



LUNDS
UNIVERSITET

Playing it Safe?

The Costs and Adverse Effects of Counterterrorism

David Öhnell

2nd Term Paper
Human Rights Studies
Autumn 2008

Supervisor: Dr. Olof Beckman

Abstract

The purpose of this paper is to evaluate international counterterrorism efforts to estimate their costs and potential adverse effects over time. An underlying presumption of the study is that flawed counterterrorism measures to some extent are counterproductive, and building on this idea a comparison is made between the distinguishing features of the 'War on Terror' and an alternative model in the form of The UN Global Counter-Terrorism Strategy. It is the argument of this paper that although it is difficult to speculate on future results, the Global Strategy constitutes a more promising approach for counterterrorism. The 'War on Terror' contains measures that violate human rights and damage legitimacy, and as such risk a backlash and an increase in terrorist recruitments, while the Global Strategy focuses on building bottom-up and addressing the root causes of terrorism in a wider, more thoroughly planned, long-term perspective.

Contents

- 1 Introduction..... 1
 - 1.1 Research Questions 1
 - 1.2 Method 2
 - 1.3 Theory and Material..... 2
 - 1.4 Terminology..... 2
 - 1.5 Delimitations..... 3
- 2 The Defining Traits of the ‘War on Terror’..... 4
 - 2.1 Legislation and Military Action..... 5
 - 2.1.1 Legislative Response in the United States..... 5
 - 2.1.2 Change in Immigration Policies 6
 - 2.1.3 The United Kingdom: Legislation and Derogation..... 7
 - 2.1.4 Treatment of Detainees..... 7
 - 2.1.5 Critique..... 8
 - 2.2 Consequences of the War Model..... 10
 - 2.2.1 Laws Potentially Misguided and Made Permanent..... 11
 - 2.2.2 Global Consequences 12
 - 2.3 Balancing Liberty and Security..... 13
 - 2.3.1 Obscurities in the Language of Balance..... 13
- 3 An Alternative Counterterrorism Model..... 15
 - 3.1 Contrasting the War Model..... 15
 - 3.2 The UN Global Strategy 16
 - 3.2.1 The Provisions of the Global Strategy 16
 - 3.2.2 The Role of the United Nations..... 18
 - 3.3 Striving for ‘Sustainable Security’ 19
- 4 A Troublesome Shift From the War Model 21
 - 4.1 Long-Term Emergencies 21
 - 4.2 Defining ‘Terrorism’..... 22
 - 4.2.1 The Issue of Agency 23
 - 4.2.2 Working Without a Definition 25
 - 4.3 Inconsistency in Political Will 25
- 5 The Time Factor 27
 - 5.1 Costs and Adverse Effects..... 27
 - 5.2 A Projection Over Time 28
- 6 Conclusions..... 30
- References 31

1 Introduction

“Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension.”¹

Since the attacks in the United States of America on 11 September 2001 combating terrorism has risen to the top of the global policy agenda. The framework for this combat has predominantly been that of a war, and the struggle has thus been dubbed a ‘War on Terror’.² The line of thought expressed in the quote above by Kofi Annan captures quite well the underlying idea of this paper: if human rights are to be defended against terrorism, then the same human rights must be emphasized in the process. With this as a starting point the purpose of this paper is to evaluate international counterterrorism efforts. An underlying presumption of the study is that flawed counterterrorism measures to some extent are counterproductive, and this is also the reason behind this subject’s relevance. Led by the US the ‘War on Terror’ has been setting the standard for international policies over the last seven years, with hitherto few signs of decline. With voices echoing concern over the lack of respect for human rights within this military model of combating terrorism, it is imperative for the subject of human rights studies to review this model and evaluate the prospects of a future policy change. In examining the cost and adverse effects of counterterrorism, this is the area that I strive to clarify.

1.1 Research Questions

The overarching question for this paper is: What are the factual and alternative costs over time of international counterterrorism? To examine this issue and to reach an answer in line with the stated purpose, a number of sub-questions are posed: What are the defining traits of the ‘War on Terror’? What distinguishes the alternative model for combating terrorism? Why does it seem a problematic situation, moving from the war model to the Global Strategy? What are the implications of the time factor?

¹ Kofi Annan, then United Nations Secretary-General, speaking at the First UN Counter-Terrorism Committee Special Meeting, 6 march 2003, as cited in Schmid, Alex P., ‘Terrorism and Human Rights: A Perspective from the United Nations’, in Ranstorp, Magnus and Wilkinson, Paul (eds.), *Terrorism and Human Rights*, p. 24.

² This term is used to characterize the global war on terrorism instigated by the Bush administration(s) in the wake of the attacks on 11 September 2001. Because of this close identification with such specific policies, and for clarification, I follow the path laid down by Wilson (2005) and others with him, in keeping the term within quotation marks throughout the paper.

1.2 Method

The method applied in this paper is a form comparative case study, the two cases being the war model and the alternative model for counterterrorism. It is, however, not simply put an empirical comparison. Instead, empirical examples are used as data to identify the distinguishing features of the ‘War on Terror’. These features will then serve as a basis for a comparison between this war model of counterterrorism and the United Nations Global Counter-Terrorism Strategy³. The result of that comparison, in turn, lays out the groundwork for an evaluation and a discussion of the respective models’ consequences and possible adverse effects over time.

1.3 Theory and Material

The subject of human rights and civil liberties in the ‘War on Terror’ is extensively covered in the plethora of literature on terrorism that has been produced since 9/11. To be an issue of global reach the representation of different actors and states in the literature is highly asymmetrical, the obvious example being the wide coverage of American policies – often by American writers. I make use of the scrutiny afforded in these works, which is the reason why this (over-) representation of the United States is evident in this paper as well. This is due to necessity; the focus on the ‘War on Terror’ entails large focus on the US, it being to great extent the American response to 9/11. Thus, this paper is not intended as an investigation of US policies *as such*, but as a study of the dominating trends distinguishing the ‘War on Terror’. On the face of it the appearance, then, might be that of a slanted approach. However, I would argue that for the subject of human rights studies there is (or at least should be) nothing controversial in the claim that many of the measures undertaken in the ‘War on Terror’ are egregious and detrimental to the system of international human rights law. It is my opinion that efficiency is better achieved by adhering to existing fundamental principles, rather than steering away from them. It is necessary, if defending and strengthening human rights is an objective, to examine closely the practices that carry the risk of leading to the opposite. Therefore, although still trying to uphold some vigilance in my reading, I view the existing literature as an enriching source and as a good starting point for the present study. Human rights, no matter if codified in law or not, are not neutral and neither can their defence be.

The material elaborated on above mainly consists of secondary sources; academic accounts and investigations on the subject of human rights, produced mainly within the Anglo-American academic sphere. The group of authors is made up of scholars of different status, mostly from the subjects of law and political science, as well as practitioners of human rights – more often than not with affiliations to the UN. In addition to these sources some primary material is also used and interpreted, such as international treaties, UN declarations, resolutions and the like.

1.4 Terminology

Given that focus is placed on actions associated with the ‘War on Terror’, some important distinctions need to be made. First of all, as implied above, I make a distinction between different

³ Hereafter called the Global Strategy.

counterterrorism models. By illustrating efforts made since 9/11 I will try to identify the general tendencies in the response to these terrorist act. This, then, will focus on the ‘War on Terror’. When writing about ‘counterterrorism’ I refer to this phenomenon in general. The third and last distinction to be made is the alternative model presented, the Global Strategy. This structure is a conscious choice to distinguish clearly between the objects of study, that is, the specific measures undertaken in the ‘War on Terror’ and the more holistic approach respectively.

Another issue concerning the terminology is the fact that one can distinguish between different types of terrorism. For example there is the distinction made by Magnus Ranstorp and Paul Wilkinson writing about ‘New Terrorism’⁴, a sub-state type of terrorism where al Qaeda is the archetype. Their purpose is to separate this relatively new phenomenon from ‘traditional’ terrorist groups and regime terror. However, this paper focuses on the responses to rather than the incidents of terrorism. As such, this distinction does not affect the work in other ways than the fact that the models presented could and perhaps should be understood as created within a context where ‘New Terrorism’ constitutes the major perceived threat.

1.5 Delimitations

The focus on the ‘War on Terror’ effectively sets the boundaries for the time period covered in this paper. As a natural consequence focus is on the situation from 11 September 2001 onward. However, these limitations are not absolute, as some historical developments and descriptive comparisons to past events are presented.

This paper does not, and cannot, claim to be exhaustive – neither in its investigation of counterterrorism models or in its account of measures undertaken thus far. Counterterrorism, namely, can be done in many shapes and sizes; on so many levels by different actors with different focus and to different degrees with different aspirations. Thus, a complete account stretches far beyond the limits and focus as stated in the purpose.

⁴ Ranstorp, Magnus and Wilkinson, Paul, ‘Introduction’, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. xvii.

2 The Defining Traits of the ‘War on Terror’

In the aftermath of the attacks on 11 September 2001, the UN Security Council created the international framework for countering terrorism. Resolution 1373, adopted unanimously on 28 September 2001, sets the agenda for all member states, and in line with the powers given to the Security Council in the UN Charter lays binding obligations upon the member states.⁵ The proposed counterterrorism framework is a sound starting point for an evaluation of undertaken measures.

In resolution 1373 international terrorism is said to constitute a threat to international peace and security – the phrasing opening up the toolbox of Charter Chapter VII at the hands of the council – and is fiercely condemned. Countering that threat the right to self-defence, as a response, is reaffirmed.⁶ Specific measures to carry out are, *inter alia*: to prevent and suppress the financing of such acts, by criminalizing the collection of funds to and freezing assets of people with terrorist affiliations⁷; the states themselves should refrain from providing support to terrorist acts, which includes suppressing recruitment, and also bring terrorists and sponsors to justice and deny them safe havens, as well as prevent movement by more effective border controls⁸; also, member states should increase their cooperation and information exchange, as well as become parties to existing international conventions dealing with terrorism.⁹

The range of the framework established in resolution 1373 is broad, which is indicative of the gravity of the situation experienced in the aftermath of the attacks. In hindsight the most telling is the notable absence of human rights in the resolution; it is only mentioned in one paragraph, concerning measures to be undertaken before granting refugee status.¹⁰ The overall situation at that time can be characterized as one in which the extreme situation required extreme measures. This would become true also in practice, as the measures were to be extended far beyond the provisions of the resolution. Case in point is the American response to the attacks – a policy in which human rights were separated from security matters and removed. The priority on national security trumped these rights concerns.¹¹

To take counterterrorism to a theoretical level Alex P. Schmid characterizes two models available for policy makers when responding: a military response and a criminal justice ditto. “The military attempts to use maximum force to overwhelm an opponent within a framework of the *laws of war*, while the police try to use minimal force within a framework of the *rule of law*.”¹²

⁵ Charter of the United Nations, 26 June 1945, Article 25 and 48(1).

⁶ UN Doc. S/RES/1373, 28 September 2001, Preamble.

⁷ *Ibid.*, Article 1.

⁸ *Ibid.*, Article 2(a), 2(c), 2(e) and 2(g).

⁹ *Ibid.*, Article 3(a)-(d).

¹⁰ *Ibid.*, Article 3(f).

¹¹ Wilson, Richard Ashby, ‘Human Rights in the ‘War on Terror’’, in Wilson, Richard Ashby (ed.), *Human Rights in the War on Terror*, p. 6f.

¹² Schmid, Alex P., in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 18 (italics in original).

These, however, can be seen as ideal scenarios and as such models to aim for, since in reality the mentioned frameworks have proven to be both fluid and easily ignored.

2.1 Legislation and Military Action

On the domestic level the ‘War on Terror’ has been characterized by efforts with the intended purpose of increasing the capability of finding and apprehending suspected terrorists. The almost immediate American response to the terrorist attacks they had suffered on 11 September 2001, starting with some propositions as early as two days after the attacks¹³, was extensive legislative changes. Internationally the most distinguishing has been the treatment of detainees and interrogation techniques used.

2.1.1 *Legislative Response in the United States*

The USA PATRIOT Act¹⁴ was the first major antiterrorism tool passed in the US. The 342-page document was proposed eight days after 9/11 and passed another five weeks later, on 26 October 2001. When voted upon, on 12 October, no possibility of amendment was given, and thus none of the provisions were open for debate.¹⁵ The purpose of the act, in light of the recent attacks, was pre-emptive, to make sure that no new attacks would occur, and its aim was fivefold: to improve information sharing between law enforcement and foreign intelligence agencies, gather antiterrorism intelligence, expand wiretap authority, prevent funding of terrorist activities, and to impose mandatory detention and deportation of non-citizens suspected of terrorist affiliations.¹⁶ One of the more controversial aspects was the possibility of law enforcement in any criminal investigation – that is, not only investigations pertaining to terrorism prevention – to perform so-called ‘secret searches’; a search and seizure of a suspect’s property with notification being made only afterwards. Such methods stand in contrast with ordinary practice where a warrant must be obtained beforehand, and this naturally results in a substantial widening of the surveillance available to (all) law enforcement agencies.¹⁷ Another aspect of the act is the loosening of the restrictions on giving warrants for gathering intelligence on a foreign power, also carrying with it a noticed side effect in the potential for this information seeping into ordinary federal law enforcement for domestic purposes of prevention.¹⁸ Furthermore, the new crime of domestic terrorism was created, with a definition so broad as to include “acts dangerous to human life” carried out with intent to influence the government’s policies. Providing assistance,

¹³ Sidel, Mark, *More Secure, Less Free? Antiterrorism Policy & Civil Liberties after September 11*, 2004, p. 9.

¹⁴ This common title is an acronym for the full title that reads ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act’.

¹⁵ Donohue, Laura K., *The Cost of Counterterrorism: Power, Politics and Liberty*, p. 1f.

¹⁶ Banks, Christopher P., ‘Protecting (or Destroying) Freedom through Law: The USA PATRIOT Act’s Constitutional Implications’, in Cohen, David B., and Wells, John W. (eds.), *American National Security and Civil Liberties in an Era of Terrorism*, p. 29ff.

¹⁷ *Ibid.*, p. 37; Sidel, Mark, p. 12.

¹⁸ Banks, Christopher, P., in Cohen, David B., and Wells, John W. (eds.), p. 38f.

without involvement in the actual domestic terrorist act, would also serve as a sufficient ground for prosecution.¹⁹

In all examples presented above the authorities are given greater powers, but with vague limitations, and as a result, the USA PATRIOT Act's wide reaching measures to prevent further terrorist crimes creates potential for major invasions of the individuals' rights and liberties. The same applies to the wider measures of surveillance that was introduced later on. In 2002 came the initiation of the Total Information Awareness (TIA), a programme immensely comprehensive with the aim to link together every government and commercial database over the world. With all the data gathered in one place it would then search and uncover patterns that might indicate an upcoming terrorist attack. Stirring up major public opinions reacting to this invasion of privacy, the programme was renamed in 2003 to Terrorism Information Awareness. However, it became clear that not much was different in the new version, and thus Congress cut its funding later that same year. Still, many of the ongoing TIA projects were transferred to other intelligence agencies, *inter alia* the National Security Agency, and so could continue to operate.²⁰

2.1.2 *Change in Immigration Policies*

In the immediate aftermath of the 9/11-attacks the administration of President George W. Bush initiated a process of preventive detention that over time has resulted in over five thousand people being detained. The target group for these measures to a great extent was Arab and Muslim foreign nationals. Many were held in secret waiting for immigration proceedings, and some who agreed to leave the country were still subject to a policy of 'hold until cleared' and kept in arrest. This sweeping action did not produce notable results; practically everyone was cleared, and, contrary to the main purpose of the imposed measures, not one of the detainees was convicted of a terrorist crime.²¹ To this there can be added the adoption of a zero-tolerance immigration policy, trying to prevent new attacks by finding potential terrorists through focusing on immigrants and visitors mainly from Arab and Muslim countries. The Special Registration programme, as it was called, required 80,000 men to register with photograph and fingerprint. The total number of people, including the ones preventively detained and also another eight thousand young, mostly Arab and Muslim, men called in for interview with the Federal Bureau of Investigation, is 93,000 – and still, the number of terrorist convictions is zero.²²

The result of actions like the ones above is many innocent people getting caught up in the searches. They are merely collateral damages; a risk that comes with the nature of the task. Similar results have also been the outcome of the British use of indefinite detention of suspected terrorists, which has shown to be used exclusively against Muslim men and thus has created resentment and alienation within the Muslim community.²³ At some point the legitimate

¹⁹ Sidel, Mark, p. 11.

²⁰ Donohue, Laura K., p. 257f.

²¹ Cole, David and Lobel, Jules, *Less Safe, Less Free: Why America is Losing the War on Terror*, p. 37f.; Sidel, Mark, p. 16f.

²² Cole, David and Lobel, Jules, p. 107.

²³ Fenwick, Helen and Phillipson, Gavin, 'Legislative over-breadth, democratic failure and the judicial response: fundamental rights and the UK's anti-terrorist legal policy', in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, p. 456.

measures to prevent a new attack crosses the line and becomes possibly illegitimate acts with worrying tendencies of racial profiling and discrimination. This is especially remarkable when relating it to the status of non-discrimination in human rights. Such provisions generally require states not only to abstain from discriminating, but to work against it. It constitutes a positive obligation upon the state.²⁴ The step from having to ensure realization of a right to violating it is noteworthy.

2.1.3 *The United Kingdom: Legislation and Derogation*

The United Kingdom saw a similarly quick and extensive legislative response in the wake of the attacks. Despite the fact that the attacks were committed on US territory, it was in number of British casualties the most serious terrorist attack in British history. This led to the passing of the Anti-Terrorism, Crime, and Security Act (ATCSA) even though an extensive review of the existing provisions, as well as passing of new permanent counterterrorism law, had been performed merely seven months prior to the attack.²⁵

One part of the British domestic response was the reintroduction of the practice of indefinite (or ‘executive’) detention – a revived model previously utilized in Northern Ireland, where its usage had ended in the 1970s.²⁶ This method was based on the powers, given to the Home Secretary in accordance with the ATCSA, to ‘certify’ foreign individuals as being suspected terrorists. The primary aim of such an act was the deportation of the suspect, but where for some reason that alternative was prevented detention remained an option. Being a state party, the UK formally derogated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – more specifically from article 5(1) – due to the sensitivity of the matter.²⁷ Derogations are not to be taken lightly and are therefore riddled with criteria that are subject for inquiry. For the evaluation of the plausibility of the derogation the measures must be viewed in light of principles of necessity and proportionality requirements, given the limitations imposed on individual liberties. In the case of Britain, those having done so have also objected on precisely these aspects.²⁸

2.1.4 *Treatment of Detainees*

In a military order on 13 November 2001, President Bush issued a military order in which indefinite detention of non-citizens was initiated. These were furthermore to be tried by military commissions where, due to practical reasons, generally recognized principles of law and rules of evidence would not be applied.²⁹ The location where this was to take place was Guantánamo Bay,

²⁴ Duffy, Helen, *The ‘War on Terror’ and the Framework of International Law*, p. 366ff.

²⁵ Donohue, Laura K., p. 11, 57.

²⁶ *Ibid.*, p. 47, 57.

²⁷ *Ibid.*, p. 58; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 5(1) stipulates the right to liberty and security.

²⁸ Duffy, Helen, p. 348.

²⁹ Donohue, Laura K., p. 71f.

Cuba, which according to then Secretary of Defense, Donald Rumsfeld, was “the least worst” of possible places available for consideration.³⁰

In establishing the camps at Guantánamo Bay, the Bush administration suspended the application of the Geneva Conventions to the detainees. In the memos discussing these measures one explanatory reason was that something like the ‘War on Terror’ was simply unforeseen in the creation of the conventions, which meant that they could not be applied.³¹ The non-application concerned both al Qaeda and the Taliban, and the effect was that the detainees were regarded ‘enemy combatants’ and as such exempt from prisoner of war status and the required standards of treatment it entails.³² Something practised and developed at Guantánamo Bay were certain forms of coercive interrogation. These were tried here and in Afghanistan, and later transferred and worsened to the degree of full-fledged torture in Iraq. The result, in the end, was the famous Abu Ghraib scandal where a number of awful methods were used. Thus, in the environments where prisoner of war status was denied the initial harsh interrogations turned into a slippery slope that ended in a human rights disaster.³³

The major justification for the measures of the ‘War on Terror’ has been that it serves the purpose and goal of prevention. The detainees are held indefinitely with this aim rather than that of bringing them to justice; to a great extent they are imprisoned not because of past wrongdoings but to prevent future such acts. As acknowledged by Rumsfeld, the purpose is “first to keep the enemy off the battlefield so that they can’t kill more innocent people. [...] [O]nly last, is the issue of punishment an issue”.³⁴ Prevention is the keyword.

To the extent that punishment actually has been of interest, the method used to bring the detainees to justice is military commissions, or tribunals as they are also called. These too were established with the 13 November 2001 military order.³⁵ The power of the President to create this kind of commissions is established by practice and is performed either by Congress or by the President with approval from the Congress. It is possible also by the President alone – something more controversial, but which has been affirmed by the Supreme Court. This practice builds on the precedent set in cases in the mid-twentieth century, related to incidents during the Second World War and the treatment of arrested German saboteurs.³⁶ Then, like now, the commissions’ role of ensuring justice was subject of dispute.

2.1.5 *Critique*

The military commissions are sometimes called military, or special, courts; they are the judicial power within their limited area of jurisdiction. This name has nonetheless raised objections. Geoffrey Robertson means that the word ‘court’ should not be used, since these commissions are

³⁰ Donald Rumsfeld, as cited in Donohue, Laura K., p. 72.

³¹ Ibid., p. 76f.

³² Ibid., p. 80.

³³ Ibid., p. 96-99.

³⁴ Donald Rumsfeld, 13 February 2004, as cited in Cole, David and Lobel, Jules, p. 28f.

³⁵ Stephens, Jr., Otis H., ‘Presidential Power, Judicial Deference, and the Status of Detainees in an Age of Terrorism’, in Cohen, David B. and Wells, John W. (eds.), p. 71f.

³⁶ Ibid., p. 73ff.

simply extensions of the executive power. With a panel consisting of military officers, often without legal qualification or experience, the judges are employed by the same authority that is in charge of the detention and prosecution.³⁷ A court should be independent, and the commissions are not.

The use of military commissions for terrorist suspects can also be found in Egypt. There it has been subject to similar critique, from the UN Human Rights Committee, due to the lack of independency of such courts and that their decision are not subject for appeal.³⁸ Both these aspects are incompatible with the provisions of the ICCPR.

Furthermore, the Inter-American Commission on Human Rights (IACHR) are also worried by the use of this kind of procedure. It is their opinion that “military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the IACHR has pointed out that the trial must respect the minimum guarantees established under international law”.³⁹

The issue of torture goes beyond talk about applying the Geneva Conventions or not; its status is the same in both the laws of war and the laws of peace. Freedom from torture is a non-derogable right according to ICCPR, forbidden in all forms according to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in customary law regarded as a peremptory *jus cogens* norm.⁴⁰ It is a serious enough deed to potentially amount to a crime against humanity, if widespread and systematic and directed towards civilians.⁴¹ In other words, torture is widely acknowledged as one of the most serious human rights violations, and consequently strongly prohibited in international law.

Heavy criticism has been presented in a large number of NGO reports against the measures undertaken. The US are, among other things, criticized for their policies at Guantánamo Bay, focusing on that detainees are being held, some of them for more than six years, without charge; they are prevented from using *habeas corpus* petitions to investigate the lawfulness of their detention; and the procedures of the military fall short of recognized standards of due process.⁴² The international norms regarding these aspects to be found in human rights law are quite clear. The International Covenant on Civil and Political Rights (ICCPR) establishes the right of every individual to freedom from arbitrary arrest or detention, as well as the rights to being promptly brought before a judge and to be entitled to a court assessment of the lawfulness of the detention.⁴³ These are precisely the provisions being denied at Guantánamo Bay. Article 4 of the ICCPR presents the state parties to the convention with the right to derogate from its provisions

³⁷ Robertson, Geoffrey, ‘Fair Trials for Terrorists?’, in Wilson, Richard Ashby (ed.), p. 174f.

³⁸ UN Doc. CCPR/CO/76/EGY, 28 November 2002, Para. 16(b).

³⁹ Inter-American Commission on Human Rights, *Terrorism and Human Rights*, 12 December 2001, available at <<http://www.cidh.org/Terrorism/Eng/part.t.htm>>

⁴⁰ Brownlie, Ian, *Principles of Public International Law*, p. 596f.; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 113, Article 2(2) and 2(3) states that no exceptional circumstances or order from a superior can ever justify the use of torture.

⁴¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Article 7(1).

⁴² Human Rights Watch, *World Report 2008*, p. 540f.

⁴³ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 9(1), 9(2) and 9(4).

(with a few exceptions) during a time of emergency.⁴⁴ However, as made clear by the UN Human Rights Committee, this does not apply to the freedom from arbitrary detention. It is regarded as a peremptory norm, and is as such an inalienable right no matter the circumstances.⁴⁵

Amnesty International too are unrelenting in their criticism: “War crimes in Iraq, and mounting evidence of the torture and ill-treatment of detainees in US custody in other countries, sent an unequivocal message to the world that human rights may be sacrificed ostensibly in the name of security”.⁴⁶ Another aspect mentioned is the fact that six months after the US Supreme Court in a ruling had determined that the detainees at Guantánamo Bay fell under the jurisdiction of the federal courts, not one of them had been tried there. Instead, those considered to be of high value were kept at secret locations beyond the reach of the courts. In some cases the situation for the detainee even amounts to enforced disappearance.⁴⁷ The general tendency, then, is that of the ‘War on Terror’ being a framework within which the toolbox has contained a wide array of available means.

2.2 Consequences of the War Model

A distinguishing feature of a situation described as a war is that it implies a state of emergency, something that in turn carries with it implications for human rights – more specifically in the opportunity to steer away from demands on abiding by international rules and norms. Three days after the 9/11-attacks President Bush declared a state of emergency, and congress authorized him in using all necessary force in his response.⁴⁸ The war rhetoric secures special war powers. This declaration, however, concerns not only the constitutionally afforded powers of the President. An important component is the impact on public opinion, important for supporting these powers, that comes with a declaration of ‘war’.⁴⁹

In political practice the ‘War on Terror’ has introduced a relapse to the reasoning prominent during the Cold War, meaning that geopolitical interests are given priority over choices grounded on for example ethical considerations. Case in point is the US cooperation with Pakistan, a state with a dubious record concerning human rights, but valued as a partner in combating terrorism.⁵⁰ Another example is the support to the Northern Alliance in Afghanistan, standing accused of many serious human rights violations – some of them allegedly “widespread or systematic”, that is, possibly amounting to crimes against humanity.⁵¹ These are clear examples of violations that

⁴⁴ Ibid., Article 4.

⁴⁵ UN Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29: States of Emergency (article 4), 31 August 2001, Para. 11.

⁴⁶ Amnesty International, *Amnesty International Report 2005*, p. 19.

⁴⁷ Ibid.; Amnesty International, *Amnesty International Report 2006*, p. 272f.

⁴⁸ Stephens, Jr., Otis H., in Cohen, David B. and Wells, John W. (eds.), p. 71.

⁴⁹ Cassese, Antonio, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’, 12:5 *European Journal of International Law*, p. 993.

⁵⁰ Wilson, Richard Ashby, in Wilson, Richard Ashby (ed.), p. 23.

⁵¹ Donohue, Laura K., ‘Terrorism and the counter-terrorist discourse’, in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, p. 17; Human Rights Watch, *Military Assistance to the Afghan Opposition*, 5 October 2001, p. 3, <<http://www.hrw.org/legacy/backgrounder/asia/afghan-bck1005.pdf>>

are purposefully ignored to serve the end goal of fighting terrorism. It is important to note that the alternative of simply shutting human rights violators out can also be detrimental, but working *with* them pose the risk of simply strengthening and legitimizing them.

Some comments from judiciary institutions show the meaning of as well as opposition towards suggested and committed acts. The Law Lords in Britain did not accept the idea of practicing indefinite detention of suspects – that is, persons not sentenced to any crime, and as such still to be regarded as innocent – claiming that such a measure is “*anathema* in any country which observes the rule of law”.⁵² The meaning of that opinion is, according to Fernando Tesón, to show that such harsh restrictions of individual liberties would be self-defeating for a democratic state.⁵³ The US Supreme Court too expressed caution, holding that “[i]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad”.⁵⁴ Giving in to the circumstances as they are presented in the war model of fighting terrorism carries these risks of greatly sacrificing important core values.

One consequence of framing the fight against terrorism as a war is the simple fact that a war in general has two parties combating each other, and in this case it would mean that those taking part in this struggle using force do so with some, yet perhaps very small, legitimacy.⁵⁵ This would render some targets for both parties of the struggle justifiable, and it is the opposite of all declarations made, nationally as well as internationally, regarding terrorism; the mantra is that terrorist acts *never* can be justified, no matter what. But if we are to take the war model to its extreme, this is the result. The general tendency and position, however, does not acknowledge this.

2.2.1 *Laws Potentially Misguided and Made Permanent*

A problem of counterterrorism laws has to do with the extraordinary context in which they are created; they are often a response to an attack. The legislation imposed in both the US and the UK was enacted due to the perception that existing laws and intelligence might not amount to sufficient protection against new attacks. That is one of the reasons as to why they were passed so swiftly, and this kind of acting carries some risks. Mainly, during this short period there is no time for any deeper investigation to reach clarity regarding where things went wrong, where the weak spots that need be corrected and enforced are to be found. There is a good chance that the changes made with, for example, the USA PATRIOT Act, meant to strengthen the national security, do not address the crucial ‘loopholes’ used by the perpetrators of 9/11.⁵⁶ Still, the legislative response is perceived as necessary, but should the above scenario be true – although it is difficult to assess – the risk of invasion in the civil liberties of the population becomes a much

⁵² Lord Nichols of Birkenhead, as cited in Tesón, Fernando, ‘Liberal Security’, in Wilson, Richard Ashby (ed.), p. 67 (my italics).

⁵³ Ibid.

⁵⁴ *Hamdi* case, 2004, as cited in Tesón, Fernando, in Wilson, Richard Ashby (ed.), p. 70.

⁵⁵ Warbrick, Colin, ‘The European Response to Terrorism in an Age of Terrorism’, 15:5 *European Journal of International Law*, p. 1016f.

⁵⁶ Donohue, Laura K., p. 13f.

more serious issue. If the reduction in rights and freedom, hypothetically, cannot be said to increase security – then the new extensive legislation take on the appearance of a misguided misuse of power.

Another important aspect of counterterrorism law is that an established pattern shows that these would-be temporary provisions actually often later come to form the basis for further legislation, thus becoming permanent. The USA PATRIOT Act was initially presented with so-called sunset provisions, set to expire on 31 December 2005, on its most intrusive aspects. However, in July that year they were renewed and as of five years after being passed, fourteen of the sixteen most intrusive provisions had been made permanent. Moreover, the 2006 USA PATRIOT Improvement Act widened the original scope and to its powers added anti-drug measures unrelated to the terrorist threat. The same pattern has also been shown in the UK, where the situation in Northern Ireland resulted in almost hundred years of continuing, and eventually making permanent, many ‘temporary’ laws.⁵⁷ The domestic situation changes drastically with the new legislation – changes that most likely will last.

2.2.2 *Global Consequences*

The ‘War on Terror’ causes damage to the international legal and institutional system. As a result of being associated with the measures carried out the legitimacy of the UN is challenged. Furthermore, the actions of the main actors themselves in some cases worsen this situation. In 2005 the US National Defense Strategy made the grave claim that “our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism”, the substance of which equates international cooperation and the principles of the rule of law with terrorism itself as a threat to the national security.⁵⁸ Judging by such assessments, the war model holds no place for human rights as a part of the counterterrorism strategy.

One conclusion drawn from the European Parliamentary Assembly investigations of the US High Value Detention programme – wherein renditions of detainees and the usage of secret detention facilities have been frequent – is that it carries with it collateral damage in the form of potentially diminished respect for human rights globally. It creates a greater danger in that others may use this American model to legitimize their own similar actions, making the US a ‘negative role model’.⁵⁹ One illustrative example of the attraction of US policies is Colombia’s redefining of its long internal conflict as a part of the global ‘War on Terror’, thus inserting their own counter-insurgency efforts into that paradigm.⁶⁰ By following the path of the main actors in the world greater legitimacy, or at least acquiescence, is more easily achieved; the shadow behind the US is a great place to hide. The lack of respect for human rights spreads to other actor seeing potential gains with this model.

⁵⁷ Ibid., p. 2, 14f.

⁵⁸ Department of Defense, *National Security Strategy of the United States of America*, March 2005, as cited in Cole, David, and Lobel, Jules, p. 16.

⁵⁹ Council of Europe, *CIA above the law? Secret detentions and unlawful inter-state transfers of detainees in Europe*, p. 237, Para. 337.

⁶⁰ Amnesty International, *Amnesty International Report 2005*, p. 19.

2.3 Balancing Liberty and Security

The type of actions presented above, being a response to terrorist attacks, is based on an attitude that there seems to be some necessity in limiting the civil liberties of the populace in order to prevent new attacks. The model for this view usually is that of a balancing act, where liberty is weighed against security. A reduction in liberties means an increase in security, and vice versa. The ideal aim is to find the middle way “between the individual’s liberty to do as he pleases and society’s need for protection against the harm that may accrue from some of the things it might please an individual to do”.⁶¹ In other words this can be posed as a dilemma, where unlimited freedom poses a risk that has to be countered by imposing limitations that creates a sufficient amount of societal and individual security. At the same time too much control and limitations is rarely seen as something positive.

The imagery is also used as public promotion for the proposed measures. The US Attorney General at the time, John Ashcroft, advocated the USA PATRIOT Act by claiming that it “provide[s] the security that ensures liberty”⁶² and attacked its opponents by saying: “[I]o those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve”.⁶³ There is no mistaking that security is the main priority, and the reason is instrumental: liberty might have to take the back seat until order has been restored – this to guarantee liberty. There is an obvious paradox in this reasoning when interpreted in this way. The image of balance, and especially its components, might well need a more thorough investigation.

2.3.1 *Obscurities in the Language of Balance*

Jeremy Waldron emphasises the importance of scrutinizing the image and rhetoric of balance, for four reasons. First, the talk of balance rests on a consequentialist thinking that is hard to reconcile with civil liberties. More specifically, the rights these liberties are associated with are usually given a status above being used as mere tools of utility. Second, justice requires that the proposed changes be closely watched, due to the risk of the decrease in liberty affecting some more than others and the changes thus being unevenly distributed. Third, the reduction in liberties and its parallel increase in the power of the state – to be used to fight terrorism – can also result in adverse effects, such as diminished security for the individual *against* the state. The result, then, might either way be harm caused for the society’s members. Finally, the reduction in liberty must be sure to have the desired effects, or at least be based on decent certainty regarding the extent of the probability of that effect. Often this is not the case, resulting in vagueness concerning whether something is achieved that is worth sacrificing liberty for.⁶⁴ To sum up, these aspects show how the pragmatic take on the balance, guided by perceived necessity, brings forth risks of serious implications for human rights. Richard Ashby Wilson agrees, stating that such a

⁶¹ Waldron, Jeremy, ‘Security and Liberty: The Image of Balance’, 11:2 *The Journal of Political Philosophy*, p. 191f.

⁶² Then Attorney General John Ashcroft, August 25 2003, as cited in Sidel, Mark, p. 10.

⁶³ John Ashcroft, 6 December 2001, as cited in Donohue, Laura K., p. 2.

⁶⁴ Waldron, Jeremy, p. 195-210.

utilitarian pragmatism is as philosophically and politically far away from an ethics of universal human rights one can come.⁶⁵

One major problem with the supposed balance is that its underlying logic places security and liberty in an oppositional relationship; an increase in the one causes a decrease in the other. However, as emphasized by Tesón, in a democracy these values are in fact complementary. As such the purpose of a response to an emergency must be to preserve the freedoms – which *de facto* are the distinguishing trait of the democracy itself. This, and only this, can justify emphasized security measures.⁶⁶ Evident here is, actually, the very consequentialist thinking criticized above, however in a more restricted and value based fashion. The reduction in liberties is seen as a means to certain ends, but the motives are not simply an emphasis on security *per se*, as an intrinsic value – which is what causes the risks described above, and furthermore makes abuse a greater possibility. Instead, liberty is to be given the upper hand and serve as the justification. This, in the end, seems to better safeguard the liberties.

An aspect mentioned by Waldron above but otherwise, according to Daniel Moeckli, often absent in discussions on balance is the distribution of the freedom that is being weighed. The general assumption merely is that everyone is equally affected by the measures pondered. Quite the opposite, the reality is that the balance might be between the majority's security and the liberty of only a minority.⁶⁷ The military commissions mentioned above, and their non-applicability on American citizens, is an example of this reasoning, proving that it is not merely a hypothetical objection. John Walker Lindh, 'the American Taliban', was indicted and sentenced in a civilian criminal court although having been arrested in Afghanistan together with many foreign Taliban fighters and viewed as an enemy combatant. The difference in treatment after the capture was explained with him being an American citizen. With the commissions, then, the rights and liberties of suspected non-citizens, a minority, are sacrificed to achieve security for the majority, the citizens.⁶⁸ This is the core of the risks posed with a utilitarian approach towards the balancing of values; its conflict with the egalitarian, non-discriminatory foundation of human rights is obvious. If the choice shall be, as David Cole and Jules Lobel suggests, not about liberty or security, "but between effective security measures and counterproductive ones"⁶⁹, the objections above need to be taken into account when making the calculation. Also, they should be thoroughly compared to alternative models and their prospects of success.

⁶⁵ Wilson, Richard Ashby, in Wilson, Richard Ashby (ed.), p. 19.

⁶⁶ Tesón, Fernando, in Wilson, Richard Ashby (ed.), p. 62f.

⁶⁷ Moeckli, Daniel, *Human rights and non-discrimination in the 'War on terror'*, p. 2-5.

⁶⁸ Cole, David, 'Enemy Aliens', 54:5 *Stanford Law Review*, p. 953-955, 957.

⁶⁹ Cole, David and Lobel, Jules, p. 17.

3 An Alternative Counterterrorism Model

A great deal of the existing literature on this subject makes the point that the protection of human rights must form the basis of all counterterrorist activities. Analogous to the sentiment of Kofi Annan cited in chapter 1, with talk of human rights as essential tools against terrorism, they are seen as important because “they are an indispensable component of the liberal democratic politics required in emergency situations”.⁷⁰ However, as shown in the previous chapter, a major feature of recent and current counterterrorism actions has been the curtailment of principles of civil and political rights and liberties at home – all in the name of security – and the violation of human rights abroad. Given the frequently made claims of the importance of these rights, this should be seen as giving the terrorists a major victory as well as strengthening them by way of more recruits and perceived legitimacy.⁷¹ This is what Schmid calls the ‘terrorist trap’ – the calculation from the terrorists’ point of view that the response to their acts will be an overreaction, which in turn will serve their own purpose of greater mobilization. In this trap, he claims, “we will not be caught if we adhere to the principles of the rule of law, respect for human rights and minimal and proportionate use of force”.⁷² These points paint a picture of the war model being very risky should it not prove successful, and this ought to be a good starting point for an alternative strategy: to uphold these basic principles is to *not* continue playing into the terrorists’ hands.

3.1 Contrasting the War Model

Jane Boulden and Thomas G. Weiss pose the simple yet very important question that, as a reaction to terrorist attacks, “would it not be preferable to develop other responses that dealt with the motivation and issues that prompted those attacks? [...] The attractiveness of this approach is that it offers some prospect of a response that might be preventive in ways other than the application of military force”.⁷³ I would describe it as acting *proactively*, rather than merely actively, to a greater extent in the response, and this turns the spotlight effectively on the prevention model of the ‘War on Terror’ highlighting what is one of the main issues of this paper: what, really, is an *effective* model for counterterrorism? The same concern is expressed by Kennedy Graham, who describes terrorism as a global ill-health and proposes that as such it should be treated – not simply suppressed.⁷⁴ Here too focus is put on the syndrome as a whole rather than its visible signs, and, hence, these writers are looking for an alternative to the war

⁷⁰ Wilson, Richard Ashby, in Wilson, Richard Ashby (ed.), p. 3.

⁷¹ Ranstorp, Magnus and Wilkinson, Paul, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. xvii.

⁷² Schmid, Alex P., in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 18.

⁷³ Boulden, Jane and Weiss, Thomas G., ‘Whither Terrorism and the United Nations’, in Boulden, Jane and Weiss, Thomas G. (eds.), *Terrorism and the UN: Before and After September 11*, p. 12f.

⁷⁴ Graham, Kennedy, ‘The Security Council and Counterterrorism: Global and Regional Approaches to an Elusive Public Good’, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 44.

model. Furthermore, the war model is seen as counterproductive, which to Graham also is the reason to why this ‘war’ cannot be won: because “it has no identifiable foe or value-based objective”.⁷⁵ It is not suiting for the phenomenon of terrorism, or the process of combating it, to call it a ‘war’ because of the many discrepancies in their characteristics. Thus some deem it an obvious misnomer.⁷⁶ The ‘War on Terror’ is not a traditional war and thus cannot be expected to end with a victory on the battlefield, if there is one, followed by the winner forcing political terms upon the defeated. Instead the victory will depend on political changes ultimately resulting in a lack of support for the ideology and strategy of the terrorists.⁷⁷ It is a natural consequence of framing the struggle as a war that the end goal becomes victory, but in the case of terrorism such a ‘victory’ can be hard to define and therefore has to be re-conceptualized. One way to do this is to move focus to human rights. In the UN Global Strategy, which I turn to next, human rights are not only helpful but in fact essential to combat terrorism.

3.2 The UN Global Strategy

On 20 September 2006 the UN General Assembly adopted ‘The United Nations Global Counter-Terrorism Strategy’, consisting of a resolution with an annexed plan of action.⁷⁸ Its foundation is an earlier report of the Secretary-General wherein five pillars are presented as suggested elements of a counterterrorism strategy: “dissuading people from resorting to terrorism or supporting it; denying terrorists the means to carry out an attack; deterring States from supporting terrorism; developing State capacity to defeat terrorism; and defending human rights”.⁷⁹ These pillars had their foundation in yet another previous report⁸⁰, and were by member states’ request further developed into forming the proposed basis of a strategy.⁸¹ With the recommendations from the Secretary-General as a guiding document the Global Strategy contains many of the same notions and it establishes a comprehensive approach towards combating terrorism, the content of which is presented in detail below.

3.2.1 *The Provisions of the Global Strategy*

The key phrases to capture the aim and core mentality of the Global Strategy are found in its preamble, asserting the General Assembly as “[r]ecognizing that development, peace and security, and human rights are interlinked and mutually reinforcing”, and to this “[b]earing in mind the need to address the conditions conducive of the spread of terrorism”.⁸² This is furthermore to be

⁷⁵ Ibid.

⁷⁶ Cassese, Antonio, p. 993.

⁷⁷ Gordon, Philip H., ‘Can the War on Terror Be Won? How to Fight the Right War’, 86:6 *Foreign Affairs*, no paging available.

⁷⁸ UN Doc. A/RES/60/288, 20 September 2006.

⁷⁹ UN. Doc A/60/825, Uniting against terrorism: recommendations for a global counter-terrorism strategy, Report of the Secretary-General, 27 April 2006, Para. 1.

⁸⁰ UN. Doc A/59/2005, In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, 21 March 2005, Para. 88.

⁸¹ See UN. Doc A/60/825, 27 April 2006, Paras. 1-3 for its history.

⁸² UN Doc. A/RES/60/288, 20 September 2006, Preamble.

understood in relation to the claim that what marks terrorism is its aim at the destruction of human rights.⁸³ The idea, then, is that to support and work for human rights is to oppose terrorism, and that measures must be undertaken focusing on all the ‘mutually reinforcing’ aspects.

The annexed plan of action consist – besides a general introduction in which the member states condemn terrorism in all its forms and manifestations and agree to take joint action to counter it – of four annexes that make up the pillars of the proposed model of counterterrorism. The five pillars presented by the Secretary-General have thus been condensed into four. Annex I focuses on how to address conditions conducive to the spread of terrorism. The enumeration of such conditions mentions, *inter alia*, prolonged unresolved conflicts, lack of the rule of law, human rights violations, ethnic, national and religious discrimination, socio-economic marginalization and lack of good governance.⁸⁴ This is interesting since, as presented above, the ‘War on Terror’ has to a great extent so far been marked by examples of human rights violations, the setting aside of the rule of law and, it can be argued, elements of ethnic discrimination. It is beyond doubt, then, that in the eyes of the Global Strategy the ‘War on Terror’ contains elements that contribute to the spread of terrorism. Ergo, the Global Strategy implies that the ‘War on Terror’ is counterproductive. The proposed measures to correct this include promoting a culture of religious tolerance and respect, justice and human development, through education and public awareness programmes; to ensure the realization of the Millennium Development Goals to eradicate poverty and come to terms with marginalization; and to within the UN system through cooperation give higher priority to human rights and good governance.⁸⁵ All in all, the prevention of terrorism by removing its foundation of recruitment means bottom-up strengthening.

Annex II presents measures to prevent and combat terrorism. Member states shall not organize, participate in, or let their territories be used for terrorist activity. They shall cooperate fully with one another, exchange information, and ensure that perpetrators are arrested and then either prosecuted or extradited. Efforts shall be made to impede terrorists’ movement over borders, as well as the traffic in arms.⁸⁶

Annex III concerns building state capacity in counterterrorism, and to strengthen the role of the UN. This is viewed as a core element of the entire strategy, and is to be developed by encouraging state contributions to UN cooperation. Furthermore states should make use of established best practices from different organizations and also encourage and improve the work of existing UN organs on this subject.⁸⁷

Annex IV contains measures for asserting the respect of human rights and the rule of law as the foundation for counterterrorism. Herein is recognized that effective counterterrorism and the protection of human rights are aspects complementing each other. This means that all efforts undertaken must be in accordance with state obligations under international law, and an effective

⁸³ Ibid.

⁸⁴ Ibid., Annex I, introduction.

⁸⁵ Ibid., Annex I, Paras. 3, 5-7.

⁸⁶ Ibid., Annex II, Paras. 1-4, 13.

⁸⁷ Ibid., Annex III, Paras. 1-2, 5-10.

criminal justice system based on the rule of law must be developed. To promote these efforts the UN is said to play an important role, and as such its human rights bodies should be supported.⁸⁸

The framework established in the Global Strategy is very extensive. It contains measures to combat terrorism, like those of resolution 1373, but distinguishes itself by working on many levels and focusing on what causes terrorism in the first place, in contrast with the war model's military solutions. This makes for a more holistic approach that also weighs in development through the mentioning of the Millennium Development Goals.

3.2.2 *The Role of the United Nations*

Security Council resolution 1373, as was presented above, makes very modest mentioning of the human rights aspect of counterterrorism. Furthermore, the Counter-Terrorism Committee, created by that resolution and responsible for its implementation, has been criticized for its poor work of enforcing human rights.⁸⁹ Resolution 1373 has instead distinguished itself in that it for the first time in a resolution, under a Chapter VII-mandate, imposed obligations on the member states in a broad-reaching context, that is, not directed at one particular country or event.⁹⁰ The significance in this, according to Paul C. Szasz, is that the 'traditional' practice of this mandate has been to use Chapter VII to pressure member states to compliance in a more limited context. In that usage the Council's decision cannot be said to establish new rules of international law.⁹¹ 1373, on the other hand, with no limits regarding context or time, can almost be seen as law making. It must be said, then, that it is a powerful resolution.

The Global Strategy is distinguished from Security Council resolutions not only in terms of its broader ambitions. An important aspect to consider is the difference in roles and responsibilities between the Security Council and the General Assembly, the latter of which being the creator of the Global Strategy.

The General Assembly has a different role, and in this context it entails an expectation to administering the policy guidelines concerning terrorism.⁹² It lacks authority to command member states' governments to do certain things. Thus, being the only body dealing with this kind of global issues, in a forum where virtually all states are represented, it serves a better role developing the normative discourse for international policies; it is about collective legitimization or delegitimization.⁹³ What is legitimized in this case, with this development, is the emphasis on human rights in combating terrorism.

In practice, these distinguishing marks of the General Assembly boil down to a more proactive, and also progressive, role to play in global counterterrorism. A partial explanation to this can be found in that the preamble to the Global Strategy reaffirms the role of the General Assembly according to the UN Charter. This role means promoting human rights and

⁸⁸ Ibid., Annex IV, Introduction, Paras. 2, 4-8.

⁸⁹ Amnesty International, *Security and Human Rights: Counter-Terrorism and the United Nations*, p. 19f.

⁹⁰ Szasz, Paul C., 'The Security Council Starts Legislating', 96:4 *The American Journal of International Law*, p. 901.

⁹¹ Ibid., p. 902.

⁹² Graham, Kennedy, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 35f.

⁹³ Peterson, M. J., 'Using the General Assembly', in Boulden, Jane and Weiss, Thomas G. (eds.), p. 173.

fundamental freedoms for all⁹⁴ – a work that all member states pledge to cooperate with⁹⁵ – which is evident in the Global Strategy.

An interesting aspect of General Assembly activity lately is that resolutions titled ‘Protection of human rights and fundamental freedoms while countering terrorism’ have been adopted at the General Assembly’s regular sessions for seven consecutive years – from the first at the 57th session, to the latest in the 63rd session last year.⁹⁶ This is worth noting. Before, the General Assembly resolutions on the subject of terrorism had for a long time focused on measures to eliminate it, with the occasional acknowledgment of the connection between terrorism and human rights. However, the strong emphasis on the need to protect human rights in *countering* terrorism is a new phenomenon. This is the context in which the Global Strategy has been created. The General Assembly can with new resolutions serve as an indicator of change in policies, and for identification of new issues.⁹⁷ As a whole this new direction should arguably, given its timing and perseverance, be understood as a reaction to the measures undertaken in the ‘War on Terror’.

3.3 Striving for ‘Sustainable Security’

The former UN High Commissioner for Human Rights, Mary Robinson, agrees with the objections against the ‘War on Terror’, concerning its implications for human rights. Since order and security has trumped all other concerns, measures since 9/11 in her eyes has meant a sacrifice of fundamental rights and freedoms to fight terrorism. Because of this an alternative is needed, and although the restoration of human rights and the rule of law is a necessary starting point, it is not sufficient. Counterterrorist measures have to go deeper and aim to address the root causes to the situation in which people more easily become susceptible to recruitment.⁹⁸ Her proposed model is one that needs to bring about a shift in the mindset, widening the concept of security and focusing on human security and its relations to human rights and human development. One key measure is building bottom-up to empower people to being able to secure their own lives.⁹⁹

A comparable concept is one in which counterterrorism constitute only one of a variety of necessary models of combating terrorism and achieving safety. This too, like Robinson’s broader concept of security, is a complex phenomenon and thus suggests another approach. Focus is put on efforts to eliminate poverty, the struggle against HIV/AIDS, disarmament, and the like.¹⁰⁰

The two concepts above are examples of the line of thought evident in the works of the Oxford Research Group in their project for a ‘sustainable security’. In their view the threats the

⁹⁴ Charter of the United Nations, Article 55(c).

⁹⁵ *Ibid.*, Article 56.

⁹⁶ See for example UN Doc. A/RES/57/219, 27 February 2003, and UN Doc. A/RES/63/185, 18 December 2008.

⁹⁷ *Ibid.*, p. 174.

⁹⁸ Robinson, Mary, ‘Connecting Human Rights, Human Development, and Human Security’, in Wilson, Richard Ashby (ed.), p. 308ff.

⁹⁹ *Ibid.*, p. 313.

¹⁰⁰ Dhanapala, Jayantha, ‘The United Nations’ Response to 9/11’, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 14.

world is facing is built of four interconnected trends: climate change, competition over resources, marginalization of the majority world, and global militarization. The ‘War on Terror’ is a part of this but has, as they claim, hijacked the agenda of global security – and done so with the wrong methods, thinking about security in terms of defence. The model they propose as an alternative contains extensive long-term measures undertaken to reach solution to all four-problem areas. As such it is described as preventative through attacking the roots of the problems instead of trying to control them militarily when it is already possibly too late.¹⁰¹

These different models construing alternatives to the ‘War on Terror’ have a common denominator in that counterterrorism must be a more extensive, better planned, long-term project. They are also, in content, closely related to the Global Strategy; they contain many of the same ideas. Notable among these is the focus on resources, with the aim to counter terrorism by eradicating poverty. This is an important aspect in making the models sustainable – by not regarding terrorism as something that simply is or happens. Effective measures focus on the reasons why it may occur.

¹⁰¹ Abbot, Chris, Rogers, Paul and Sloboda, John, *Beyond Terror: The Truth About the Real Threats to Our World*, p. 4-8, 85.

4 A Troublesome Shift From the War Model

What needs to be done in moving from the ‘War on Terror’ to the Global Strategy is to change the mindset and investigate what the objectives of the fight against terrorism should be. This necessitates a shift in perspectives, away from militarily trying to control and eliminate terrorism *now*, to working for removing its foundations and thus focusing on the long-term results. If there is truth, namely, behind the claims that the war model is counterproductive – then the alternative model is essential. Sergio Vieira de Mello was clear on this point: “Fundamental grievances, embedded in a denial of human rights and basic justice, must be addressed if we are to ensure that terrorist groups cannot cloak their acts with a spurious veil of justification. [...] [A]n all-encompassing approach is required. Human rights can help provide such a framework”.¹⁰² Why is this in practice so problematic? The issues are a lack of long-term perspective and goals, as well as misdirected political objectives in the process resulting in a lack of cooperation and coherence.

4.1 Long-Term Emergencies

Initially, after 9/11, the situation was declared as a state of emergency, and the response was shaped accordingly. The UK, as mentioned above, derogated from the ECHR and the US fell just short of a similar response, explicitly declaring a state of emergency but making no formal derogations from the ICCPR.¹⁰³ A problem and troubling aspect is that the diffuse ‘war’ and its vague time frames cause a risk of creating a permanent state of emergency. As mentioned in chapter 2, efforts, like legislation, meant to be temporary become permanent and the foundation on which new laws are based. The result of such a pattern is that the exception becomes the norm.¹⁰⁴

The discussion on long-term or short-term measures contains a major paradox. The emphasis in the ‘War on Terror’ on national security is arguably based on a long-term notion of security. However, when this is used to justify the short-term reduction in individual liberties the paradox occurs and the potential for government abuse increases.¹⁰⁵ When adding to this equation the fact that the short-term interferences often become permanent and established as the new normal, a widely problematic situation is created. The short-sightedness of the ‘War on Terror’ becomes ever so evident.

In reviewing the answer to this notion some note the tendency to instead describe the present situation as a “long war against islamofascism”, partly from the Bush administration itself

¹⁰² Sergio Vieira de Mello, then UN High Commissioner for Human Rights, Address to the Counter-Terrorism Committee, 21 October 2002, available at <<http://www.un.org/sc/ctc/documents/HC.htm>>

¹⁰³ Duffy, Helen, p. 347.

¹⁰⁴ Ibid., p. 346.

¹⁰⁵ Joyner, Christopher C., ‘The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties’, 5 *International Studies Perspectives*, p. 252.

in justifying the extended efforts.¹⁰⁶ With such phrasing any mentioning of short-term goals should be seen as void; this is not a swift state-of-emergency-retaliation. It seems that the ‘War on Terror’ today finds itself in an involuntary long-term project, still using short-term means. One way to structure it would be better coherence in the framework of law.

4.2 Defining ‘Terrorism’

Reaching an agreement upon a common definition of terrorism has proven to be an immensely difficult task. It is a problematic situation that is illustrated by the fact that one can discern at least 109 possible definitions having been put forward over the years.¹⁰⁷ This has been part of the process, the Sisyphean task still in progress, aiming to create a comprehensive convention covering terrorism as a whole. The process started in the 1930s and reached its first and major accomplishment under the guise of the League of Nations, in the 1937 Convention for the Prevention and Punishment of Terrorism. The convention, however, was never adopted and thus never entered into force. According to Helen Duffy this was due to problems with reaching a consensus on the definition of the term.¹⁰⁸ Arguably, though, the timing should also be mentioned. The outbreak of the Second World War inevitably placed such discussions on a definition in the shadows and the League of Nations in the waste bin of history.

Since the 1960s conventions on specific aspects of terrorism have been created, and there are today thirteen international conventions (to be distinguished from the additional regional ones).¹⁰⁹ These provide a framework of prohibitions of certain separated aspects of what is perceived as terrorism. They all define only the specific acts of terrorism relevant for the purposes of each convention; no general definition of terrorism is presented. In the 1970s, however, work on a generic definition was once again initiated, by means of a 1972 *ad hoc* committee of the UN General Assembly. The purpose of the committee was to consider a draft comprehensive convention. However, at that time in history, in the new reality of global politics that emerged with the process of decolonization, there was such a strong division between member states regarding the status of national liberation movements that no such draft could be agreed upon. The issue was that of including or excluding these movements from the scope of the convention.¹¹⁰ Instead of reaching consensus the process of creating specific conventions continued.

In 1994 there was some success with the Declaration on Measures to Eliminate International Terrorism, which was approved and included in a General Assembly resolution the same year.¹¹¹ This resolution was then ‘recalled’ by subsequent resolutions, wherein the

¹⁰⁶ Rogers, Paul, *Why We’re Losing the War on Terror*, p. 119.

¹⁰⁷ Duffy, Helen, p. 17f.

¹⁰⁸ Ibid. 18f.

¹⁰⁹ ‘International Instruments to Counter Terrorism’, at <<http://un.org/terrorism/instruments.shtml>> Examples are the 1979 International Convention against the Taking of Hostages and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

¹¹⁰ Duffy, Helen, p. 19.

¹¹¹ Ibid.; UN Doc. A/RES/49/60, 9 December 1994.

declaration's definition of terrorism was also reiterated. It reads: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes [...]"¹¹² Given these repeated assertions, this definition can be said to represent a recognizable level of unity, albeit not in a binding document or a convention.

Following the above mentioned resolutions another *ad hoc* committee has been working on a draft comprehensive convention. Disagreement today concerns the draft treaty articles regarding, still, the definition and its relation to national liberation movements, as well as possible exemptions for a state's armed forces when performing their duties.¹¹³ From within the drafting process the latter is seen as the key aspect constituting the obstacle towards reaching consensus.¹¹⁴

The closest thing to a generic definition yet to date to be found in an international convention exists in the 1999 International Convention for the Suppression of Financing of Terrorism. It defines a terrorist act as one "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".¹¹⁵ However, this definition is only implicit and not intended as a general definition, since the convention only prohibits the providing or collecting funding for the described act.¹¹⁶ Deduced from this is the conclusion that since the funding of those acts is prohibited, and the purpose of the convention is to prohibit financing of terrorism, specifically, the described act must logically constitute terrorism. This is all but set in stone, though, but being a definition of a general sort, that has survived all the way through the drafting process and its negotiations, it is a great approximation of what a generic definition could – and might – look like.

4.2.1 *The Issue of Agency*

Some definitions focus on the perpetrator for the determination of the act. This has close ties with the issue of including or excluding acts of the military forces, as acts of states are not always associated with terrorism. Ranstorp and Wilkinson stipulate the purpose of terrorism as aiming to create "a climate of fear among a wider group than the immediate victims of the violence, often to publicise a cause, as well as to coerce a target into acceding to terrorist aims".¹¹⁷ This latter part could be true of both the terrorist act and the response to it, and the writers acknowledge terrorism as a form of means that can be used by states as a part of their foreign or domestic policy.¹¹⁸ The same point is being made in the 1994 Declaration on Measures to Eliminate

¹¹² UN Doc. A/RES/49/60, 9 December 1994, Article 3; UN Doc. A/RES/50/53, 29 January 1996, Article 2; UN Doc. A/RES/51/210, 16 January 1997, Article 2.

¹¹³ Graham, Kennedy, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 36f.

¹¹⁴ UN Doc. A/C.6/59/L.10, Measures to eliminate international terrorism, Report of the Working Group, 8 October 2004, Annex, Para. A(4).

¹¹⁵ Article 2.1(b), as cited in Duffy, Helen, p. 20.

¹¹⁶ Article 2.1, International Convention for the Suppression of Financing of Terrorism, 9 December 1999, 2178 UNTS 197.

¹¹⁷ Ranstorp, Magnus and Wilkinson, Paul, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. xiii.

¹¹⁸ *Ibid.*, p. xiv.

International Terrorism.¹¹⁹ This is, however, not always an obvious point to make. The US only acknowledges states as sponsors of terrorism, of which they keep a list, and not as perpetrators.¹²⁰ Consequently, the definition in the U.S. Code is more limited than the ones presented above. The aim is still said to influence an audience, but the act is defined as “[p]remeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents”.¹²¹ This puts as much emphasis on the actor as it does the act. The issue of terrorism, then, becomes an issue about the perpetrators – the terrorist *groups* – rather than terrorism as a whole. This idea is connected to the claim made that these groups all share a common denominator: they are weaker than their enemies, which is the reason they choose the method of terrorism to achieve their goals.¹²² Interestingly, this latter part about choosing the method acknowledges that terrorism is in fact a tool – but according to the conditions presented in the definition only if certain actors make use of the tool. This has political implications. The terrorists are by virtue of their acts separated as something other than for example military acts with similar results; terrorism and counterterrorism do not share characteristics.

Contrary to the reasoning above, some authors acknowledge the relationship between terrorism and its counterpart. In this view they are to a certain extent identical. For example both, generally speaking and traditionally performed, involve violence, fear and influence a larger audience. Also, they are purposive, political acts that affect non-combatants.¹²³ It is partly this closeness between terrorism and its counterpart that causes the problems of definition. The neglect of this relationship, evident in the exclusion of state action in the definitions, is said by Jordan J. Paust to be part of the problem. It is not as much due to the acts themselves, they can still fall within the range of other regulations, as it is because of the message this behaviour sends out. In Paust’s view, by saying that what states do cannot amount to terrorism, the state elites creating the conventions through their negotiations are playing into the hands of the potential non-state terrorists witnessing the act. It reads as the states trying to regulate this kind of acts by excluding their own use of them from the definition.¹²⁴ The power to do so comes with states’ control over the application of the term ‘terrorism’. State acts are either interpreted differently, seen through the perspectives of war or national self-defence, or simply hidden in innovative language with terms like ‘coercive diplomacy’.¹²⁵ This makes room for arbitrariness, and the

¹¹⁹ It states the General Assembly being “[d]eeply disturbed by [...] acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved [...]”. UN Doc. A/RES/49/60, 9 December 1994, Annex, Preamble.

¹²⁰ Graham, Kennedy, in Ranstorp, Magnus and Wilkinson, Paul (eds.), p. 43.

¹²¹ The U.S. Code, as cited in Richardson, Louise, “The Roots of Terrorism: An Overview”, in Richardson, Louise (ed.) *The Roots of Terrorism*, p. 2. Original is found in 22 U.S.C. § 2656f. (d)(2), available at <<http://www.law.cornell.edu/uscode/22/2656f.html>>

¹²² Richardson, Louise, in Richardson, Louise (ed.), p. 2.

¹²³ Donohue, Laura K., in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, p. 34f.

¹²⁴ Paust, Jordan J., ‘Terrorism as an International Crime’, in Nesi, Giuseppe (ed.), *International Cooperation in Counterterrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, p. 25.

¹²⁵ Donohue, Laura K., in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, p. 20.

consequence is a major lack of legitimacy and policies bringing about a risk of being or becoming counterproductive.

4.2.2 *Working Without a Definition*

In the absence of an agreed upon generic definition, or a comprehensive convention, the fight against terrorism is either coined in the terminology of the specific conventions, or by simply referring to ‘terrorism’ with no further elaboration provided. The UN Security Council resolution 1373 is a case of the latter.¹²⁶ What are the consequences of laying down these obligations for the member states to combat terrorism when there is no general agreement on what constitutes terrorism? Something that has been noted is the obvious risk of a lack of coherence in the efforts of all member states following the principles of the resolution; the lack of a common definition leaves it up to the states themselves to define the term and the act.¹²⁷ This semi-coordinated network of domestic definitions pose a significant obstacle to achieving results, which is the reason behind the view of Gerhard Hafner, that an agreed upon common definition is the key to enabling real international cooperation.¹²⁸ With the importance given to the common definition in this reasoning, it becomes so essential as to be regarded as the *sine qua non* of a joint international struggle against terrorism.

The potential risks of working without a definition are presented by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his first report to the UN Commission on Human Rights. This causes incoherence that might in turn result in adverse effects for human rights – as a result to deliberate misuse of the term, and in the form of unintended abuses through legitimizing the conduct of oppressive regimes combating what they dub ‘terrorism’.¹²⁹

Worth noting is that the lack of a common definition does not mean that acts of terrorism can elude punishment. The specific conventions cover and prohibit many aspects of terrorist acts, and thus form a net that ‘captures’ many terrorist acts – given that the deed is committed on the territory of a state party to the particular convention, and that the state also fulfils this commitment. Further, even in the absence of a criminalization of terrorism *per se*, those types of violent acts are usually covered by national legislation prohibiting murder, or other attacks on people and property.¹³⁰ The issue is rather of cooperation.

4.3 Inconsistency in Political Will

The evidence thus far as to political will among the international community tells of forceful actions from the Security Council, which is of great influence given its status and power. As shown above the framework established through resolution 1373 is still central to the

¹²⁶ It mentions only “terrorist acts”. See for example UN Doc. S/RES/1373, 28 September 2001, Article 1(a).

¹²⁷ Ibid., p. 4f.

¹²⁸ Hafner, Gerhard, ‘The Definition of the Crime of Terrorism’, in Nesi, Giuseppe (ed.), p. 35.

¹²⁹ UN Doc. E/CN.4/2006/98, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005, Para. 27.

¹³⁰ Hafner, Gerhard, in Nesi, Giuseppe (ed.), p. 41ff.

international struggle against terrorism. And within that framework, human rights play only a peripheral role.

Moving on to the General Assembly, the wide recognition through the adoption of the Global Strategy legitimacy in these policies. However, as already described only the Security Council have the power of creating mandatory provisions. There is a revealing discrepancy here, in the fact that the Global Strategy has been adopted, together with repeated General Assembly resolutions on the subject, but in terms of the Security Council decisions not much has happened. It seems that the political will, at least among the major, norm-setting members stretches more easily to comprehensive suggestions when they do not require obedience.

Problems relating to political will are also evident in the discussions concerning a definition. The obstacles seem to consist of protection of state interest from the members feeling they have something to lose in changing the direction. The major military powers steer away from propositions that might prove to become a limitation on military practice further ahead.

The two models are evidence of political will to both fight terrorism – the expressions of it – and to erase it through human rights and development. The difference is the status of the international forums emphasizing the different models, where the Security Council of course have the greatest power. However, it must not be neglected that state practice has shown a will to handle this issue independently, which has meant following neither model very strictly and ignoring important principles of human rights.

5 The Time Factor

Kofi Annan has stated that since terrorist acts by nature are serious human rights violations, the practice of sacrificing these rights to achieve security is merely “shortsighted, self-contradictory, and, in the long run, self-defeating”.¹³¹ It is the emphasis on the long run that is especially worth acknowledging. The time factor is greatly missing in the policies in counterterrorism measures. In Security Council resolution 1373 no time period for the proposed plan of action is given. That is part of its broad reach – not only in terms of the general framework that is not related to any specific situation, but evidently also regarding the time frame of the measures. On the other hand, the time period implied in an alternative model such as the Global Strategy is by default much longer. The purpose is still prevention, but by non-coercive means and by building from the bottom-up, trying to erase the factors ‘creating’ terrorism in the first place. It will, of course, not disappear completely, but another kind of prevention could lead to a situation where at least the risk is manageable – and not increasing with every effort to prevent it. This would reduce the risks of reaping what is sowed in terms of a backlash of recruitment.

5.1 Costs and Adverse Effects

Several references have now been made emphasizing the fundamental role of human rights in counterterrorism. One reason behind this is the adverse effects of the ‘War on Terror’ that are more likely with every abuse and violation committed. The risk is of creating more terrorists as a response to the flawed counterterrorism. This is a general idea that is illustrated by a specific example; the results of the 2003 invasion of Iraq. This was a pre-emptive war motivated *inter alia* by Saddam Hussein’s alleged possession and development of weapons of mass destruction, as well as a claimed linkage between Hussein and al Qaeda. Both of these were at the time dubious, and have been proven wrong.¹³² Still, the goal of countering terrorism has remained throughout, catalyzed by the increased activity by terrorists and insurgents in Iraq. The goal thus became to stabilize the region to prevent future terrorism. In light of this it must be considered a major failure that the claimed existence of al Qaeda-affiliated groups in Iraq has become a reality only *after* the invasion. In December 2004 insurgent leader Abu Musab al-Zarqawi publicly declared his affiliation to al Qaeda, as evidence of the terrorist organization’s de facto presence in Iraq. This event is given an even stronger symbolism in the claim by Wilson that al-Zarqawi previously was a sworn rival to Osama bin Laden.¹³³ Uniting against the common enemy becomes a unifying factor, and the adverse effects of the counterterrorism measures are evident. This scenario is a case in point of the ‘terrorist trap’.

¹³¹ UN Doc. SG/SM/8417, Kofi Annan speaking to the Security Council, 2002.

¹³² The Economist, *The weapons that weren't: Intelligence failures*, 17 July 2004, no paging available.

¹³³ Wilson, Richard Ashby, in Wilson, Richard Ashby (ed.), p. 11, n. 14.

The practice of the US today has parallels with British actions in Northern Ireland, where the issues were largely the same. Thus the lessons from previous experiences could be useful, and where necessary choose another direction, but instead “[t]he U.S. is doing what the British did in the nineteen seventies, detaining people and violating their civil liberties. It did nothing but exacerbate the situation”.¹³⁴ Once again, a risk of the ‘terrorist trap’.

Critics emphasize these adverse effects resulting from flawed counterterrorism policies. In the point of view of Cole and Lobel the ‘War on Terror’ has done little else than hurting the US, making them more vulnerable due to useful resources being spent on inefficient measures. “Obsessed with playing offense, [the Bush administration] has failed to put up a good defense”.¹³⁵ The model has been to spend more per day in Iraq than what is done annually on some of the most important homeland security measures, where arguably national security could be seriously strengthened. Precisely this aspect is also the reason why the US policies are awarded poor grades in these areas in the report of the 9-11 Commission.¹³⁶ An analogy of that argument can very well be drawn and projected on the international level as well, albeit the alternative measures to the inefficient spending focusing on development and capacity building instead.

A practical issue causing negative results is the difficulty of bringing to justice a person that has been subject to coercive interrogation or torture. Any evidence gathered under such circumstances is considered tainted and would not be accepted in an ordinary, civilian court. This was the case of US citizen José Padilla, originally accused of terrorism but eventually tried for very thin and unrelated charges. The lack of evidence meant that there was no case for a terrorist trial; the reason was that existing evidence was gathered through coercive interrogation.¹³⁷ It is a dilemma of not being able to detain people forever, with increasing unpopularity, and at the same time not being able to bring them to justice elsewhere. That is, if one cannot accept the fact the justice sought in many cases actually has to mean releasing the detainee.

The registration and preventive detention mentioned above had no visible effects pertaining to their purpose of preventing terrorism. This means no gains, but all the more risks for presumably adverse effects due to a damaged legitimacy such acts cause, and the reaction they spur. The adverse effects lie in the reactions to measures perceived by other actors as wrongful.

5.2 A Projection Over Time

The negative consequences of adverse effects multiplied over time, presuming that the existing measures continue, results in a grim projection of the future situation. Both inefficiency and counterproductivity add up to a negative result – this being the worst case estimation of a continuation of the ‘War on Terror’. Still seven years into this ‘war’ few success stories have been produced. This is in fact a sound pessimist argument for the Global Strategy: even if calculating with a protracted efficiency flaw, having trouble reaching positive results, the nature of the measures characteristic of the Global Strategy at least reduces the risk of stepping into the

¹³⁴ Tom Parker, former MI5 Officer, as cited in Donohue, Laura K., p. 33.

¹³⁵ Cole, David, and Lobel, Jules, p. 2.

¹³⁶ Ibid., p. 13.

¹³⁷ Cole, David and Lobel, Jules, p. 95ff.

'terrorist trap'. This is an alternative to the war model, where the search for an expedient solution to the security issues at hand has started to pose risks of only creating more trouble and less security along the way. What must be emphasized is the focus on the long-term perspective, evident in the Global Strategy's character of striving to be sustainable. To achieve this the measures must be lasting, which requires planning and the wider approach.

6 Conclusions

In investigating the costs and adverse effects of international counterterrorism, this paper has found that the distinguishing tendencies of the 'War on Terror' has been wide-reaching anti-terror legislation and surveillance, resulting in a decrease in civil liberties at home. To this is added preventive detention with implications of racial profiling. Abroad human rights have been violated through indefinite detention, the use of torture, a lack of the rule of law and principles of due process. There has been a lack of long-term perspectives, and misdirected political objectives in the process has led to a lack of cooperation and coherence. With all these results, positive aspects are difficult to calculate leaving negative effects perhaps easier estimated. The question is also how possible positive effects should be viewed in light of their costs; it is not generally accepted, although practice might sometimes imply it, that any means are legitimate in this struggle.

It is clear that egregious acts are damaging to the legitimacy of the counterterrorism measures, weakening the human rights system, and might create a backlash in time. Behind these measures lies a dominant focus on national security, which I argue has come pose risks of increasing international insecurity. The underlying reasons, as I have presented in this paper, is the lack of long-term goals. Speedy solutions have been given primacy over efforts to achieve efficiency through the consistency and predictability of abiding by the rules. Here lies the strength of the Global Strategy – in the emphasis on building bottom-up and addressing the root causes of terrorism in a wider, more thoroughly planned, long-term perspective.

A troubling aspect is how to actually measure security, and this is why there is a question mark in the title of this paper. All actors are trying to play it safe, striving for security. But when acts might have a bigger chance of causing the opposite, becoming counterproductive, this aspect is all but evident. The security of the 'War on Terror' must thus be questioned, and for this the sustainability of the Global Strategy is an important alternative.

References

Literature

- Abbot, Chris, Rogers, Paul and Sloboda, John, *Beyond Terror: The Truth About the Real Threats to Our World*, Rider 2007.
- Banks, Christopher P., 'Protecting (or Destroying) Freedom through Law: The USA PATRIOT Act's Constitutional Implications', in Cohen, David B., and Wells, John W. (eds.), *American National Security and Civil Liberties in an Era of Terrorism*, Palgrave Macmillan 2004.
- Boulden, Jane and Weiss, Thomas G., 'Whither Terrorism and the United Nations', in Boulden, Jane and Weiss, Thomas G. (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press 2004.
- Brownlie, Ian, *Principles of Public International Law*, Seventh Edition, Oxford University Press 2008.
- Cassese, Antonio, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12:5 *European Journal of International Law* (2001), p. 993-1001.
- Cole, David, 'Enemy Aliens', 54:5 *Stanford Law Review* (2002), p. 953-1004.
- Cole, David and Lobel, Jules, *Less Safe, Less Free: Why America is Losing the War on Terror*, The New Press 2007.
- Dhanapala, Jayantha, 'The United Nations' Response to 9/11', in Ranstorp, Magnus and Wilkinson, Paul (eds.), *Terrorism and Human Rights*, Routledge 2008.
- Donohue, Laura K., 'Terrorism and the counter-terrorist discourse', in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press 2005.
- Donohue, Laura K., *The Cost of Counterterrorism: Power, Politics and Liberty*, Cambridge University Press 2008.
- Duffy, Helen, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press 2005.
- Fenwick, Helen and Phillipson, Gavin, 'Legislative over-breadth, democratic failure and the judicial response: fundamental rights and the UK's anti-terrorist legal policy', in Ramraj, Victor V., Hor, Michael and Roach, Kent (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press 2005.
- Gordon, Philip H., 'Can the War on Terror Be Won? How to Fight the Right War', 86:6 *Foreign Affairs* (2007).
- Graham, Kennedy, 'The Security Council and Counterterrorism: Global and Regional Approaches to an Elusive Public Good', in Ranstorp, Magnus and Wilkinson, Paul (eds.), *Terrorism and Human Rights*, Routledge 2008.
- Hafner, Gerhard, 'The Definition of the Crime of Terrorism', in Nesi, Giuseppe (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate 2006.

- Joyner, Christopher C., 'The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties', 5 *International Studies Perspectives* (2004), p. 240-257.
- Moeckli, Daniel, *Human Rights and Non-discrimination in the 'War on Terror'*, Oxford University Press 2008.
- Paust, Jordan J., 'Terrorism as an International Crime', in Nesi, Giuseppe (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate 2006.
- Peterson, M. J., 'Using the General Assembly', in Boulden, Jane and Weiss, Thomas G. (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press 2004.
- Ranstorp, Magnus and Wilkinson, Paul, 'Introduction', in Ranstorp, Magnus and Wilkinson, Paul (eds.), *Terrorism and Human Rights*, Routledge 2008.
- Richardson, Louise, "The Roots of Terrorism: An Overview", in Richardson, Louise (ed.), *The Roots of Terrorism*, Routledge 2006.
- Robertson, Geoffrey, 'Fair Trials for Terrorists?', in Wilson, Richard Ashby (ed.), *Human Rights in the 'War on Terror'*, Cambridge University Press 2005.
- Robinson, Mary, 'Connecting Human Rights, Human Development, and Human Security', in Wilson, Richard Ashby (ed.), *Human Rights in the 'War on Terror'*, Cambridge University Press 2005.
- Rogers, Paul, *Why We're Losing the War on Terror*, Polity Press 2008.
- Schmid, Alex P., 'Terrorism and Human Rights: A Perspective from the United Nations', in Ranstorp, Magnus and Wilkinson, Paul (eds.), *Terrorism and Human Rights*, Routledge 2008.
- Sidel, Mark, *More Secure, Less Free? Antiterrorism Policy & Civil Liberties after September 11*, University of Michigan Press 2004.
- Stephens, Jr., Otis H., 'Presidential Power, Judicial Deference, and the Status of Detainees in an Age of Terrorism', in Cohen, David B., and Wells, John W. (eds.), *American National Security and Civil Liberties in an Era of Terrorism*, Palgrave Macmillan 2004.
- Szasz, Paul C., 'The Security Council Starts Legislating', 96:4 *The American Journal of International Law* (2002), p. 901-905.
- Tesón, Fernando, 'Liberal Security', in Wilson, Richard Ashby (ed.), *Human Rights in the 'War on Terror'*, Cambridge University Press 2005.
- Waldron, Jeremy, 'Security and Liberty: The Image of Balance', 11:2 *The Journal of Political Philosophy* (2003), p. 191-210.
- Warbrick, Colin, 'The European Response to Terrorism in an Age of Terrorism', 15:5 *European Journal of International Law*, p. 989-1018.
- Wilson, Richard Ashby, 'Human Rights in the "War on Terror"', in Wilson, Richard Ashby (ed.), *Human Rights in the 'War on Terror'*, Cambridge University Press 2005.

Treaties and Additional Material

Amnesty International, *Amnesty International Report 2005*.

Amnesty International, *Amnesty International Report 2006*.

Amnesty International, *Security and Human Rights: Counter-Terrorism and the United Nations Charter of the United Nations*, 26 June 1945.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 113.

Council of Europe, *CLA above the law? Secret detentions and unlawful inter-state transfers of detainees in Europe*.

The Economist, *The weapons that weren't: Intelligence failures*, 17 July 2004.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

Human Rights Watch, *Military Assistance to the Afghan Opposition*, 5 October 2001. <<http://www.hrw.org/legacy/backgrounders/asia/afghan-bck1005.pdf>> Viewed on 5 January 2009.

Human Rights Watch, *World Report 2008*.

Inter-American Commission on Human Rights, *Terrorism and Human Rights*, 12 December 2001, available at <<http://www.cidh.org/Terrorism/Eng/part.t.htm>> Viewed on 6 January 2009.

International Convention for the Suppression of Financing of Terrorism, 9 December 1999, 2178 UNTS 197.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

U.S. Code, definition of 'terrorism'. See 22 U.S.C. § 2656f. (d)(2), available at <<http://www.law.cornell.edu/uscode/22/2656f.html>> Viewed on 18 December 2008.

United Nations Documents

'International Instruments to Counter Terrorism', available at <<http://un.org/terrorism/instruments.shtml>> Viewed on 27 December 2008.

Sergio Vieira de Mello, UN High Commissioner for Human Rights, *Address to the Counter-Terrorism Committee*, 21 October 2002, available at <<http://www.un.org/sc/ctc/documents/HC.htm>> Viewed on 6 January 2009.

UN Doc. A/RES/49/60, Measures to eliminate international terrorism, 9 December 1994.

UN Doc. A/RES/50/53, Measures to eliminate international terrorism, 29 January 1996.

UN Doc. A/RES/51/210, Measures to eliminate international terrorism, 16 January 1997.

UN Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29: States of Emergency (article 4), 31 August 2001.

UN Doc. S/RES/1373, 28 September 2001.

UN Doc. SG/SM/8417, Kofi Annan speaking to the Security Council, 2002.

UN Doc. CCPR/CO/76/EGY, Concluding observations of the Human Rights Committee: Egypt, 28 November 2002.

- UN Doc. A/RES/57/219, Protection of human rights and fundamental freedoms while countering terrorism, 27 February 2003.
- UN Doc. A/C.6/59/L.10, Measures to eliminate international terrorism, Report of the Working Group, 8 October 2004.
- UN. Doc A/59/2005, In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, 21 March 2005.
- UN Doc. E/CN.4/2006/98, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005.
- UN. Doc A/60/825, Uniting against terrorism: recommendations for a global counter-terrorism strategy, Report of the Secretary-General, 27 April 2006.
- UN Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20 September 2006.
- UN Doc. A/RES/63/185, Protection of human rights and fundamental freedoms while countering terrorism, 18 December 2008.