fear of separatism and communal pressures which are at the heart of the Indian state identity.⁴⁴⁸

In 1987, in response to the situation in Punjab, the Indian parliament passed the Terrorist and Disruptive Activities (Prevention) Act (TADA).⁴⁴⁹ TADA is similar to other counterterrorism laws in providing for definitions and punishments for various terrorism related activities. First, TADA elaborately defines a terrorist act to include various threats to life and property which is intended to "strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect harmony amongst different sections of the people."⁴⁵⁰ Interestingly, in addition to acts intended to strike fear, the TADA definition of terrorist act also included acts intended to "overawe the Government."⁴⁵¹ For both types of acts, TADA provides for capital punishment if the act results in death or up to life imprisonment for other acts. TADA also criminalizes conspiracies and attempts to commit terrorist acts,⁴⁵² as well as harboring or concealing a terrorist,⁴⁵³ or possessing property derived from terrorist acts.⁴⁵⁴

In addition to these basic provisions, TADA also contained various proscriptions which went beyond its counterparts in the United States. For example, in addition to proscribing harboring or concealing terrorists, TADA also criminalized advocating or abetting terrorist acts,⁴⁵⁵ the latter of which includes the mere communication or association with terrorists.⁴⁵⁶ In addition, TADA proscribed membership in terrorist groups. Finally, TADA also proscribed various "disruptive activities," which included not only acts that disrupt the sovereignty or territorial integrity of India, but also acts which "question" such sovereignty or territorial integrity, or "support any claim... directly or indirectly... for the cession of and part of India, or secession of any part of India from the Union."⁴⁵⁷ Any of these advocacy crimes were punishable by up to life imprisonment.

TADA also provided for the creation of "Designated Courts" which had exclusive jurisdiction to try violations of its provisions.⁴⁵⁸ These courts were closed to the public,⁴⁵⁹ and provided significantly diminished procedural protections for suspected terrorists. For example, where the potential punishment

ity%20%27%26M%3D1%26K%3D450%26U%3D1 [hereinafter NSA].

448. See Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 427 (1998).

449. See Marwah, *supra* note 405, at 324.

450. TADA § 3(1).

451. *Id.*

452. *Id.* § 3(3).

453. *Id.* § 3(4).

454. *Id.* § 3(6).

455. *Id.* § 3(3).

456. *Id.* § 2(1)(a)(i).

457. *Id.* § 4(2). Acts within the meaning of disruptive activity included action taken whether by act or speech. *Id.*

458. See *id.* § 11(1). These courts also had supplemental jurisdiction to try ordinary criminal offences which were connected to crimes under TADA. See *id.* § 12(1).

459. SHARMA, *supra* note 172, at 148.

was not more than three years, the court was authorized to conduct a "summary trial," though it was free to recall witnesses or rehear a case where circumstances warranted.⁴⁶⁰ In addition, TADA provided reduced evidentiary burdens in the Designated Courts, for example, for confessions⁴⁶¹ and eyewitnesses identifications.⁴⁶² Finally, TADA created a presumption of guilt in situations where arms or explosives were found in the possession of the accused and were similar to those used in the act, or the accused's fingerprints were found at the scene or on arms or vehicles used in the act, or where the accused rendered "any financial assistance to a person *accused of or reasonably suspected of* [a terrorist act]."⁴⁶³

TADA did create some protections for the accused, including *Miranda* type protections for confessions,⁴⁶⁴ and the right to appeal.⁴⁶⁵ But despite these nominal protections, TADA was prone to substantial abuse by the Indian government, often being applied in areas not afflicted by terrorism.⁴⁶⁶ Faced with substantial criticism, the Indian government allowed TADA to expire in 1995.⁴⁶⁷

In addition to laws such as TADA, the Indian constitution authorizes the central government to provide for preventative detention in matters related to foreign affairs, defense, or security.⁴⁶⁸ Unlike in the United States, the Indian preventative detention provisions could be employed without criminal charge.⁴⁶⁹ Since independence, the Indian parliament has enacted several statutes authorizing preventative detention, the most recent of which is the National Security Act of 1980 (hereinafter "NSA").⁴⁷⁰ Under the NSA, the Indian Central government, or any State government, may order the detention of an individual in order to prevent him or her from acting in a manner "prejudicial to the [defense] of India, the relations of India with foreign powers, or the security of India."⁴⁷¹ The statute

460. See TADA § 14(2).

461. *Id.* § 15; see SHARMA, *supra* note 172, at 148.

462. TADA § 22; see Sharma, *supra* note 172, at 149.

463. TADA § 21 (emphasis added).

464. *Id.* § 15(2).

465. *Id.* § 19.

466. See Marwah, *supra* note 405, at 324.

467. *Id.* at 324-25.

468. INDIA CONST. sched. 7, list I, entry 9, available at <http://www.constitution.org/cons/india/const.html>. See generally, Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 323 (2001).

469. See Jinks, *supra* note 468, at 326 (noting that the Indian Supreme Court upheld the Preventative Detention Act of 1950, which provided for preventative detention without criminal charge). In the United States, preventative detentions have been held constitutional by the Supreme Court where criminal charges have been filed. See *United States v. Salerno*, 481 U.S. 739 (1987). Arguably, current U.S. government practices could be characterized as preventative detentions, even though they are the result of immigration violations or material witness's warrants. However, the very need for the U.S. government to provide such justifications demonstrates that difference between American and Indian approaches.

470. NSA, *supra* note 447.

471. *Id.* §§ 3(1)-(2).

requires detention orders to meet with the same procedural requirements as a warrant under the ordinary criminal procedure code.⁴⁷² The statute sets a maximum detention period of twelve months.⁴⁷³ Under the NSA, some procedural protections exist for accused persons, though they are ultimately ineffective safeguards. The detaining authority is required to inform the detainee of the cause for the detention,⁴⁷⁴ and of his or her rights under the constitution.⁴⁷⁵ In addition, within three weeks of the date of detention, the detention must be reported to an advisory board⁴⁷⁶ which is to rule as to whether there is sufficient cause to justify the detention.⁴⁷⁷ However proceedings before the advisory board are informal, with no formal findings or rules of evidence, and the accused has no right to counsel or of confrontation.⁴⁷⁸ More generally, judicial deference to executive authorities as to the existence of security risks substantially curtails protections for detainees under the NSA.⁴⁷⁹

Executive Action

Beyond these legislative measures, India's counterterrorist policies have tended to be dominated by its military and paramilitary apparatus. The belief that Pakistan has both covertly and overtly supported anti-Indian terrorism most likely form part of the explanation for this phenomenon. In addition, India's constitutional structure, like the United States's, divides sovereign authority between the State and Central governments. Law and order has traditionally been a State issue.⁴⁸⁰ As a result, the Indian central government has treated terrorism first as a law and order problem to be dealt with by State governments, and then, upon deterioration, escalated the conflict by responding with military and paramilitary forces.⁴⁸¹

The Indian government's drastic measures in Punjab illustrate this approach well. In response to the increasing militant violence in Punjab, the Indian Central government took control of the State in imposed direct rule on the State in 1984.⁴⁸² In addition, in June 1984, the Indian government launched the infamous "Operation BlueStar," a wide spread assault on Punjabi militants.⁴⁸³ The centerpiece of the Operation was an assault on the Golden Temple Complex at Amritsar.⁴⁸⁴ The Indian government had alleged that the Golden Temple was

472. *Id.* § 4.

473. *Id.* § 13.

474. Jinks, *supra* note 468, at 336.

475. *Id.* at 337.

476. NSA § 10.

477. *Id.* § 11.

478. Jinks, *supra* note 468, at 335-36.

479. *See id.* at 329.

480. *See* Marwah, *supra* note 405, at 303.

481. *Id.*

482. *See also* HUMAN RIGHTS WATCH, INDIA: ARMS AND ABUSES IN INDIAN PUNJAB AND KASHMIR 2 (1994), available at <http://www.hrw.org/campaigns/kashmir/1994/index.htm> [hereinafter Arms and Abuses].

483. *Id.*

484. *Id.*

being used as a headquarters for Punjabi militants.⁴⁸⁵ The operation also included assaults on forty one other sites, and involved the use of seventy thousand troops, the expulsion of foreign journalists, and the imposition of a statewide curfew.⁴⁸⁶ In the end, the government reported the deaths of 493 terrorists and eighty-three army personnel, although eyewitnesses reported between four thousand and eight thousand persons killed.⁴⁸⁷ In addition, over six thousand persons were detained following the assault, and several thousand more were arrested in operations throughout Punjab in subsequent months.⁴⁸⁸

In subsequent years, significant abuses by Indian security forces continued. A 1994 Human Rights Watch report noted that security forces had engaged in summary executions, and had been issued shoot-to-kill orders.⁴⁸⁹ In addition, security forces had conducted mass round-ups and warrantless house-to-house searches for suspected militants.⁴⁹⁰ The use of torture was also condoned by Indian officials, both as a means of extracting information, and as a form of reprisal.⁴⁹¹ For example, after one attack on security forces, two hundred persons were detained and tortured near Kathunangal.⁴⁹² Finally, "forced disappearances" had been widespread in Punjab.⁴⁹³ In general, these policies were not only tolerated, but encouraged by government officials in India.⁴⁹⁴ Since 1992, the separatist violence has been in significant decline, which many believe is the result of the resumption of political processes and state elections in Punjab.⁴⁹⁵ Others, however, have noted continued impunity for human rights abuses there.⁴⁹⁶

In Kashmir, the response of the Indian government has been even more severe. Just as in the case of Punjab, following the onset of separatist violence, the Indian government imposed direct rule on Kashmir in January 1990.⁴⁹⁷ This was followed by a steady escalation of the conflict between security forces and militants. In January 1993, for example, nearly forty civilians were massacred near Sopore by Indian Border Security forces.⁴⁹⁸ In addition, beginning in 1995, the Indian government began arming and training local auxiliaries to supplement

485. Marwah, *supra* note 405, at 305.

486. Kaur, *supra* note 417, at 271.

487. *Id.*

488. ARMS AND ABUSES, *supra* note 482, at 2.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.* at 3.

493. *Id.*

494. *Id.*

495. *See, e.g.,* Marwah, *supra* note 405, at 310.

496. *See generally* Kaur, *supra* note 417 (noting the widespread occurrence of disappearances in Punjab and impunity for government officials responsible).

497. *See* HUMAN RIGHTS WATCH, BEHIND THE KASHMIR CONFLICT: ABUSES BY INDIAN SECURITY FORCES AND MILITANTS CONTINUE (1999), available at <http://www.hrw.org/reports/1999/kashmir/> [hereinafter Behind Kashmir].

498. *See* HUMAN RIGHTS WATCH, INDIA'S SECRET ARMY IN KASHMIR: NEW PATTERNS OF ABUSE EMERGE IN THE CONFLICT (1996), available at <http://www.hrw.org/campaigns/kashmir/1996/> [hereinafter India's Secret Army].

security forces.⁴⁹⁹ Regarding these paramilitary units, a 1996 *India Today* article noted, “[they have become the] centerpiece of the counterinsurgency operations in the Valley... Used initially as intelligence sources—to help in flushing-out operations—they are now also being used as “prowlers”: they take part in the security forces’ armed encounters with militants....”⁵⁰⁰ By 1999, nearly 400,000 security personnel were deployed by the Indian government in Kashmir.⁵⁰¹

Both military and paramilitary forces have been responsible for gross human rights violations in Jammu and Kashmir. As in the case of Punjab, these have included extra-judicial executions, forced disappearances, and torture.⁵⁰² Security legislation for the area authorizes shoot-to-kill orders and the destruction of property.⁵⁰³ In addition, there is a widespread incidence of rape of local women at the hands of Indian security forces and paramilitary groups.⁵⁰⁴ Attacks against human rights workers and journalists have also been documented.⁵⁰⁵ As in the case of Punjab, security forces and paramilitary personnel act with impunity in the region.⁵⁰⁶

Recent Developments

On October 24, 2001, just six weeks after the September 11 attacks, the Indian government issued the Prevention of Terrorism Ordinance (POTO).⁵⁰⁷ Then, on March 27, 2002, the Indian parliament gave the ordinance permanent effect by passing the highly controversial Prevention of Terrorism Act, 2002 (POTA) to replace the lapsed TADA.⁵⁰⁸ Counter intuitively given the timing of its passage, POTA was significantly less drastic than TADA, perhaps reflecting the deep seated criticism that TADA faced during its existence. POTA’s basic provisions were similar to TADA in the definitions of terrorist acts, the criminalization of support for terrorism, and the proscription of the proceeds of terrorist acts.⁵⁰⁹ The act also provides for the seizure of property connected to terrorist activity,⁵¹⁰ and requires disclosure to government authorities of financial transactions.⁵¹¹

499. *Id.*

500. *Id.*

501. See BEHIND KASHMIR, *supra* note 497.

502. See *generally id.* (noting nearly 300 incidences of forced disappearances and the use of torture to extract information, for reprisal, and to force persons to join counterinsurgency groups).

503. See *id.*

504. See *id.*

505. See India’s Secret Army, *supra* note 498.

506. See *id.*

507. See President of India, The Prevention of Terrorism Ordinance, 2001, available at http://www.indianembassy.org/policy/Terrorism/poto_2001.htm [hereinafter POTO].

508. Prevention of Terrorism Act of the Parliament of India, 89 A.I.R. 2002 ACTS [hereinafter POTA]. POTO refers to the proposed legislation, whereas POTA refers to the legislation as enacted by the Indian Parliament. References to sections below will be to POTA, not POTO.

509. *Id.* §§ 3-4.

510. *Id.* § 7. The Act also designs a procedure for appeals of forfeiture, and for claims of third parties. See *id.* §§ 10, 12.

511. *Id.* § 14.

Like TADA, POTA establishes Special courts with exclusive jurisdiction to try terrorist offenses and supplemental jurisdiction to try other offenses.⁵¹² Like the Courts under TADA, the POTA Courts have the authority to try certain offenses in a summary fashion if the punishment does not exceed three years.⁵¹³ The requirements for confessions are similar to those in TADA.⁵¹⁴ POTA also places similar presumptions of guilt as under TADA.⁵¹⁵ Finally, POTA gives some protections to the accused, notably by allowing them to consult with counsel.⁵¹⁶ Family must also be notified whenever someone is arrested under the Act.⁵¹⁷

POTA departs from TADA in establishing a procedure for the declaration of terrorist organizations under the Act.⁵¹⁸ Membership in such organization is criminalized, as is providing support to such organizations.⁵¹⁹ The Act also establishes a procedure for organizations wishing to challenge their status as terrorist organizations.⁵²⁰ In addition, POTA is substantially different from TADA in allowing for interception of electronic communications. Like the Patriot Act, POTA is designed to expand the investigatory powers of the state to take into account changing technology.⁵²¹ POTA requires investigators to apply to a Competent Authority, rather than a judicial officer, for a warrant to intercept electronic communications if there is reason to believe a terrorist act will occur.⁵²²

The dominant criticism of POTA is that, like TADA, it can be used to arrest political opposition not engaged in terrorist acts.⁵²³ For example, the definition of terrorist act includes intents not only to threaten the security, but also the "unity" of India, and incorporates not only acts of violence but "any other means" which "disrupt services."⁵²⁴ In other words, POTA, if the government so chooses, could be interpreted to proscribe acts of civil disobedience such as labor strikes. A Human Rights Watch Report issued in March 2003 noted that POTA had in fact been used against political opponents and religious minorities.⁵²⁵ This has included the arrest of leaders of various political parties not only in Kashmir, but in the states of Tamil Nadu, and Uttar Pradesh.⁵²⁶

512. *Id.* §§ 23, 25.

513. *Id.* § 29(2).

514. *Id.* § 32.

515. *Id.* § 53.

516. *Id.* § 52(4). However, counsel does not have to be present at all times during interrogation. *Id.*

517. *Id.* § 52(3).

518. *Id.* §§ 18-22.

519. *Id.*

520. *Id.*

521. See generally Jayanth K. Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 *LAW & INEQUALITY* 265 (2004) (detailing the history of POTO and POTA and their relation to the United States' Patriot Act).

522. POTA § 38.

523. HUMAN RIGHTS WATCH, BRIEFING PAPER: IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003), available at <http://www.hrw.org>.

524. POTA § 3(1)(a).

525. See HUMAN RIGHTS WATCH, *supra* note 523.

526. *Id.*

Beyond legislative avenues, September 11 arguably escalated the scope of India's counterterrorist efforts. The relationship between the September 11 attacks and Indian counterterrorism efforts is complicated. At one level, many have long argued that anti-Indian terrorism, especially as related to Kashmir, was part of a broader Islamic militant movement which conducted attacks against the United States.⁵²⁷ The fact that many Kashmiri militants were supported by Pakistan and were trained in Afghanistan seemed to lend credibility to this argument. Beyond this, the political milieu of South Asia was drastically changed post-9/11. The United States invasion of Afghanistan in response to the attacks was executed with the support of the Pakistani government, angering Pakistani hardliners.⁵²⁸ Pakistan currently continues to support U.S. counterterrorist efforts, for example, in assisting in the capture of Khalid Sheikh Mohammed.⁵²⁹ To the extent that the government of Pakistan needs their support, it is safe to assume that an escalation of the Kashmir conflict would be necessary to appease these hardliners. If Pakistan, or elements of the Pakistani government, supports anti-Indian terrorism, as the Indian government claims, there would be an increase in terrorism, and countermeasures by the Indian government as a response to the American "war on terror," and now, perhaps, the American invasion of Iraq.

Although perhaps not appropriately described as an escalation, in the year after those attacks, two episodes demonstrated India's approach to counterterrorism in the post-9/11 world. First, on December 13, 2001, terrorists allegedly trained by Pakistan attacked the Indian parliament.⁵³⁰ India blamed Pakistan, and in the weeks that followed, tensions between the two escalated as the world feared a possible nuclear exchange.⁵³¹ Crisis was averted when Pakistan arrested leaders and followers of Lashkar-e-Taiba and Jaish-e-Muhammad, two groups India blamed for the attacks.⁵³² Just a few months later, however, this scenario was repeated when militants in Kashmir attacked an Indian soldier and his family on May 14, and then an Indian police station on May 30.⁵³³ While it is arguably absurd to risk nuclear attack because of terrorist attacks, both episodes reflect the reality of Indian counterterrorist efforts—India sees Kashmir related terrorism as war by proxy. It responds in kind. At the very least, terrorism had continued to prevent meaningful negotiations for peace because, like Israel, India continued to argue that negotiations would not occur until acts of violence ceased.⁵³⁴

527. See, e.g., Marwah, *supra* note 405, at 336.

528. Michael R. Gordon, *An Alliance Shift South of Kabul Could Aid U.S. but Irk Pakistan*, N.Y. TIMES, Nov. 29, 2001, at A1.

529. See *A Timely Arrest*, ECONOMIST, Mar. 8, 2003, at 42 (noting that Mohammed, alleged to be al-Qaeda's chief of operations, was arrested by a joint FBI-Pakistan team).

530. See generally, *Suicide Attack on Indian Parliament*, BBC On This Day, at http://new.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid_3695000/3695057.stm.

531. *Id.*

532. See *Eyeball to Eyeball*, *supra* note 408, at 33.

533. See *Bridging the Great Divide*, ECONOMIST, June 1, 2002, at 39.

534. The peace process has begun to gain more momentum since the Congress Party returned to power in India in the Spring of 2004, but challenges still remain. See, e.g., *No Shortcut to Peace; India*

IV. CONCLUSION

After examining counterterrorism in the United States, Israel, and India, we can attempt to classify each country's policies into one of the three models discussed earlier, the criminal justice model, the intelligence model, and the war model. As discussed earlier, each country's policies are categorized using three variables of analysis which reflect important civil liberties and democratic values: collectivity, accountability, and timing. Under the criminal justice model, punishment is exacted in a manner which is most consistent with democratic values; it is open, reactive, and individualized. The intelligence model is individualized, secretive, and application tends to be preventative. Finally, the war model is applied collectively, and application tends to be preventative and in secret, though the more collectively it is applied, the less secretive the action taken can be. Using the variables discussed, it is clear that each of these countries is currently committed to a war model of counterterrorism. Such a model is problematic, not only because of the civil liberties and human rights implications of the model, but also because the approach has been combined with an unwillingness of each government to address the underlying causes of terrorism.

The United States' commitment to the war model is of course demonstrated by its execution of the "war on terror." First, the United States has engaged in several policies which indicate a willingness to take a collectivist approach toward counterterrorism rather than an individualized one. Domestically, using material witness warrants and immigration laws, the U.S. government has detained over twelve hundred persons who have not committed acts of terrorism. In addition, in early 2004, the U.S. government began a program to photograph and fingerprint all persons entering the country.⁵³⁵ While the merits and civil liberties implications of this program are debatable, it is clear that the U.S. government is continuing to expand the reach of its counterterrorist efforts. The program is also a paradigmatic example of the "security" model, which is the domestic counterpart of the war model. Internationally, this collectivist approach is demonstrated by the wars in Afghanistan and Iraq that the United States fought in the two years after the September 11 attacks as part of its war on terror. These wars, as well as the Bush administration's classification of the "axis of evil," and pressures placed on Syria and Iran since September 11, demonstrate a more general willingness to hold states responsible for terrorist attacks. As in the domestic examples, these policies reflect a collectivist approach of the U.S. government, which is willing to take action against large classes of persons in order to reach the smaller class of terrorists. Second, the U.S. government has moved away from a reactive model and towards a preventative model of counterterrorism. Domestically, the detention of persons suspected of having ties to terrorism, rather than merely those who are suspected of

and Pakistan, THE ECONOMIST, Nov. 27, 2004. Most recently, the establishment of a bus route between Srinagar (the capitol of Indian held Kashmir) and Muzaffarabad (the capitol of Pakistani held Kashmir) gave parties on both sides renewed optimism for a negotiated settlement. See "All Aboard?; India and Pakistan", THE ECONOMIST, February 19, 2005.

535. Abby Goodnough & Eric Lichtblau, *U.S. Institutes Fingerprinting at Entry Points*, N.Y. TIMES, Jan. 6, 2004, at A1.

committing terrorist acts, is a quintessential preventive act. In addition, the USA Patriot Act expanded the surveillance powers of the government to allow it to use FISA to obtain warrants for pen registers and trap and trace devices (including the ability to monitor e-mail), as well as to obtain roving wiretaps. Like detentions, these efforts reflect an increased emphasis on preventing attacks rather than punishing those guilty of committing acts. Internationally, the Bush Administration has engaged in targeted assassinations at the individual level, and preemptive strikes at the collective level—as in Iraq. All of these events indicate a move away from reactive efforts towards a preemptive model of counterterrorism. Finally, U.S. policy is becoming increasingly less transparent and accountable. For example, as discussed, USA Patriot expanded the use of the secret FISA court to obtain warrants in counterterrorist efforts. In addition, the U.S. government has indicated a decreased willingness to use an open criminal justice system for those it accuses of terrorist acts. Rather, as in the cases of Yasser Hamdi, Jose Padilla, and Ali Saleh Kahlah al-Marri, the government has opted for secret military tribunals, and it has indicated its willingness to do so in the case of Zacarias Moussaoui. In cases such as Khalid Sheikh Mohammad, and those captured in Afghanistan, it has avoided criminal charges entirely. In sum, the current U.S. policy, with its increasing secrecy and its emphasis on collective prevention, has unabashedly moved towards a war model of counterterrorism.

Israeli policy also clearly tracks the war model under the relevant variables. First, Israel's collectivist approach is demonstrated by various policies, including target hardening and lock-down mechanisms, security screenings in public places, limitations on the freedom of movement, and the development of the so called security fence in the Occupied Territories. In addition, in the Occupied Territories, Israeli military action in the Occupied Territories, (such as those that were undertaken in the spring of 2002), and statutes such as those allowing for the demolition of homes, reflect similar collectivist tendencies in Israeli policy. Israeli military action against Jordan, Lebanon, and most recently against Syria, reflect similar tendencies. Second, Israeli policy has tended to be less transparent and accountable. Primary domestic counterterrorism responsibility falls on one of its three intelligence services, the General Security Services, the Israeli Defense Forces Intelligence Branch, and the Mossad. These agencies have resorted to torture in order to obtain information, and have generally been subject to less oversight than their American counterparts. Moreover, like the United States, Israel has tended to rely on military tribunals rather than open courts in cases of terrorism (at least in the case of Palestinians in the Occupied Territories). Finally, like current U.S. policy, the Israeli policies, such as preventative detention and target assassinations, reflect an increased emphasis on preventative action rather than the reactive enforcement of the criminal justice model.

India, perhaps more than any of the other the countries in this study, has consistently followed a war model of counterterrorism. First, with respect to collectivity, in both Punjab and Kashmir, India deployed massive numbers of troops in order to counter insurgencies there. In Punjab, the infamous Operation Blue Star involved not only the deployment of large numbers of troops, but the killing and detention of vast numbers of persons. While not on the same scale,

similar widespread searches and roundups of militants continued for years afterwards. In Kashmir, the Indian army or its surrogates have engaged in widespread retaliation against civilians. In addition, India continues to hold Pakistan responsible for Kashmir related terrorism. India, therefore, like the U.S. and Israel, does not treat terrorism as the act of individuals, but rather a justification for action against large-population groups. Second, India's use of secret tribunals in the case of terrorism, like in the United States and Israel, increases the secrecy of Indian counterterrorist policies. This combined with the massive human rights violations, including torture, rape, and extrajudicial killings, reflect the minimal accountability and transparency in Indian counterterrorism. Finally, Indian preventative detention laws reflect a strong willingness to employ preventative rather than reactive measures in punishing terrorism. In sum, India, like Israel, and the United States since September 11, has resorted to large scale collective actions in order to repel counterterrorist efforts. This, combined with its aggressive use of preventative detention laws and secret tribunals, places India squarely within the war model of counterterrorism.

That the "war" language has been adopted by the United States and other countries since September 11 should come as no surprise. But the language of war could simply be a rhetorical device, or a means of rallying national efforts toward a common objective, as in the case of a "war" on poverty. Applying the variables of collectivity, accountability and timing, however, it becomes clear that the "war on terror" is not simply rhetoric, it is a move away from open and individualized justice, toward secretive government action which employs group punishment. This has significant civil liberties and human rights implications. By being employed against large groups rather than individuals, and in a preventative rather than reactive manner, the war model essentially exacts punishment against innocent parties. In other words, the war model takes actions against large groups because it is more efficient than expending resources toward directing punishment with precision. Innocent parties become the collateral damage in a war on terror. Moreover, the political expediency of the war model and its collateral damage is disturbing—rather than simply being more efficient, the war model may in fact be a form of displaced anger. Victims of human rights abuses in Kashmir, for example, noted that the Indian Army (or their surrogates) engages in human rights abuses against the local population when it is unable to locate terrorist suspects.⁵³⁶ This presents an interesting parallel to the U.S. invasion of Iraq in the spring of 2003. Even if it was indeed part of the "war on terror," the invasion of Iraq was arguably also simply a result of the Bush Administration's inability to catch top al-Qaeda operatives such as Usama bin Laden. The response of the Indian army and the U.S. government is the same—the scale is only larger because the scope of the conflict is larger.

In addition, the rhetorical usefulness of the war terminology diverts attention from the severe problems associated with the war model. As Heymann notes, war requires a massive reallocation of resources, an understanding of tremendous costs

536. Behind Kashmir, *supra* note 497.

to be borne, and, among them, limitations on civil rights.⁵³⁷ The increased accountability which results from the scale of the war model is therefore undercut by the willingness of the public to defer to the State in times of war. The countervailing principle which justifies such costs is the determination of exigency and the limited time frame of the conflict. However, the pre-conditions of terrorism, in contrast to the pre-conditions of paradigmatic war, are neither exigent nor temporary.⁵³⁸ In India for example, the National Security Act, authorizing preventative detentions, was justified on the grounds that:

The anti-social and anti-national elements including secessionist communal and pro-caste elements and also other elements that adversely influence and affect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom.⁵³⁹

However, these conditions do not reflect extenuating circumstances calling for extreme measures, they are the description of India's long-term political condition.⁵⁴⁰ Similarly, Israeli-Palestinian conflicts and the American "war on terror" are the result of long term conditions in the Middle East and other parts of the Islamic world. In short, "'war' is neither a persuasive description of the situation we face nor an adequate statement of our objectives."⁵⁴¹

Indeed, an analysis of these long term conditions is precisely what is missing from each of the models discussed in this study. As discussed earlier, the criminal justice, intelligence, and war models are "repressive" models which seek to prevent terrorism through *ex ante* or *ex post* deterrence. An alternative approach would be to employ "conciliatory" models which call for negotiation with terrorists or reform in order to end violence. By addressing the root causes of terrorism, conciliation decreases the incentives of actors to engage in terrorism. In India for example, after political reforms were instituted in Punjab, deaths from terrorism declined from 2,586 in 1991, to sixty-eight from 1993-98.⁵⁴² Similar declines were seen in anti-Israeli terrorism during the implementation of the Oslo Accords, during which time the Israeli Defence Ministry reported a greater than 90 percent decline in the terrorism in Israel and the Occupied Territories.⁵⁴³

Unfortunately, the pattern in the West over the past few decades has been to pay less and less attention to the root causes of terrorism, such as oppressive conditions and poverty. Examining root causes has been viewed by some as appeasement of terrorism. Moreover, some have argued that looking at root causes of terrorism is inappropriate because the "the vast majority" of the world's repressed and poor people do not resort to terrorism.⁵⁴⁴ Such analyses lead to

537. HEYMANN, *supra* note 26, at 20.

538. *Id.* at 21.

539. Jinks, *supra* note 469, at 339.

540. *Id.* at 340.

541. HEYMANN, *supra* note 26, at 19.

542. Marwah, *supra* note 405, at 306.

543. See Gazit, *supra* note 323, at 238 (noting a decline from 3,142 in 1993, to 242 in 1999).

544. See DERSHOWITZ, *supra* note 16, at 2.

faulty policy. First, even though not all persons in oppressive and impoverished conditions resort to terrorism, it does not follow that improving conditions would not lead to a decline in terrorism. Moreover, it is also true that not all persons who live in poverty or lack opportunity resort to conventional criminal activity. But it is readily apparent that we can reduce criminal activity by improving economic conditions and opportunity for persons living in poverty. Such an argument would never be construed as "appeasing" criminals or providing incentive for criminal activity. Nor would it be attacked as unpatriotic.

Second, a stated policy of non-negotiation or non-reform effectively allows terrorists to control policy. Assume, for example, the Israeli government states a policy of not negotiating with the Palestinian Authority (PA) until anti-Israeli terrorism stops. This position allows terrorist groups to exploit conditions to their best advantage. If they want negotiations to occur, they can cease terrorist acts; if they want negotiations to fail, they can engage in more terrorism. A policy of "we will not negotiate with terrorists" in order to prevent "rewarding" terrorists, assumes that negotiations are what the terrorist group wants. But as many have noted, terrorists often engage violence in order to prevent negotiation and encourage repressive policies which turn people against the target state.⁵⁴⁵ In other words, adopting a repressive "war" model may be giving terrorists exactly what they want. Governments should not condition the examination of root causes on the end of terrorism; they should look at root causes in spite of terror in order to end the violence. Such a position puts governments in control of policy, rather than terrorists.

Indeed, of the countries in this study, the U.S. government should be the most inclined to examine the root causes of terrorism, rather than employing the war mentality it has adopted to combat terrorism. As many have noted, while terrorists engage in anti-American violence for a variety of reasons, there is a seemingly endless supply of recruits to anti-American causes due to a variety of U.S. policies. These have included: 1) support for repressive regimes in the Middle East, including Saudi Arabia, 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 ammunition to the anti-American cause. Unlike in the cases of Israel and India, for whom reconciliation would require "giving something up" in terms of land, the United States does not have to give anything up in order to examine its policies. The change required of the United States by conciliation is simply what the United States should have been doing all along: examining the consequences of its foreign policy on innocent populations. Unfortunately, in the 2 years since the September 11 attacks, the United States has adopted a position that addressing underlying concerns is incompatible with maintaining strength in the "war on terror."

This paper has not been an attempt to develop a set of "best practices" for counterterrorism. I have attempted to compare counterterrorist strategies in the United States, Israel, and India through the lens of three models. The criminal

545. SHARMA, *supra* note 172, at 68; *see also* Gazit, *supra* note 323, at 228.

justice model treats terrorism as essentially a criminal justice problem. It relies on the criminal processes and punishment in order to deter terrorist activity. In contrast, the intelligence model treats terrorism as a security problem. It seeks to prevent terrorism as through direct prevention rather than punishment. But while its lack of procedural safeguards aids in the prevention of terrorism, they also raise significant civil liberties concerns. Finally, like the intelligence model, the war model treats terrorism as a security problem. But unlike the intelligence model, counterterrorism is achieved through action against large groups of people in order to achieve either prevention or punishment. The key feature of the war model is that by acting against groups, application of the war model allows governments to avoid both the procedural safeguards of the criminal justice model and costs of precision associated with the intelligence model. But both of these characteristics raise substantial civil liberties and human rights concerns. Both terrorists and innocents face punishment without procedural safeguards. Through the axes of analysis developed in this paper—collectivity, accountability, and timing—it is clear that all three countries have adopted a war model of counterterrorism. In the United States, this approach has worked in conjunction with an unwillingness to address the underlying causes of terrorism. But regardless of the moral implications of terrorism, an unwillingness to deal with root causes simply leads to bad policy. Thus, while the merits of the approaches of each country will continue to be debated, their costs cannot be ignored. Of course, no one approach is adequate, but terrorism has and will be a long term political problem—it stands to reason that it will require long term political solutions.

