

courts, the limitation of the suspension of the privilege of the writ of habeas corpus to those involved in rebellion or invasion, and the requirement that those detained during the suspension of the privilege of the writ of habeas corpus must be charged in court within three days have been repealed.¹³⁴

Instead, there will be an interim Parliament composed of the incumbent Senators and Congressmen, at least one-third of the Cabinet Members with portfolio, and thirty persons to be appointed by President Gloria Macapagal-Arroyo.¹³⁵

The interim Prime Minister and the Cabinet will be under the direction and supervision of President Gloria Macapagal-Arroyo.¹³⁶ President Gloria Macapagal-Arroyo will be the President, Head of State, and Head of Government.¹³⁷

It therefore behooves every Filipino to resist this attempt to restore authoritarianism with every legal weapon.

The nightmarish experience of the nation during the dark days of the 1973 Constitution brings to mind the warning of Justice Calixto Zaldivar in his separate opinion in the case of *Javellana*, when he quoted a dissenting opinion of Justice George Sutherland, '[t]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.'¹³⁸

134. *Id.* art. IX § 8.

135. *Id.* art. XX § 9.

136. *Id.* art. XX § 12.

137. *Id.* art. XX § 13.

138. *Javellana v. Commission on Elections*, 50 SCRA 30, 309 (1973) (citing *The Associated Press v. National Labor Relations Board*, 301 U.S. 103, 141 (1937)).

Legal Concept of Terrorism under International Law and Its Application to Philippine Municipal Law

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I. INTRODUCTION 824

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Cite as 51 ATENEO L.J. 823 (2007).

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I. INTRODUCTION

The face of terror caused the death of 38 people in New York City on 16 September 1920.¹ A wagon pulled by a horse exploded at a Wall Street corner killing people instantly. A bold political statement found in a nearby mailbox pointed to likely perpetrators: "Free the political prisoners or it will be sure death for all of you. American Anarchist Fighters."² The attack was considered as an act of war. Since then thousands have died due to terrorist attacks. The first proven case of air sabotage in the history of aviation occurred 13 years later. On 10 October 1933, a United Airlines Boeing 247 is destroyed by a nitroglycerin bomb, killing all seven people aboard.³ On 17

1. DAVID M. KENNEDY, ET AL., *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 728-34 (2002). The Wall Street bombing was a terrorist incident that occurred at 12:01 p.m. on September 16, 1920, in the Financial District of New York City. Thirty-eight were killed and 400 persons were injured by the blast.
2. Wikipedia, Wall Street Bombing, http://en.wikipedia.org/wiki/Wall_Street_bombing (last accessed Aug. 16, 2007).
3. *Seven die as plane crashes in flames*, NEW YORK TIMES 1 (Oct. 11, 1933).

December 1973, Palestinian guerillas armed with automatic weapons and grenades charged through the terminal and went aboard Pan Am Flight 110 leading to the death of 29 people on the plane.⁴ Almost a year later, on 8 September 1974, another plane, TWA Flight 841, exploded from a bomb in the cargo hold, and all 88 passengers were killed.⁵ In 1985, an Air India jet was bombed killing all 329 people aboard.⁶ On 12 March 1993, 13 bomb explosions rocked Mumbai, India in what appeared to be religiously motivated attacks that led to over 250 civilian fatalities and 700 injuries.⁷

Terrorism attacks spanned the entire globe. The deadliest and most fatal terrorist design written in the pages of history caught the world unaware. On the fateful day of 11 September 2001, the all-powerful United States witnessed how two hijacked planes crashed against the World Trade Center causing the towers to collapse within the hour, claiming the lives of almost 3,000 people.⁸ The World Trade Center became Ground Zero, a reminder of the poignant reality that terrorism is a war without borders. In the aftermath of the 9-11 attacks, the United States vigorously campaigned for an all-out war against terrorism. Through its political and economic muscles, U.S. called on a world alliance and implored international support and cooperation for its agenda.⁹ The zeal by which the United States has

4. Wikipedia, Pan Am Flight 110, http://www.en.wikipedia.org/wiki/Pan_Am_Flight_110 (last accessed Aug. 16, 2007).
5. James Dunnigan, *Patterns of Islamic Terror*, http://www.strategypage.com/the_war_on_terror/tactics/2004102822.asp (last accessed Aug. 16, 2007).
6. PAMELA GRISET & SUE MAHAN, *TERRORISM IN PERSPECTIVE* 278 (2003).
7. THOMAS HANSEN, *WAGES OF VIOLENCE: NAMING AND IDENTITY IN POSTCOLONIAL BOMBAY* 125 (2001).
8. CNN Archives, September 11: Chronology of Terror, <http://www.archives.cnn.com/2001/US/09/11/chronology.attack/> (last accessed Aug. 16, 2007).
9. GRISET & MAHAN, *supra* note 6, at 277; See also, Alliance of Progressive Labor, Resurrected Anti-Terrorism Bill Threatens Human Rights in Exchange for Aid, at <http://www.apl.org.ph/ps/2004/20040203atb.htm> (last accessed Aug. 16, 2007). In the post-September 11 world, the U.S. government's counter-terrorism policy is seen as an integral part of its foreign affairs policy. The fact that the passage of the Anti-Terrorism Bill (ATB) is a requirement for the flow of more US aid (in line with US-led war against terrorism) leads to the opposition of several sectors in the Philippines to the passage of said bill. The Alliance of Progressive Labor and Akbayan says:

The ATB would qualify the Philippines for more aid from the United States, which the people the ATB would affect will eventually have to pay for in the long run as debt. A myopic prescription for a problem

engaged in the war against terrorism is easily understood. In the past two decades, roughly one-third of all terrorist attacks worldwide have been aimed at U.S. citizens or property.¹⁰ The commitment of other nations is borne from the reality that terrorism does not end with the crumbling of the twin towers. On 12 October 2002, 202 were killed and another 300 were injured by the blasts in two night clubs in Bali, Indonesia. The majority of the dead and wounded were Australians, but Indonesians, Germans, French, British, and Americans were among the casualties.¹¹ On 23 October 2002, 40-50 armed hostage-takers demanding an end to the war in Chechnya have taken up to 700 people hostage in the Palace of Culture of the Podshipnikov Zavod in Moscow, Russia.¹² On 11 March 2004, in Madrid, Spain, "ten explosions, packed into 13 rucksacks and detonated by cell phones, occurred on four commuter trains at the height of rush hour killing 191 civilians and injuring over 1,800."¹³ In 7 July 2005, terror was in the underground trains in the United Kingdom killing 56 people and injuring hundreds.¹⁴ In the Philippines, we have the notorious Abu Sayyaf who gained even greater international prominence after keeping as hostage American Gracia Burnham and her husband.¹⁵ The bombing of the Light Rail Transit in Manila on December 30, 2000¹⁶ and the Valentines Day bombing in 2005 are among

with roots deeper and more wide-ranging than the government is willing to admit.

10. GRISET & MAHAN, *supra* note 6, at 278-79. The United States and its interests are attractive to transnational terrorists and the explanation is traced to the changes in International Politics due to the end of the Cold War and the fact that the emergence of the United States as the World's sole super power has fueled resentments around the globe.
11. *Hundreds Missing in Bali Bombings*, CNN ARCHIVES, <http://www.archives.cnn.com/2002/WORLD/asiacpf/southeast/10/13/bali.blst.missing/index.html> (last accessed Aug. 16, 2007).
12. *Chechen Gunmen Seize Moscow Theatre*, CNN ARCHIVES, <http://www.archives.cnn.com/2002/WORLD/europe/10/23/russia.siege/> (last accessed Aug. 16, 2007).
13. *Madrid Train Bombing*, <http://www.globalsecurity.org/security/ops/madrid.htm> (last accessed Aug. 16, 2007).
14. *London Terror: Minute-by-Minute Account*, <http://www.cnn.com/2005/WORLD/europe/07/07/london.timeline/index.html> (last accessed Aug. 16, 2007).
15. MARIA RESSA, *SEEDS OF TERROR (AN EYEWITNESS ACCOUNT OF AL-QAUEDA'S NEWEST CENTER OF OPERATIONS IN SOUTHEAST ASIA)* 104-07 (2003).
16. Philip Tubeza, *Terrorist raps filed vs. Asia's Most Wanted Man*, PHILIPPINE DAILY INQUIRER, <http://www.inq7.net/nat/2003/July08> (last accessed Dec. 21, 2005).

the major domestic terrorist attacks that claimed the lives of innocent Filipinos.

The United Nations recognized that combating terrorist attacks is a collective responsibility of the international community. The Security Council adopted several resolutions reverberating with a common sentiment: terrorism is condemned in the strongest possible sense and international cooperation is urged among States to combat all forms of terrorism.¹⁷

II. DEFINING THE LEGAL PROBLEM: INTERNATIONAL RESPONSIBILITY ARISING FROM TERRORISM

Terrorism is a global phenomenon that is changing and redefining the conceptual landscape of international law. The underlying framework by which the United States leads the war against terrorism is hinged on international cooperation and the consideration of terrorist acts as grave crimes against humanity.

The brutal slaying of 11 Israeli athletes and one German police officer during the 1972 Munich Olympics is said to have launched a new era of international terrorism.¹⁸ The attackers were members of the Palestinian militant group, Black September.¹⁹ On 5 September 1972, Golda Meir, then Prime Minister of Israel, appealed to other countries to "save our citizens and condemn the unspeakable criminal acts committed."²⁰ The attack was widely condemned around the world, with King Hussein of Jordan — the only leader of an Arab country to publicly denounce the Olympic attack — calling it a "savage crime against civilization ... perpetrated by sick minds."²¹ It was evident that terrorism was beginning to be considered a heinous act. At the same time, it thrust into the world spotlight the cause of the Palestinians. Israel responded to the massacre with Operation Wrath of God and Operation Spring of Youth, a series of Israeli air strikes and assassinations of the principal planners of the Munich massacre. These counter-terrorist attacks of Israel were, however, highly criticized.

17. S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002) (pertaining to bomb attacks in Bali, Indonesia.); *See also*, S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002) (pertaining to the Hostage taking in Moscow, the Russian Federation.); S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002) (pertaining to acts of terror perpetrated in Kenya.); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sep. 28, 2002); S.C. Res. 1465, U.N. Doc. S/RES/1465 (Feb. 13, 2003).
18. *See generally*, GEORGE JONAS, *VENGEANCE: THE TRUE STORY OF AN ISRAELI COUNTER-TERRORIST TEAM* (1985).
19. *Id.*
20. JOHN COOLEY, *GREEN MARCH BLACK SEPTEMBER: THE STORY OF THE PALESTINIAN ARABS* 24-25 (1973).
21. *Id.*

The complexity of terrorism made it initially impossible for nations to actually have a universal and general plan of action. An initial response was to adopt treaties that characterized specific acts of terrorism such as attacks against civil aviation, bombings and financing of terrorist organization.²² After the 9-11 attacks, there has been an increased vigor among Member States to agree on a collective action against a unique problem. The direct attack on the United States seems to have quickened the tempo on the enforcement of anti-terrorist measures all over the world.²³ While there is yet to be unanimity on the definition of terrorism and while the States' attempt to list known terrorists and terrorist groups fail to reach a consensus, there is a general agreement that terrorist acts are to be condemned.

Many nations lost citizens in the World Trade Center tragedy. The attack became the catalyst for the outpouring of sympathy for the innocent lives taken and an international condemnation of terrorism. On the part of the United States, it used the world's reaction to jumpstart an international coalition committed to finding the perpetrators and preventing future attacks. In the aftermath, many nations immediately offered full support for the Washington agenda.²⁴ The spontaneous activity of a great number of States supporting a specific line of action can be described as instant custom.²⁵ It is apparent that the recognized sources of obligation under

22. See, United Nations Treaty Collection (Conventions on Terrorism), available at <http://www.untreaty.un.org/English/Terrorism.asp> (last accessed Aug. 16, 2007).

23. In the United States, the main Anti-Terrorism Act passed after Sep. 11 is the USA Patriot Act 2001 (Bill no. H.R. 3162; Public Law no: 107-56) and the Homeland Security Act 2002 (Bill no. H.R. 5005; Public Law no: 107-296) which created a new Department of Homeland Security to oversee national security matters previously the responsibility of 22 separate agencies. In the United Kingdom, its Terrorism Act of 2006 (introduced Oct. 12, 2005) received Royal assent after lengthy debate. It deals with incitement, strengthens powers of various agencies and redefines terrorism. In Canada, they passed An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and Other Acts, and to Enact Measures Respecting the Registration of Charities, in Order to Combat Terrorism (Anti-terrorism Act 2001). In the Philippines, An Act to Secure the State and Protect our People from Terrorism [HUMAN SECURITY ACT OF 2007], Republic Act No. 9372 (2007) was signed into law.

24. In the aftermath of the 9-11 attacks, the following countries and organizations offered full support (including military, use of bases or airspace): Australia, Canada, European Union, Great Britain, India, Japan, NATO (The organization has invoked article 5 of its charter for the first time, deeming the attacks as an attack on all 19 member countries.), New Zealand, Spain, Sweden, Turkey, and Ukraine. Other nations offered cooperation in varying degrees.

25. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 993-1001, 12 EUR. J. INT'L 5; See also, PETER MALNCZUK,

international law²⁶ were no longer adequate to define the world's response to terrorism. One author has suggested that the collective action of nations gave birth to an instant customary law where collective self-defense is recognized as a valid response to the terrorist attack.²⁷ Unlike custom, which is the product of a constant and prolonged practice, the united action of nations was witnessed as a reaction to a perceived common threat. The international coalition eventually led to the adoption of treaties which were declarations and expansions of the instant custom. To consolidate and enhance these activities, Member States opened a new phase in their counter-terrorism efforts by subsequently agreeing on a global strategy to combat terrorism.²⁸

The uniqueness of the collective action is that it is not directed towards an international legal person but to a non-State entity. Only recently has the strategy on how to respond to attacks from persons without an international legal personality been laid down. The United Nations was formed after World War II to "save succeeding generations from the scourge of war"²⁹ and to govern relations primarily between States. Its purposes are to maintain international peace and security, develop friendly relations among nations, achieve international cooperation and be a center for harmonizing the actions of nations in the attainment of these common ends.³⁰ The principal judicial organ of the UN is the International Court of Justice and under the Statute of the Court, only States may be parties in the court.³¹

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 45-46 (7th ed. 1997).

26. The traditional sources are Treaties, Custom, General Principles of Law, Decisions of National and International Tribunals, and Writings of Highly Acclaimed Publicists.

27. Cassese, *supra* note 25, at 993-99.

28. United Nations General Assembly Adopts Global Counter-Terrorism Strategy, <http://www.un.org/terrorism/> (last accessed Aug. 21, 2007). United Nations Global Counter-Terrorism Strategy was adopted by Member States on Sep. 8, 2006. Sheikha Haya Rashed Al Khalifa, President of the 61st session of the General Assembly Launching the UN Global Counter-Terrorism Strategy said:

The passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated.

29. U.N. Charter, Preamble.

30. *Id.* art. 1.

31. Statute of the International Court of Justice art. 34. June 26, 1945, 3 Bevens 1179, 59 Stat. 1031, T.S. 993, 39 AJIL Supp. 215. This is annexed to the

Traditionally, States and the Holy See were the sole subjects of international law. In the last century, international organizations have been recognized as relevant parties as well. The development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain non-State entities.³² To a lesser degree, international law also affects multinational corporations and individuals. Their activities have a global impact and they are given the capacity to bear some rights and duties under international law. Individuals have long been subject to direct responsibility for the international crimes of piracy and slavery. Due to the absence of international accountability mechanisms, however, they could only be held liable by national legal systems until 2002 when the Statute of the International Criminal Court (ICC) entered into force.³³ The ICC provided a permanent forum in which individuals can be held directly accountable for genocide, crimes against humanity, and war crimes if States parties fail to act. There was a significant interest in adding terrorism to the mandate of the Court, but it was not decided on in Rome. The jurisdiction would likely expand to include terrorism if most States characterized terrorist acts as crimes against humanity. The attack on the World Trade Center on 11 September 2001 was characterized as a crime against humanity by Kofi Annan of the UN Secretariat and by Mary Robinson, the UN High Commissioner on Human Rights, and by many distinguished jurists.³⁴ The importance of the characterization of the 9-11 attack as a crime against humanity is that the action of various States against forces of Bin Laden has been justified as collective self-defense under article 51 although under said

Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organize the composition and the functioning of the Court.

32. See, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (Advisory Opinion).
33. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998). In July 1998 in Rome, 120 Member States of the United Nations adopted a treaty to establish for the first time in the history of the world — a permanent international criminal court. This treaty entered into force on 1 July 2002, 60 days after 60 States have become parties to the Statute through ratification or accession.
34. The French jurist and Minister of Justice, Robert Badinter, Alain Pellet of *Le Monde* and the British lawyer G. Robinson characterized the attack as a crime against humanity because of its atrocious character seen in its magnitude, its gravity, and the targeting of civilians as part of a well-planned operation.

article, self-defense is traditionally considered a legitimate response to an armed attack by a State.³⁵

The limited jurisdiction of the International Court of Justice highlights the importance of domestic laws in combating terrorism.³⁶ Jurisdiction is the capacity of a State to prescribe laws and regulations and apply this to its territorial jurisdiction, persons or economic activity. The scope of a State's jurisdiction depends on the interest of the State in affecting the subject matter in question. A State may acquire jurisdiction over a particular subject matter under various principles. Considering terrorist acts as a crime against humanity would imply that such acts may be punished wherever they may occur even if there is no actual link between the State and the parties or the acts in question. This exercise of jurisdiction of States would be based on the universality principle.³⁷ For example, in light of the global efforts to punish

35. PETER MALNCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW*, 311-14 (1997).

36. Rome Statute of the International Criminal Court, art. 36, U.N. Doc. A/CONF.183/9 (1998); The International Criminal Court, <http://www.un.org/News/facts/icfact.htm> (last accessed July 25, 2007).

There are clear conditions specified in the Rome Statute under which the Court can exercise its jurisdiction, as well as specific requirements as to when the Court can do so. There are many safeguards to prevent frivolous or politically motivated prosecutions from taking place, with ample, repetitive opportunities for challenges. When a State ratifies the Statute, it agrees to accept the jurisdiction of the Court over the crimes listed in the Statute. The Court may exercise its jurisdiction in situations that meet one of the following conditions: one or more of the parties involved is a State Party; the accused is a national of a State Party; the crime is committed on the territory of a State Party; or a State not party to the Statute may decide to accept the court's jurisdiction over a specific crime that has been committed within its territory, or by its national. But these conditions do not apply when the Security Council, acting under Chapter VII of the Charter, refers a situation to the Prosecutor.

But something else must happen first, before the Court can act. Either a State Party refers a 'situation' to the Prosecutor; the Security Council refers a 'situation' to the Prosecutor; or the Prosecutor initiates an investigation on his own authority, as set out in the Statute.

37. MALNCZUK, *supra* note 35, at 112-13. The universality principle recognizes that certain activities, universally dangerous to States and their subjects, require authority in all community members to punish such acts wherever they may occur. See, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 781, n.7. (DC Cir., Feb. 4, 1984). The premise of universal jurisdiction is that a State may exercise jurisdiction to define and punish certain offences recognized by the community of nations as of universal concern even when no other recognized basis of

aircraft piracy and hostage taking, these acts have been elevated to international crimes over which all States should exercise jurisdiction.³⁸ Under the territoriality principle, a State will have jurisdiction over crimes committed within its territory.³⁹ The nationality principle subjects a citizen of a country to punishment in the courts of his or her country even for acts committed abroad.⁴⁰ In case of the protective principle, a State may exercise jurisdiction outside its territory if the acts committed threatens its security. Some academicians have urged a more liberal interpretation of the protective

jurisdiction is present. *See also*, Rome Statute of the International Criminal Court, art. 7, UN Doc. A/CONF.183/9 (1998), which provides:

Article 7: Crimes against humanity. (1) For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (2) For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ... (emphasis supplied)

38. *See*, International Convention Against the Taking of Hostages, U.N. Doc. A/34/46 (1979); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

39. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 2 (1930).

Application of its provisions — Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction ...

See also, MALNCZUK, *supra* note 35, at 110-11.

40. *Blackmer v. United States*, 284 U.S. 421 (1932); *See*, MALNCZUK, *supra* note 35, at 111.

principle when applied to terrorist activities.⁴¹ The passive personality principle asserts that a State may apply law to an act committed outside its territory by a non-national where the victim of the act was its national.⁴² This passive personality principle is increasingly accepted as a source of jurisdiction for terrorist attacks.⁴³

Terrorism is a global phenomenon that presents new challenges to international law. The international response shows the expansion of domestic jurisdiction over terrorist acts, new dimensions of State responsibility and new strategies in fighting a war without borders.

III. HISTORY OF INTERNATIONAL INSTRUMENTS

A. Pre 9-11-01

Ethnic separatist violence in the 1930s provoked the League of Nations, formed after World War I, to encourage world stability and peace and to define terrorism for the first time, as:

All criminal acts directed against a State and intended or calculated to create a State of terror in the minds of particular persons or a group of persons or the general public.⁴⁴

41. *United States v. Yunis*, 681 F.Supp. 896 (1988); *See also*, MALNCZUK, *supra* note 35, at 111-12.

42. Restatement (Third) of Foreign Relations Law of the United States, § 402 cmt. d (1987). Passive personality is rarely accepted, except against terrorism.

43. *United States v. Yunis*, 681 F.Supp. 896 (1988). In this case the United States asserts jurisdiction over a hijacker who seized an American hostage on foreign soil. Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threaten the very foundations of world order, but it has its own interest in protecting its nationals.

44. Convention for the Prevention and Punishment of Terrorism, League of Nations, Nov. 16, 1937, O.J. no. 19, at 23 (1938); Definitions of Terrorism, http://www.unodc.org/unodc/terrorism_definitions.html (last accessed July 29, 2007); *See also*, Ben Saul, *The Legal Response of the League of Nations to Terrorism*, Jan. 19, 2006, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, available at <http://www.jicj.oxfordjournals.org/cgi/content/abstract/mqio96v1> (last accessed July 29, 2007).

Terrorism was first confronted as a discreet subject matter of international law by the international community in the mid-1930s, following the assassination of a Yugoslavian king and a French foreign minister by ethnic separatists. The League's attempt to generically define terrorism in an international treaty prefigured many of the legal, political, ideological, and rhetorical disputes which plagued the international community's attempts to define terrorism in the 50 years after the Second World War. Although the treaty never entered into

The definition defines terrorism as primarily a criminal act without regard to political or religious advocacy. In the succeeding years, the treaties took the form of agreements directed to address particular terrorist acts. From 1963-2001, there were 12 multilateral treaties directed to combat terrorism.⁴⁵

In the 1950's and 1960's, the spread of aircraft hijacking led to the adoption of multilateral treaties aimed to protect civil aviation.⁴⁶ The

force following the dissolution of the League itself, the League's core definition has been highly resilient and has influenced subsequent legal efforts to define terrorism ...

45. See, United Nations Treaty Collection (Conventions on Terrorism), <http://www.untreaty.un.org/English/Terrorism.asp> (last accessed July 25, 2007). The 12 major treaties are:

- (1) Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention", 1963 — safety of aviation); (2) Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970 — aircraft hijackings); (3) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention", 1971 — applies to acts of aviation sabotage such as bombings aboard aircraft in flight); (4) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973 — outlaws attacks on senior government officials and diplomats); (5) International Convention Against the Taking of Hostages ("Hostages Convention", 1979); (6) Convention on the Physical Protection of Nuclear Material ("Nuclear Materials Convention", 1980 — combats unlawful taking and use of nuclear material); (7) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1988 — extends and supplements the Montreal Convention on Air Safety); (8) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 — applies to terrorist activities on ships); (9) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988 — applies to terrorist activities on fixed offshore platforms); (10) Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991 — provides for chemical marking to facilitate detection of plastic explosives, e.g., to combat aircraft sabotage); (11) International Convention for the Suppression of Terrorist Bombing (1997); and (12) International Convention for the Suppression of the Financing of Terrorism (1999).

46. *Id.* Although the first recorded aircraft hijack was on Feb. 21, 1931, in Arequipa, Peru, the first real wave of hijackings began around 1958. As a response to the hijackings, the Legal Committee of the International Civil Aviation Organization met in Rome in 1962 to draft a convention on the

Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) was enacted to address terrorism and applied to acts affecting in-flight safety. The convention authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft and requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.⁴⁷ The Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) required parties to the convention to make hijackings punishable by "severe penalties."⁴⁸ The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage) (Montreal, 1971) covered attacks against a person on board a civilian aircraft in flight or against the aircraft itself, which would endanger the aircraft.⁴⁹

Due to kidnapping and assaults upon diplomats in South America, Europe and Middle East and working on the premise that crimes against

subject of crimes committed on board an aircraft in international flight. The result is the adoption of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, Sep. 14, 1963). Other multilateral treaties were the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, 1970 — aircraft hijackings) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention, 1971 — applies to acts of aviation sabotage such as bombings aboard aircraft in flight).

47. Convention on Offences and Certain Other Acts Committed on Board Aircraft, arts. 1, 6, 11, Sep. 14, 1963, 20 U.S.T. 2041, 704 U.N.T.S. 219.
48. Convention for the Suppression of Unlawful Seizure of Aircraft, art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

Any person who on board an aircraft in flight:

1. unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
2. is an accomplice of a person who performs or attempts to perform any such act commits an offence

The Convention also requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; requires parties to assist each other in connection with criminal proceedings brought under the convention. (arts. 5-10)

49. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), art. 1, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177. The convention makes it an offence for any person, unlawfully and intentionally, to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts.

diplomatic agents and other internationally protected persons create a serious threat to the maintenance of normal international relations necessary for cooperation among States, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons was opened for signature in 1973.⁵⁰ The convention covered attacks upon the person or official premises or the means of transport of an internationally protected person likely to endanger his life, person, or liberty.⁵¹

The International Convention against the Taking of Hostages (New York, 1979) provides that:

[A]ny person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention.⁵²

The Convention excluded situations where the Geneva Convention of 1949 and the additional protocols of 1977 are relevant.⁵³

50. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Feb. 20, 1977, 1035 U.N.T.S. 167, 13 I.L.M. 41.

51. *Id.* arts. 1-2.

52. International Convention Against the Taking of Hostages, art. 1, U.N. Doc. A/34/46 (1979).

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention.

Any person who:

attempts to commit an act of hostage-taking, or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

53. *Id.* art. 12.

In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of

As a response to terrorist bombings, the International Convention for the Suppression of Terrorist Bombings (New York, 1997) was adopted on 23 May 2001 creating a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious injury to the body, or with intent to cause extensive destruction of the public place.⁵⁴

The International Convention for the Suppression of the Financing of Terrorism (New York, 1999) required parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social, or cultural goals, or which also engage in such illicit activities as drug trafficking or gun running.⁵⁵ It also provided for the identification, freezing, and seizure of funds allocated for terrorist activities, as well as for the sharing the forfeited funds with other States on a case-by-case basis.⁵⁶ The convention defined terrorism as acts constituting an offense under adopted treaties relating to specific terrorist activities.⁵⁷ In addition, terrorism is:

armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

54. International Convention for the Suppression of Terrorist Bombings, art. 2, Dec. 15, 1997, U.N. Doc. A/RES/52/164.

55. *See generally*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/RES/54/109.

56. *Id.*

57. *Id.* art. 2(a). The direct or indirect financing of offenses defined in the following conventions are considered terrorist acts and are to be suppressed:

(1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on Dec. 16, 1970; (2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on Sep. 23, 1971; (3) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on Dec. 14, 1973; (4) International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on Dec. 17, 1979; (5) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on Mar. 3, 1980; (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention

any other act 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.⁵⁸

The response of the international community was centered on combating specific acts. After the 9-11 tragedy, there was an aggressive commitment to find a universal strategy to combat terrorism.

B. Post 9-11-01

In response to the terrorist acts that took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, the United Nations Security Council unanimously adopted a wide-ranging anti-terrorism resolution.⁵⁹ The resolution reaffirms the commitment made by nations in the UN Charter, Security Council resolutions and other instruments. Resolution 1373 provided steps and strategies to suppress the financing of terrorists acts, to prohibit making any funds available in the commission of terrorist acts, and to refrain from providing any form of support to terrorist acts including exchange of information and providing a safe haven to terrorists.⁶⁰ Terrorist acts should be established as serious criminal offenses in domestic laws and regulations.⁶¹ The most important provision is the recognition of the inherent right of individual or collective self-defense as a response to terrorist attacks. States were urged to work together urgently through increased cooperation and full implementation of the relevant international conventions relating to terrorism. Acting under Chapter VII of the Charter of the United Nations,⁶² the Convention provided that all States shall criminalize support of any terrorist activities and shall refrain from providing any form of active or passive support to entities or persons involved in

for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on Feb. 24, 1988; (7) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on Mar. 10, 1988; (8) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on Mar. 10, 1988; and (9) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on Dec. 15, 1997.

58. *Id.* art. 2(b).

59. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

60. *Id.*

61. *Id.*

62. U.N. Charter, arts. 39-51 (action with respect to threats to the peace, breaches of the peace, and acts of aggression).

terrorist acts. In effect, the Resolution is premised on the fact that terrorism is to be condemned and that the strategy to combat it could be found in existing international legal instruments.

The succeeding terrorist bombing and attacks on other nations were similarly responded to by the UN Security Council, using as its main instrument, Resolution 1373.

The bomb attacks in Bali, Indonesia, led to the adoption of United Nations S/RES/1438 (2002) wherein the Security Council reaffirmed the need to combat all threats to international peace and security and urged all States, in accordance with their obligations, to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks.⁶³

The Security Council also condemned in the strongest terms the heinous act of taking hostages in Moscow, the Russian Federation, on 23 October 2002, as well as other recent terrorist acts in various countries. Through United Nations S/RES/1440 (2002), the Security Council demanded the immediate and unconditional release of all hostages of this terrorist act and reminded States to honor their obligations under Resolution 1373 (2001) and to cooperate with the Russian authorities in their efforts to bring to justice those responsible for the attacks.⁶⁴

The United Nations S/RES/1450 (2002) was adopted as a response to the acts of terror perpetrated in Kenya on 28 November 2002, terrorist bomb attack at the Paradise Hotel, in Kikambala, Kenya, and the attempted missile attack on Arkia Israeli Airlines flight 582 departing from Mombasa, Kenya, on 28 November 2002, as well as other recent terrorist acts in various countries. The Security Council, reaffirmed the purposes and principles of the Charter of the United Nations and its relevant resolutions, and regarded such acts, like any act of international terrorism, as a threat to international peace and security.⁶⁵

On 16 September 2006, 192 member States adopted a resolution affirming the commitment of the United Nations to combat terrorism in all its forms and manifestations, which included a comprehensive global plan of action against terrorism.⁶⁶ The proposal of Secretary-General Kofi Annan,

63. S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002).

64. S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002).

65. S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002).

66. Adopting a Global Counter-Terrorism Strategy: 60th Session of the General Assembly, <http://www.un.org/terrorism/framework.html> (last accessed Aug. 16, 2007).

A global counter-terrorism strategy for the United Nations was adopted by all 192 Member States on 8 September 2006 and launched at a high-level meeting of the General Assembly on 19 September

which became a basis for discussions on formulating a comprehensive counter-terrorism strategy, allowed for preventive as well as operational actions and incorporated short, mid and long-term measures. It was a framework to help sustain the political will of Member States and to effectively assist them in their national, as well as regional and global counter-terrorism efforts.⁶⁷

The plan of action included measures to address the conditions conducive to the spread of terrorism, prevent and combat terrorism, build States' capacity and strengthen the role of United Nations and to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.⁶⁸ The resolution on the United Nations Global Counter-terrorism Strategy provided that terrorist acts are activities aimed at the destruction of human rights, fundamental freedoms, and democracy.⁶⁹ These are acts, methods, and practices threatening territorial integrity, security of States, and destabilizing legitimately constituted Governments.⁷⁰ The resolution reaffirmed that terrorism cannot and should not be associated with any religion, nationality, civilization, or ethnic group.⁷¹

The challenge is not to reach a consensus to condemn terrorism or to combat specific terrorist acts. What still remains unresolved is agreeing on the operative definition of terrorism. The resolution included reaffirming the Member States' determination to make every effort to resolve the outstanding issues related to the legal definition and scope of the acts covered by the convention.⁷²

2006. This is the first time that all countries in the world agreed on a common approach to fight terrorism. The adoption of the strategy is a culmination of years of efforts and fulfils the commitment made by world leaders at the 2005 September Summit. The strategy also builds on many of the proposals and recommendations made by Secretary-General Kofi Annan.

67. Kofi Annan, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, <http://www.un.org/unitingagainstterrorism/> (last accessed Aug. 16, 2007).

68. Resolution: The United Nations Global Counter-Terrorism Strategy, <http://www.un.org/terrorism/strategy-counter-terrorism.html> (last accessed Aug. 16, 2007).

69. *Id.* ¶ 7.

70. *Id.*

71. *Id.* ¶ 8.

72. *Id.* ¶ 9.

IV. LEGAL CONCEPT OF TERRORISM: PROBLEM OF OPERATIVE DEFINITION

Terrorism is a real and deadly threat to the community of nations. It is a global phenomenon often complicated by political, economic, social, cultural, and religious issues. There is a consensus that terrorism is to be condemned and that it is a threat to the national security of many countries. The strategy of the United Nations, in its fight against terrorists, is hinged on international cooperation. Also, the international conventions against terrorism usually depend on domestic laws for implementation. A common and precise definition of terrorism is important to foster cooperation between law enforcement personnel in different countries and to recognize that terrorism is a complex phenomenon and defined in many different ways.

The word "terror" was first used to describe the Jacobin *Reign of Terror*, which followed the French Revolution in 1789.⁷³ One 1988 study identified a total of 109 different definitions, and the number would be far higher today.⁷⁴ The common element in these definitions is that terrorism involves violence and the threat of violence, and seeks to create fear, not just within the direct victims but among a wide audience. The UN's academic consensus on the definition of terrorism is that:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by clandestine individual, group or State actors, for idiosyncratic, criminal or political reasons, whereby — in contrast to assassination — the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence-based communication processes between terrorists, victims, and main targets are used to manipulate the main audience, turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.⁷⁵

73. John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire* 19 ISRAEL YEARBOOK ON HUMAN RIGHTS 13, 14 (1989); Ben Golder & George Williams, *What is "Terrorism"?* *Problems of Legal Definition* 27 UNSW L.J. 270 (2004).

74. Ben Golder & George Williams, *What is "Terrorism"?* *Problems of Legal Definition* 27 UNSW L.J. 270 (2004).

75. ALEX P. SCHMID & A.J. JONGMAN, *POLITICAL TERRORISM* 5 (1988). This definition is written by terrorism expert Alex P. Schmid and is widely used by social scientists. See also, *Madan Singh v. State of Bihar*, <http://www.sacw.net/hrights/judgementjehanabad.doc> (last accessed Aug. 21, 2007). In this case, the Supreme Court of India adopted Alex P. Schmid's definition of acts of terrorism as "peacetime equivalents of war crimes."

Terrorism is a pervasive legal concept but it has not been defined in all jurisdictions. It has been easy to define terrorism as particular acts: hijackings, suicide bombings, hostage takings, assassinations, or public bombings. The main consideration is the attack itself and its effects rather than terrorist platforms. General Assembly Resolution 49/60, adopted on 9 December 1994, contains a provision describing terrorism as:

[c]riminal acts intended or calculated to provoke a State of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.⁷⁶

Some definitions treat all acts of terrorism as a simple criminal activity regardless of political or religious motivations. For example, in the United States the standard definition used by the Federal Bureau of Investigation (FBI) describes terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."⁷⁷ The European Union provides that terrorist offenses are certain criminal and serious offenses against persons and property which:

given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.⁷⁸

Treating terrorism as a purely criminal act is problematic and is a cause of disagreement among nations. It does not distinguish terrorist acts from cases in which violent attacks against a government may be legitimate. Air

76. G.A. Res. 49/60, U.N. Doc. A/Res/49/60 (Dec. 9, 1994).

77. Federal Criminal Code, chapter 113B, 18 U.S.C. § 2331. Terrorism is defined as:

activities that involve violent ... or life-threatening acts... that are a violation of the criminal laws of the United States or of any State and ... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and ... (C) occur primarily within the territorial jurisdiction of the United States ... [or] ... (C) occur primarily outside the territorial jurisdiction of the United States ...

78. Framework Decision on Combating Terrorism, art. 1, European Union Framework Decision 2002/475/JHA, June 13, 2002.

attacks of the United States in Iraq have caused civilian casualties and have been considered by many as terrorist acts. In the past, the African National Congress of South Africa committed violent actions against that country's apartheid government and yet have not been considered as terrorism.⁷⁹ Another example is the Resistance movement against the Nazi occupation of France during World War II.⁸⁰ The lack of consensus on what constitutes terrorism points to its inescapably political nature, perhaps best encapsulated in the aphorism that "one person's terrorist is another person's freedom fighter."⁸¹

A. On the Character of Perpetrators

Terrorism is perpetuated by individuals or organizations with a particular agenda. The importance of motives and intentions become apparent in light of the reality that many guerrilla groups are accused of being terrorist organizations while they claim to be reform movements. The contemporary Palestine Liberation Organization is accused of orchestrating many terrorist attacks yet they are also recognized as the legitimate representative of the Palestinian people and their clamor for self-determination. Groups conducting revolution such as the Communist Party of Nepal, the Chechen rebels and the Tamil Tigers are denigrated as terrorists although they accuse the respective countries they are fighting as also being responsible for terrorist attacks.

Terrorist acts are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons. It is the element of fear and the degree to which terrorism relies on this fear that distinguishes terrorists from freedom fighters.

Conventional military forces may engage in psychological warfare, but their principal means of victory is strength of arms. Guerrilla forces may rely on acts of terror but their primary aim is to overthrow a government and occasionally these rebels succeed.⁸² Terrorism proper is thus the systematic use of violence to generate fear, and thereby to achieve political goals, when direct military victory is not possible. This has led some social scientists to

79. *Terrorism*, in ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9071797/terrorism> (last accessed July 28, 2007).

80. *Id.*

81. Golder & Williams, *supra* note 74, at 272.

82. Guerrilla forces aim at military victory and occasionally they succeed (e.g., the Viet Cong in Vietnam and the Khmer Rouge in Cambodia).

refer to guerrilla warfare as the "weapon of the weak" and terrorism as the "weapon of the weakest."⁸³

B. On Currently Used Definition

Terrorism is an act intended or calculated to provoke a state of terror. Terrorists use weapons of destruction and violence in order to achieve a particular end. Terrorists are to be distinguished from guerrilla fighters although the use of violence is common to State and non-State groups. Another line to be drawn is when the violence used is still legitimate. This is one of the inherent controversies in the definition of terrorism. Among these definitions, several do not recognize the possibility of a lawful use of violence by civilians against an invader in an occupied country and would thus label all resistance movements as terrorist groups. Others make a distinction between lawful and unlawful use of violence. The United States Department of Defense defines terrorism as the "calculated use of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in pursuit of goals that are generally political, religious, or ideological."⁸⁴

Some definitions are so broad like that provided in the United Kingdom's Terrorism Act of 2000 which includes the disruption of a computer system wherein no violence is intended or results.⁸⁵ The majority of definitions in use have been written by agencies directly associated with a government, and are systematically biased to exclude governments from the definition. Russia, for example, published a list of 17 groups it regards as terrorist organizations and did not include the Palestinian movement Hamas

83. *Terrorism*, in ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9071797/terrorism> (last accessed July 28, 2007).

84. *Definition of Terrorism*, in WIKIPEDIA, http://www.en.wikipedia.org/wiki/Definition_of_terrorism (last accessed July 25, 2007).

85. The United Kingdom defined acts of terrorism in the Terrorism Act of 2000 as the use of threat of action where: (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. The British Terrorism Act 2000 defines terrorism so as to include not only violent offences against persons and physical damage to property, but also acts designed seriously to interfere with or seriously to disrupt an electronic system.

or Lebanon's Hizbullah group, because they included in their terrorist list only those organizations which represent the greatest threat to their own security.⁸⁶ Ultimately, the distinction is a political judgment.

V. ILLUSTRATIVE CASES ON RESPONSIBILITY FOR ACTS OF TERRORISM: AL-QAEDA AND TALIBAN MILITIA AND U.S. DOMESTIC RESPONSE: "WAR ON TERRORISM"

A. Preliminary Inquiry

In the immediate aftermath of the 9-11 attacks, the United States declared a war on terror and a U.S.-led coalition launched an attack against the Taliban militia of Afghanistan. The Taliban is a fundamentalist movement that ruled most of Afghanistan after overthrowing the government and gaining control of Kabul, the country's capital. The Taliban regime, however, was recognized only by Pakistan, Saudi Arabia, and the United Arab Emirates. On 7 October 2001, the United States, aided by the United Kingdom, Canada, and supported by a coalition of other countries including several from the National Atlantic Treaty Organization (NATO) alliance, initiated military actions in Afghanistan, code named Operation Enduring Freedom (OEF-A). The initial military objectives of OEF-A, as articulated by President George W. Bush in his September 20th Address to a Joint Session of Congress and his October 7th address to the country, included the destruction of terrorist training camps and infrastructure within Afghanistan, the capture of Al-Qaeda leaders, and the cessation of terrorist activities in Afghanistan.⁸⁷ NATO declared that the attacks on the United States were within the parameters of its charter and that article 5 of the NATO agreement was satisfied on 12 September 2001.⁸⁸ The Taliban forces were

86. Associated Press, Hamas, Hizbullah not on Russia's terror list, <http://www.ynetnews.com/articles/0,7340,L-3282840,00.html> (last accessed July 28, 2007).

87. Office of International Information Programs, U.S. Department of State, Bush Announces Start of a "War on Terror", <http://www.globalsecurity.org/military/library/news/2001/09/mil-010920-usia01.htm> (last accessed July 28, 2007).

88. North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

eventually overthrown by U.S.-led aerial bombing in cooperation with the Northern Alliance ground forces. Some smaller groups of the Taliban are currently engaged in a protracted guerrilla war against allied NATO forces and the current government of Afghanistan.

B. Interplay Between Terrorism and Humanitarian Law

The 9-11 attack was an atrocity condemned by many nations. Subsequent attacks against Afghanistan led by the United States were carried out under the banner of a war against terrorism. U.S. pilots have systematically dropped bombs and fired projectiles in Afghanistan causing the death of more than 3000 civilians.⁸⁹ The Taliban regime was no match for the United States. Interestingly enough, the World Bank observed:

Afghanistan — suffering from more than 20 years of conflict, a three-year drought, loss or degradation of most of its infrastructure, depletion of its human resource base, and erosion of social capital — is one of the poorest and certainly the longest-suffering country. With an estimated 7 million people vulnerable to famine and millions already displaced from their homes (domestically or as refugees to neighboring countries), Afghanistan faces a dire humanitarian emergency. It is doubtful that there will be a complete accounting of the deaths and the sufferings of the Afghans and other wretched masses because it is of little consequences to the rich and the powerful. Afghanistan faces enormous problems of reconstruction and eradication of poverty.⁹⁰

The Congress of the United States also signed into law the USA Patriot Act,⁹¹ which has been criticized because it allows law enforcement to invade

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

89. See, Marc W. Herold, A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting, <http://www.pubpages.unh.edu/~mwherold/> (last accessed July 28, 2007). This war against Afghanistan has led to the deaths of at least 3,000 civilians, according to Professor Marc Herold's comprehensive study of available media reports. It also led to countless injuries, immense hardships, diseases, and dislocations of Afghans. Thus, grave sufferings were inflicted on one of the poorest people in the world. The US military actions put a large number of people on the brink of malnutrition and risk of starvation.

90. Afghanistan World Bank Approach, available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2001/12/11/000094946_01112104010390/Rendered/INDEX/multiopage.txt (last accessed July 29, 2007).

91. An Act to Deter and Punish Terrorist Acts in the United States and Around the World, to Enhance Law Enforcement Investigatory Tools, and for Other Purposes [USA PATRIOT ACT], HR 3162, § 352 (2001).

the privacy of citizens and eliminates judicial oversight of law-enforcement and domestic intelligence gathering. The Homeland Security Act of 2002⁹² created the Department of Homeland Security representing the largest restructuring of the U.S. government in contemporary history.

The United States also set up a detention center at Guantanamo Bay, Cuba, to hold people suspected by the executive branch of the U.S. government as being Al-Qaeda and Taliban operatives and prisoners captured in Afghanistan and all over the world. In July 2003, about 680 alleged Taliban members and suspected Al-Qaeda terrorists from 42 different countries were incarcerated there.⁹³ The U.S. called the prisoners as "illegal enemy combatants" rather than prisoners of war (POWs).⁹⁴ The U.S. government uses article 4 of the Geneva Convention to support their position that those detained do not have the status of prisoners of war:

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.⁹⁵

The detention center in Guantanamo Bay and the military commissions set up by the Bush administration to try the detainees have been criticized by many States and international organizations for being violative of human

92. To Establish the Department of Homeland Security, and for Other Purposes. [HOMELAND SECURITY ACT], H.R. 5005 (2002).

93. Guantanamo Bay Detention Camp
http://en.wikipedia.org/wiki/Guantanamo_Bay_detainment_camp (last accessed July 28, 2007).

94. *Id.*

95. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

rights.⁹⁶ One of the detainees is Salim Ahmed Hamdan, a driver formerly employed by Osama Bin Laden to work on an agricultural project to support the people of Afghanistan. Hamdan questioned the legitimacy of the special military commissions set up by the United States.⁹⁷ Hamdan was captured during hostilities in 2001 and transferred to Guantanamo Bay charged with conspiracy to commit terrorism. He was to be tried by the military commission but he filed a petition for writ of *habeas corpus* arguing that the military commission was illegal and lacked the protections required under the Geneva Conventions and United States Uniform Code of Military Justice. The decision held that Hamdan can still be tried provided that his case should be heard in a court where adequate protection of his human rights could be made. The United States later issued a Statement that all detainees at Guantanamo Bay and in U.S. military custody everywhere are entitled to humane treatment under the Geneva Conventions. The United States Congress, however, enacted the Military Commissions Act of 2006 to facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other purposes.⁹⁸ The Act provided that treaty obligations under the Geneva Conventions shall not be invoked to establish certain claims.⁹⁹ This again raised the

96. The legitimacy of these detentions has been questioned by, among others, Member States of the European Union, the Organization of American States, and Amnesty International.

97. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

98. An Act to Authorize Trial by Military Commission for Violations of the Law of War, and for Other Purposes [MILITARY COMMISSION ACT OF 2006], Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

99. *Id.* § 5, 6(a)(3)(A).

Sec. 5. Treaty Obligations Not Establishing Grounds for certain Claims

(a) In General.—No person may invoke the Geneva Conventions or any protocols thereto in any *habeas corpus* or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

Sec. 6. Implementation of treaty Obligations

(a) Implementation of treaty Obligations.—

(3) Interpretation by the President.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

question of which court would hear cases involving Guantanamo Bay detainees.

C. *Military Commission Act of 2006*

The United States Military Commissions Act of 2006 changes many pre-existing laws. The Act contained *habeas corpus* provisions that removed access to the courts for any alien detained by the United States government who is determined to be an enemy combatant, or who is "awaiting determination" regarding enemy combatant status.¹⁰⁰ This allowed the United States government to detain such aliens indefinitely without prosecuting them in any manner. The provision applied to all cases pending at the time the Act is enacted, as well as to all such future cases.¹⁰¹ The said act defines an unlawful enemy combatant as a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al-Qaeda, or associated forces).¹⁰²

An unlawful enemy combatant shall be tried under a military commission convened for this purpose if the government chooses to bring a

100. *Id.* § 7.

Sec. 7. Habeas Corpus Matters:

(a) In General ...

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

101. *Id.* § 3 (10 U.S.C. § 948d). Under section 3, which amends subtitle A of title 10, United States Code, a finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter

102. *Id.* § 3 (10 U.S.C. § 948a(1)(i)).

prosecution against the detainee. The accused shall be informed of the charges against him as soon as practicable.¹⁰³ The accused has a right to a civilian defense lawyer provided that the lawyer is eligible for access to classified information that is classified at the level Secret or higher.¹⁰⁴ A finding of guilty by a particular commission requires only a two-thirds majority of the members of the commission present at the time the vote is taken.¹⁰⁵

On 13 December 2006, Salim Ahmed Hamdan tried to challenge the MCA's declination of *habeas corpus* to alien unlawful enemy combatants in the United States District Court for the District of Columbia. That court, however, held that the right of the unlawful enemy combatants to file a petition for *habeas corpus* in civilian courts is not a constitutional right and can therefore be regulated by statute.¹⁰⁶

D. Self-Defense and the Limitation on War on Terrorism

In the absence of a code penalizing terrorism, an international police capable of enforcing any such law, or an international court with jurisdiction over all acts of terrorism, counter-terrorism efforts usually take the form of domestic laws.¹⁰⁷ The right to collective self-defense against terrorism, first recognized after the 9-11 attacks, prompted the United Nations Security Council to adopt Resolution 1368, which called on all States to work together urgently to bring to justice those responsible for terrorist attacks and stressed that those responsible for aiding or supporting these acts will likewise be held accountable.¹⁰⁸ A U.S.-led coalition launched a war against Afghanistan without waiting for a United Nations endorsement. The Military Commission Act of 2006 advanced a doctrine of enemy status and State responsibility. Terrorism is to be condemned and States who aid terrorists would be considered enemies.

The United States had prosecuted airplane hijackers for crimes committed outside its territorial jurisdiction under the passive personality principle. States have also claimed jurisdiction for *jus cogens* offenses and crimes against humanity. With terrorist groups rising in prominence, counter-terrorist measures have, however, become more aggressive. The

103. *Id.* § 3 (10 U.S.C. § 948q(b)).

104. MILITARY COMMISSIONS ACT OF 2006, § 3 (10 U.S.C. § 949c(b)(3)(D)).

105. *Id.* § 3 (10 U.S.C. § 949m(a)).

106. Robert Barnes, *Judge Rejects Detention Challenge of Bin Laden's Driver*, THE WASHINGTON POST, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/13/AR2006121301946.html> (last accessed July 28, 2007).

107. GRISET & MAHAN, *supra* note 6, at 270-81.

108. U.N. Doc. S/RES/1368 (Sep. 12, 2001).

attacks on Afghanistan and Iraq have been justified on the ground of the right to self-defense. Legitimacy and limits of the use of self-defense as a response to terrorist attacks remain an issue.

Under the United Nations Charter, State signatories have an inherent right of self-defense in response to an armed attack. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁰⁹

The article empowered Member States to a military-based self-defense in either their respective individual or collective capacities. Historically, the right embodied in the United Charter was read narrowly. Member States have a right to a military-based self-defense in either their respective individual or collective capacities only in the event of an armed attack. In the 1986 case of *Nicaragua v. US*,¹¹⁰ the International Court of Justice held that the attacks of the United States on Nicaraguan ports and oil installations, its support to the contras in Nicaragua and armed opposition in El Salvador, is not justified under the doctrine of collective self-defense. To justify self-defense, the elements of necessity and proportionality should be satisfied.

The Court observed that the United States measures cannot be said to correspond to a necessity justifying the action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. A factor considered was how the U.S. actions took place several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed and when the actions of the opposition were considerably reduced in consequence. The court held that the activities of the United States against Nicaragua were no longer necessary and that the reaction of the United States in the context of what it regarded as self-defense was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.¹¹¹

Nicaragua was alleged to have supplied arms to the opposition in El Salvador, but the court held that although the concept of an armed attack included the dispatch by one State of armed bands into the territory of

109. U.N. Charter, art. 51.

110. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27).

111. *Id.* at 14 ¶ 237.

another State, the supply of arms and other support to such bands cannot be equated with armed attack.¹¹² The use of force by one State against another may be justified only on the ground that the State has committed a wrongful act of force against a third State only when the wrongful act provoking the response was an armed attack.¹¹³ It is the position of the court that there is no customary international law or any principle under the United Nations system that grants States the right of collective armed response to acts that do not constitute an armed attack.¹¹⁴ The court also concluded that the protection of human rights is a noble objective, but the use of force could not be the appropriate method to monitor or ensure such respect.¹¹⁵

In order to justify the use of force, the response must be proportional to the armed attack. The acts of which Nicaragua are accused, even assuming these to have been established and imputed to that State, could only have justified proportionate counter-measures on the part of the States that were injured by these acts, namely El Salvador, Honduras, or Costa Rica.¹¹⁶

After the 9-11 attacks, the provision on collective self-defense is again being invoked to justify the actions against Afghanistan and Iraq. Many definitions of terrorism adopt the view that terrorism is a criminal act. However, the recent attacks have shown that terrorism is a very grave problem, that international networks now exist to finance terrorist activities and that several States are now being accused of harboring terrorists. Terrorist activities have been enhanced by modern advances in destructive capability and the growing willingness of groups to take the lives of the innocent to further their own beliefs. International law regarding the use of force has developed in response to centuries of inter-State warfare and terrorism is increasingly being considered as an act of war.

One of the criticisms to the U.S. attacks against Afghanistan is that despite the bombings, those responsible for the World Trade Center attacks were not detained. A lot of suspected terrorists were brought in the Guantanamo Bay Camp. These detainees continue to question the legitimacy of not being treated as prisoners of war on the claim that they were in fact engaged in a holy war. Clearly, in addition to detaining those responsible, the proportionality principle should also consider that International Humanitarian Law should be respected. States have a duty to ensure that basic human rights are enforced but they also have an obligation to protect their citizens and residents from threats of terrorism. The measures to be taken should, however, not lead to the deaths of more civilians.

112. *Id.* ¶ 247.

113. *Id.* ¶ 193-95.

114. *Id.* ¶ 211.

115. *Id.* ¶ 267-68.

116. *Id.* ¶ 249.

Further, the primary targets should not be civilian lives but military installations and targets. Another element is to refer to Security Council authorization for the use of force against specific States. The United States went ahead with aerial attacks on Afghanistan without waiting for endorsement from the United Nations. In *Nicaragua*, the Court held that no customary international law provides the requirement to make a report to the United Nations on a State's claim to be acting on the basis of collective self-defense under article 51 of the United Nations Charter.¹¹⁷

E. Ramification Beyond U.S. Response

It is evident that terrorist attacks are no longer limited to political assassinations or bombings conducted by individuals or small groups with limited resources. The terrorists of this decade belong to an international network, are well funded, and have come up with more elaborate and complex plans that have led to deaths and destruction. One strategy that has been adopted to combat terrorism is by suppression of the financing of terrorist acts. United Nations Security Council Resolution 1373 included provisions criminalizing the willful provision or collection of funds in order to carry out terrorist acts, freezing of financial assets and prohibiting of making funds available, or providing any support to the commission of terrorist acts.¹¹⁸

The USA Patriot Act,¹¹⁹ in amending the United States Code, included anti-money laundering provisions. The Act required that each financial institution should establish anti-money laundering programs.¹²⁰ As of this writing, Australia and New Zealand are similarly pursuing new Anti-Money Laundering Laws.¹²¹ Counter-terrorism measures aim to have a crackdown on the money trail that funds terrorism. These security measures would have a great impact on the way businesses are run globally. In the panel, *The Impact of Terrorism on Financial Institutions*, the issue was explored from various perspectives:

The long-term impact of terrorism on the stock market, one panelist maintained, was quite limited, but financial markets continued to be vulnerable to terrorist attacks, for example from cyber space. Furthermore, the participants highlighted the absolute need to combat corruption and

117. *Id.* ¶ 237.

118. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

119. USA PATRIOT ACT, § 352.

120. *Id.*

121. See generally, Anti-Money Laundering and Counter-Terrorism Enacting Measures, <http://www.ag.gov.au/aml> (last accessed Aug. 16, 2007); Anti-money Laundering and Countering the Financing of Terrorism, <http://www.justice.govt.nz/fatf/index.html> (last accessed Aug. 21, 2007).

overhaul the existing practices and methods through which terrorist financing is fought.¹²²

The focus on enforcing security measures on financial institutions is not unfounded. The United Nations estimates that every year, around USD 200 billion is circulating in global informal banking systems with a significant percentage alleged to be at the disposal of terrorist networks.¹²³ The principles of due diligence and knowing your customers emphasize the need to identify and verify customer identity and conduct a scrutiny of transactions undertaken throughout the course of a business relationship.¹²⁴

F. Terrorist Listing of Individuals and Organizations

The United States introduced the concept of enemy status in the wake of the 9-11 tragedy. Pursuant to Resolution 1267, the Security Council Committee was established. The committee had approached States to seek information about the names already on the list and the submission of new ones. The problem in not having a universal operative definition of terrorism is that it would be unlikely to have a common terrorist list. Most States would include in their terrorist list only those that would directly be a threat to national security.

VI. APPLICATION IN THE PHILIPPINES

A. Terrorist Listing Applied to the Communist Rebels and Abu Sayyaf

In order to curtail support of terrorist organizations, the United States had designated certain groups as Foreign Terrorist Organizations. The foreign organization must engage in terrorist activity or retain the capability and intent to engage in terrorist activity, and the organization's terrorist activity or terrorism must threaten the security of U.S. nationals or the national security of the United States.¹²⁵ Terrorist activity means any activity, which is unlawful under the laws of the place where it is committed involving the following: (1) high jacking or sabotage of any conveyance; (2) seizing or detaining another individual in order to compel a third person to do or

122. The Impact of Terrorism on Financial Institutions, <http://www.summit.clubmadrid.org/keynotes/impact-of-terror-on-financial-institutions.html> (last accessed July 28, 2007). The panel was organized in collaboration with the *Instituto de Empresa*.

123. See, *The War on Terror Money*, CHRISTIAN SCIENCE MONITOR, Apr. 8, 2004.

124. Jane Wilson, *Knowing your customers - increases your protection*. GENERAL MANAGER OF BUSINESS INFORMATION SOLUTIONS, Nov. 23, 2004, http://www.vedaadvantage.com/VANTAGE/print/print.aspx?f=knowing_your_customers.aspx (last accessed July 29, 2007).

125. Immigration, Asylum and Nationality Act of 2006, § 219(a)(4), 8 U.S.C. 1189(a)(4).

abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (3) a violent attack upon an internationally protected person; (4) an assassination; and (5) use of biological, chemical or nuclear weapon, device or explosives.¹²⁶ Once designated as a foreign terrorist organization, the members will be inadmissible or removable from U.S. territory and financial institutions will block their assets.

Among the groups designated as Foreign Terrorist Organizations are the Abu Sayyaf Group and the Communist Party of the Philippines/New Peoples' Army (CPP/NPA).¹²⁷ The Abu Sayyaf's Jihad is said to be part of the network of international terrorism with the Abu Sayyaf's fighters funded and trained by Al-Qaeda.¹²⁸

The Council of the European Union included Jose Maria Sison and the New Peoples' Army (NPA) in the list of so-called terrorist organizations.¹²⁹ Following the adoption of this list, the joint bank account of Mr. Sison and his wife was frozen. The social benefits received by Sison were suspended and he was prohibited from subscribing to insurance as an apparent measure under suppression of terrorist financing.

B. Specific Challenges to the Adoption of Domestic Legislation

While Malaysia used to be criticized for its Internal Security Act and the alleged human rights violation that has resulted from its implementation, after the 9-11 attack, the United States has become silent with regard to the human rights record of Malaysia.¹³⁰ Terrorist attacks may be heinous acts,

126. *Id.* § 212(a) (3) (B).

127. US Department of State: Foreign Terrorist Organizations (FTOs), OFFICE OF COUNTER-TERRORISM FACT SHEET, Oct. 11, 2005, available at <http://www.State.gov/s/ct/rls/fr/37191.htm> (last accessed July 28, 2007). More than 40 groups are currently designated Foreign Terrorist Organizations including: (1) Abu Sayyaf Group; (2) Communist Party of the Philippines/New People's Army (CPP/NPA); (3) Gama'a al-Islamiyya (Islamic Group); (4) HAMAS (Islamic Resistance Movement); (5) Hizballah (Party of God); (6) Islamic Jihad Group; (7) Liberation Tigers of Tamil Eelam (LTTE); (8) Libyan Islamic Fighting Group (LIFG); (9) Palestine Liberation Front (PLF); and (10) al-Qa'ida.

128. RESSA, *supra* note 15, at 107-10.

129. Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, EC 2580/2001, Dec. 27, 2001 (70-75 OJ L344 28/12/2001).

130. *Malaysia's Internal Security Act and Suppression of Political Dissent*, A HUMAN RIGHTS WATCH BACKGROUNDER, <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm> (last accessed July 28, 2007).

but the war against terrorism should not be fought at the expense of human rights and basic civil liberties.

Amnesty International has criticized the United States for its alleged systematic violations of international law. They condemn the human rights violation committed under the banner of counter-terrorist measures. These violations include: secret detention, enforced disappearance, torture, and other cruel, inhuman or degrading treatment, outrages upon personal dignity, including humiliating treatment, denial and restriction of *habeas corpus*, indefinite detention without charge or trial, prolonged *incommunicado* detention, arbitrary detention, and unfair trial procedures.¹³¹ There appears to be no safeguard for potential humanitarian consequences arising from the freezing of the assets of mixed entities, which provided assistance to the needy, as well as to terrorists.

Many domestic laws enacted to implement international agreements to counter terrorism have similarly been problematic. The Internal Security Act of Malaysia, for example, is alleged to have been used by the Malaysian government over the years to silence and control the administration's opposition.¹³² In the Philippines, the war against terrorism led to the immediate signing into law of the Human Security Act. While still being discussed in Congress, the bill was regarded by some of the opposition as a resurrection of the Anti-Subversion Law. Representative Lorenzo Tañada III described the proposed Anti-Terrorism Bill as a revival of the Anti-Subversion Law during the Marcos regime and expressed serious concern that the law may be interpreted to jail members of the opposition, adversarial

131. United States of America: Military Commissions Act of 2006 – Turning Bad Policy Into Bad Law, <http://www.web.amnesty.org/library/index/ENGAMR511542006> (last accessed July 28, 2007).

132. *Malaysia's Internal Security Act and Suppression of Political Dissent*, A HUMAN RIGHTS WATCH BACKGROUNDER, <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm> (last accessed July 28, 2007). Over the years, the Malaysian government has consistently used the Act for its own political purposes to detain thousands of citizens, including political opposition leaders, academicians, trade unionists, religious, social, environmental, and women's rights activists. The ISA was used to arrest political opponents of Mahathir in a major crackdown in 1987-88, as well as politicians in Sabah, east Malaysia, in 1990, whose party was considered a major rival to the ruling party, UMNO. In November 1997, 10 people were arrested under the ISA for allegedly spreading Shiite teachings deemed detrimental to national security: Muslims in Malaysia are Sunnis. The ISA was used in 1998 to arrest Deputy Prime Minister Anwar Ibrahim and six of his political supporters. Anwar was the primary leader of opposition to Mahathir, and is currently serving a 15-year sentence following convictions in 1999 and 2000 in politically motivated trials for sodomy and corruption and abuse of power.

business groups, members of the media, and the academe.¹³³ The Anti-Subversion Law provided that nothing in the Act shall be interpreted as a restriction to freedom of thought, of assembly and of association for purposes not contrary to law as guaranteed by the Constitution and guaranteed that no prosecution shall be made unless the city or provincial fiscal, or any special attorney or prosecutor duly designated by the Secretary of Justice, as the case may be, finds after due investigation of the facts, that a *prima facie* case for violation of this Act exists against the accused, and thereafter presents an information in court against the said accused in due form.¹³⁴ Despite this guarantee, the law was used to justify the arrest and detention of thousands of Filipinos suspected of subversion. Among them were then President Marcos's critics and political opponents namely, Senator Benigno S. Aquino, Jr., Jose W. Diokno, and Jovito R. Salonga.

In addition, laws against terrorism include provisions that may be violative of right to privacy and communication. The Bush administration invoked 9-11 as the reason to initiate a secret National Security Agency operation "to eavesdrop on telephone and e-mail communications between the United States and people overseas without a warrant."¹³⁵

133. *Anti-terrorism bill, a revival of the anti-subversion law*, LP solon says, Oct. 25, 2005, http://www.liberalparty.ph/news/News-LP2005/lp_antiterrorism.html (last accessed Dec. 21, 2005). Rep. Lorenzo III Tañada (4th District, Quezon) said the proposed anti-terrorism bill resembles the anti-subversion law during the Marcos regime, which was used to jail (members of) the legitimate opposition and hunt down suspected enemies of the State including communist and Muslim rebels. He also said that:

This anti-terrorism bill, like its precursor, will be utilized to suppress protest actions, assemblies or mere pronouncements from anyone considered as anti-government. The government may categorize a rally or demonstration as a terrorist act since to them it is economic terrorism. The government may arrest and jail anyone they consider terrorists once the bill is enacted into law. The anti-terrorism bill is not a cure-all measure to threats of terrorism on the country. Bombings and other terrorist attacks may happen anytime of the day and the government will not be able to stop them even if the anti-terrorism law were passed.

134. An Act to Outlaw the Communist Party of the Philippines and Similar Associations, Penalizing Membership Therein, and for Other Purposes, Republic Act No. 1700 (1957).

135. Jim Vandehei & Dan Eggen, *Cheney Cites Justifications For Domestic Eavesdropping*, THE WASHINGTON POST, Jan. 5, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/04/AR2006010400973.html> (last accessed July 28, 2007).

Terrorism is said to be rooted in a culture of intolerance, religious extremism, or structural inequalities within societies. In *Nicaragua*, the International Court held that whether or not the Nicaraguan Government was establishing a totalitarian Communist Dictatorship, adherence by a State to any particular doctrine does not constitute a violation of customary international law. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.¹³⁶ Adherence to a particular ideology is different from religious extremism. The Taliban Militia adhered to strict fundamentalist Islamic Law which has been criticized for being abusive to women and children. One of the major reasons invoked by the United States, however, when it waged a war against Afghanistan, is the failure of the latter to turn over Osama Bin Laden and the accusation that Afghanistan harbored and supported terrorists.

Terrorism has been called weapon of the weakest. Many of those identified as terrorist organizations claim to represent a marginalized sector of society. The Palestinians in Israel earn so much less than their Jewish neighbors and the difference in their quality of life is glaring. The Tamil Tigers in Sri Lanka as well as the Abu Sayyaf commit terrorist acts under the context of a fight for the right to independence and self-determination.

C. Philippine Anti-Terrorism Law (*Human Security Act of 2007*)

In the Philippines, the threat of terrorism led to the adoption of the Human Security Act (HSA).¹³⁷ The House of Representatives approved a bill against terrorism as early as 2005 and Speaker Jose de Venecia stated that the bill was a major step to enhance the country's capability to meet threats from regional and global terrorism.¹³⁸

The Human Security Act of 2007 declares that it will be the policy of the State to protect life, liberty, and property from acts of terrorism and to make terrorism a crime against the Filipino people, against humanity, and

136. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 ¶ 249 (1988).

137. An Act to Secure the State and Protect our People from Terrorism [HUMAN SECURITY ACT OF 2007], Republic Act No. 9372 (2007).

138. Albano and Tubianosa, *House approves Anti-terrorism bill*, PUBLIC RELATIONS AND INFORMATION DEPARTMENT (CONGRESS), Dec. 15 2005, available at <http://www.congress.gov.ph/press/details.php?pressid=1062> (last accessed Dec. 18, 2005); Tita Valderama, *House 'railroads' terror bill*, Dec. 16, 2005, available at <http://www.journal.com.ph/news.asp?pid=2&sid=1&nid=16146&month=12&day=16&year=2005> (last accessed Dec. 18, 2005). Speaker De Venecia says, "Approval of the anti-terrorism bill reflects our resolve to fight head-on the threats of terrorism."

against the law of nations.¹³⁹ It further recognizes the need for a comprehensive approach to the problem and the need to address the root causes of conflict. The State commits that the implementation of the policy would not be at the expense of basic rights and fundamental liberties.

1. Definition of Terrorism

The Human Security Act defines terrorism as:

Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:

- A. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
- B. Article 134 (Rebellion or Insurrection);
- C. Article 134-a (Coup d'Etat), including acts committed by private persons;
- D. Article 248 (Murder);
- E. Article 267 (Kidnapping and Serious Illegal Detention);
- F. Article 324 (Crimes Involving Destruction),

or under

1. Presidential Decree No. 1613 (The Law on Arson);
2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
4. Republic Act No. 6235 (Anti-Hijacking Law);
5. Presidential Decree No. 532 (Anti-piracy and Anti-highway Robbery Law of 1974); and,
6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.¹⁴⁰

What is immediately seen in the definition of terrorism provided in the law is that it fails to consider terrorism as a political crime or at least a crime committed in pursuit of a religious ideology.¹⁴¹ The element of intent is also

139. HUMAN SECURITY ACT OF 2007, § 2.

140. *Id.* § 3.

141. See, DAVID WHITTAKER, *THE TERRORISM READER* 3-4 (2001). Some of the definitions of terrorism cited are as follows:

The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (FBI)

irrelevant under this special penal law. International practice in this regard is mixed. At least two international law instruments — Taking of Hostages Convention (1979) and Financing of Terrorism Convention (1999) — make intent relevant. Another distinctive character of the law as differentiated from crimes punishable under the Revised Penal Code is the need to suppress the *preparatory acts* through interventions in a non-violent manner in order to deter acts of terrorism. Before, the efforts of States were focused on either attempted or consummated acts of terrorism for purposes of punishment.

It may be arguable that the law fails to provide sufficient standards by which to gauge whether a crime is an act of terrorism or a felony like “[d]amage and obstruction to means of communication,” or “[r]esistance and disobedience to a person in authority or the agents of such person.”¹⁴² The additional requirement that the criminal act must create a condition of widespread and extraordinary fear in the public, and that the crime must be committed in order to coerce the government to give in to an unlawful demand may be viewed as overbroad and susceptible to abuse or misapplication to a variety of situations. To determine whether the fear created by a criminal act has already become extraordinary, what is the applicable test? In view of this, the implementation of the law could become subjective.

The calculated use of violence or the threat of violence to inculcate fear, intended to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological. (US Department of Defense)

The use of threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against any person or property. (United Kingdom Government)

The use or threatened use of force designed to bring about political change. (Brian Jenkins)

142. The crime of resistance and disobedience to a person in authority or the agents (REVISED PENAL CODE, art. 151) of such person providing of a penalty of only *arresto mayor* and a fine not exceeding 500 pesos — in contradistinction to the life imprisonment provided for the crime of terrorism. In the same way, the crime of damage and obstruction to means of communication with the maximum penalty of *prision mayor* (REVISED PENAL CODE, art. 330) is not easily distinguished from the crime of terrorism involving destruction of property. Similarly, the felony of illegal assembly which is any meeting attended by armed persons for purpose of committing a felony and punished by *prision correccional* in its maximum period to *prision mayor* (REVISED PENAL CODE, art. 146) in its medium period may be punished under the Human Security Act as terrorism under illegal possession of firearms or even, rebellion. The Act provides only two additional requirements: that the criminal act creates widespread and extraordinary fear and that there is a demand to the government to give in to an unlawful demand.

The standard of due process exists both as a procedural and substantive limitation for the purposes of inquiring into the arbitrariness of a law.¹⁴³ It would be interesting to note that a federal judge in Los Angeles California has declared as unconstitutional a portion the USA Patriot Act that bars giving expert advice or assistance to groups designated as international terrorist organizations. The ban on providing “expert advice or assistance” is impermissibly vague and deemed to be violations of the First and the Fifth Amendments.¹⁴⁴ The judge’s decision was founded on the fact that the law

143. *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*, 20 SCRA 849, 860-61 (1967). The Court expounded on the concept of due process as follows:

What then is the standard of due process which must exist both as a procedural and a substantive requisite to free the challenged ordinance, or any governmental action for that matter, from the imputation of legal infirmity sufficient to spell its doom? It is responsiveness to the supremacy of reason, obedience to the dictates of justice. Negatively put, arbitrariness is ruled out and unfairness avoided. To satisfy the due process requirement, official action, to paraphrase Cardozo, must not outrun the bounds of reason and result in sheer oppression. Due process is thus hostile to any official action marred by lack of reasonableness. Correctly it has been identified as freedom from arbitrariness. It is the embodiment of the sporting idea of fair play. It exacts fealty ‘to those strivings for justice’ and judges the act of officialdom of whatever branch ‘in the light of reason drawn from considerations of fairness that reflect [democratic] traditions of legal and political thought.’ It is not a narrow or ‘technical conception with fixed content unrelated to time, place and circumstances,’ decisions based on such a clause requiring a ‘close and perceptive inquiry into fundamental principles of our society.’ Questions of due process are not to be treated narrowly or pedantically in slavery to form or phrases.

144. *Federal judge rules part of Patriot Act unconstitutional*, ASSOCIATED PRESS, Jan. 26, 2004, available at <http://www.cnn.com/2004/LAW/01/26/patriot.act.ap/index.html> (last accessed July 29, 2007). A federal judge in Los Angeles California has declared as unconstitutional a portion the USA Patriot Act that bars giving expert advice or assistance to groups designated as international terrorist organizations. The ban on providing “expert advice or assistance” is impermissibly vague and deemed to be violations of the First and Fifth Amendments. The case before the court involved five groups and two U.S. citizens seeking to provide support for lawful, nonviolent activities on behalf of Kurdish refugees in Turkey. The Humanitarian Law Project, which brought the lawsuit, said the plaintiffs were threatened with 15 years in prison if they advised groups on seeking a peaceful resolution of the Kurds’ campaign for self-determination in Turkey. The judge’s ruling said the law, as written, does not differentiate between impermissible advice on violence and encouraging the use of peaceful, nonviolent means to achieve goals. “The USA Patriot Act places no limitation on the type of expert advice and assistance which is prohibited and instead bans the provision of all

failed to differentiate between impermissible advice on violence and encouraging the use of peaceful, nonviolent means to achieve goals.

The Constitution provides that no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.¹⁴⁵ The test to deprive a person of property is simply that it should not be arbitrary, discriminatory, or oppressive. The infringement of human rights, however, requires a more stringent criterion, the existence of a grave danger of substantive evil which the State has the right to prevent.¹⁴⁶ The primacy of human rights requires that any act of government which tends to deprive a person of his life or liberty must be fully justified. The Human Security Act, while declaring as policy the respect for human rights, contains provisions that apparently endanger the right to privacy and property without due process of law.

2. The Anti-Terrorism Council

The HSA provided for the creation of an Anti-Terrorism Council, which shall assume all the responsibility for the proper and effective implementation of the anti-terrorism policy of the country. It must be noted that the Council is effectively under the Office of the President since it is composed of the Executive Secretary as Chairperson, Secretary of Justice as its Vice Chairperson, the Secretaries of the Departments of Foreign Affairs, National Defense, Interior and Local Government, Finance and the National Security Adviser.¹⁴⁷ The Council is in effect under the power of control of the President¹⁴⁸ and would have immense powers and the government resources

expert advice and assistance regardless of its nature," the judge said. Cole declared the ruling "a victory for everyone who believes the war on terrorism ought to be fought consistent with constitutional principles."

145. PHIL. CONST. art III, § 1.

146. *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.*, 51 SCRA 189 (1973).

147. HUMAN SECURITY ACT OF 2007, § 53.

148. PHIL. CONST. art VII, §§ 17-18. The 1987 Constitution provides in art. VII, § 17 that the President shall have control of all executive departments, bureaus, offices and ensure that the laws be faithfully executed; and in Sec. 18. the President is Commander-in-Chief and may call out armed forces to prevent or suppress lawless violence, invasion and rebellion. The composition of the Anti-Terrorism Council and the fact that it is under the office of the President makes the council essentially under the power of control of the President. This could be justifiable if only the Council does not wield such tremendous powers that could infringe on civil liberties without a judicial determination of guilt. The provisions of the law suffer from constitutional infirmities and the fact that it gives the executive a certain latitude to make a determination of who would be subjected to a deprivation of liberty, property and the right to privacy

at its disposal. The functions of the Council include creation of a database information systems and linkages on terrorism, terrorist activities, and counter-terrorism operations.¹⁴⁹ The Council shall also have the function of freezing the funds, property, bank deposits, placements, trust accounts, assets, and records belonging to a person suspected of or charged with the crime of terrorism or conspiracy to commit terrorism, pursuant to Republic Act No. 9160 otherwise known as the Anti-Money Laundering Act of 2001, as amended, and grant monetary rewards and other incentives to informers who give vital information leading to the apprehension, arrest, detention, prosecution, and conviction of person or persons who are liable for the crime of terrorism or conspiracy to commit terrorism.¹⁵⁰

3. Provisions with Potential for Abuse

One of the strongest objections to the HSA is the provision that legitimizes wiretapping and other forms of surveillance upon application by a police or law enforcement official and members of his team to listen to, intercept and record, with the use of any mode, form, kind or type of electronic, or other surveillance equipment or intercepting and tracking devices, or with the use of any other suitable ways and means for that purpose, any communication, message, conversation, discussion, or spoken or written words between members of a judicially declared and outlawed terrorist organization, association, or group of persons or of any person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism.¹⁵¹ This is not only a violation of a person's right to be secure in their persons, houses, papers, and effects but it makes admissible as evidence whatever may be obtained in violation of this constitutional guarantee.¹⁵² In *Alvarez v. Court of First Instance*, the Court held that seizure of books and documents by way of search warrant for purpose of conducting an investigation or using as evidence against person in whose possession they were found is unconstitutional because it is equivalent to compelling a person to testify

constitutes meting out a penalty prior to a judicial trial and therefore takes the form of a bill of attainder.

149. HUMAN SECURITY ACT OF 2007, § 54.

150. *Id.*

151. *Id.* § 7.

152. PHIL. CONST. art. 3, §§ 2-3; Michelle Garcia, *N.Y. City Council Passes Anti-Patriot Act Measure*, THE WASHINGTON POST, Feb. 5, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A13970-2004Feb4.html> (last accessed July 28, 2007). It is also interesting to note that the New York City Council in 2004 passed an Anti-Patriot Act Measure opposing the investigatory powers granted to law enforcement agencies under the USA Patriot Act. It criticized the provisions allowing investigators to see citizens' library records and eases requirements for search warrants.

against himself.¹⁵³ Under the Act, police or law enforcement may be able to put a person under surveillance if he is merely charged or suspected of the crime of terrorism.¹⁵⁴ The information obtained will be admissible only if the evidence is obtained not in violation of the pertinent provisions of the Act.¹⁵⁵ Further, the Act, explicitly legitimizes the surveillance of a person who is not yet charged before a court of law. The surveillance may yield information and evidence which may be subsequently used against the person being investigated in violation of a person's right against self-incrimination.¹⁵⁶ In light of the political climate in the country, the provisions on surveillance appear to be prone to abuse.¹⁵⁷

4. Surveillance

The safeguards in the law provided a person put under surveillance the right to be informed of the acts done by the law enforcement authorities or to challenge, if he or she intends to do so, the legality of the interference before the Court of Appeals which issued the written order.¹⁵⁸ These rights, however, would not be available prior to the invasion of the privacy of a person charged or suspected of terrorism. The opportunity to be heard cannot be availed of until after the fact because an *ex parte* application by a

153. *Alvarez v. Court of First Instance*, 64 Phil 33 (1937).

154. HUMAN SECURITY ACT OF 2007, § 8. The *Formal Application for Judicial Authorization* shall only be granted by the authorizing division of the Court of Appeals upon an *ex parte* written application of a police or of a law enforcement official who has been duly authorized in writing by the Anti-Terrorism Council to file such *ex parte* application, and upon examination under oath or affirmation of the applicant and the witnesses he may produce to establish: (a) that there is probable cause to believe based on personal knowledge of facts or circumstances that the said crime of terrorism or conspiracy to commit terrorism has been committed, or is being committed, or is about to be committed; (b) that there is probable cause to believe based on personal knowledge of facts or circumstances that evidence, which is essential to the conviction of any charged or suspected person for, or to the solution or prevention of, any such crimes, will be obtained; and (c) that there is no other effective means readily available for acquiring such evidence.

155. *Id.* § 15.

156. PHIL. CONST. art III, § 17. No person shall be compelled to be a witness against himself.

157. The present administration through the Department of Justice have charged activists and certain party-list leaders with the crime of rebellion but such charges were later held unfounded by the Supreme Court. With the enactment of the Human Security Act, there is the possibility that many people will be charged with terrorism and be put under surveillance for up to 60 days even when there is no probable cause.

158. HUMAN SECURITY ACT OF 2007, § 9.

police official would be enough to get authorization to conduct the tracking down, tapping, intercepting, and recording.¹⁵⁹ The authorization that may be granted by the Court of Appeals may be effective for a period of 30 days and may be extended for another 30 days.¹⁶⁰

5. Judicial Declaration of Terrorists or Terrorist Organizations

The proscription of Terrorist Organizations, Association, or Group of Persons is to be initiated by the Secretary of Justice. An organization may be declared as a terrorist and outlawed organization by a competent Regional Trial Court upon application of the Department of Justice before a competent Regional Trial Court, with due notice and opportunity to be heard given to the organization, association, or group of persons concerned.¹⁶¹ Subsequently, members of these organizations may be arrested without a judicial warrant, put under surveillance and have their assets frozen. The existence of a terrorist listing in other countries does not affect our own court's declaration of certain persons or organizations as terrorists. Delisting, for example, of a person by another State will not have any legal implication under the Act.

6. Arrest and Detention

The Human Security Act allows for arrest and detention without a judicial warrant after being duly authorized in writing by the Anti-Terrorism Council, which is composed of members of the executive branch of government.¹⁶² Under section 18 of the HSA, the period of detention without judicial warrant of arrest has been prescribed as follows:

The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, any police or law enforcement personnel, who, having been duly authorized in writing by the Anti-Terrorism Council has taken custody of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said charged or suspected person to the proper judicial authority within a period of three (3) days counted from the moment the said charged or suspected person has been apprehended or arrested, detained, and taken into custody by the said police, or law enforcement personnel....¹⁶³

159. *Id.* § 12.

160. *Id.* § 10.

161. *Id.* § 17.

162. *Id.* § 18.

163. *Id.* § 18; See, REVISED PENAL CODE, art. 125, as amended by Executive Order No. 272. The period provided in the Act is longer than what is presently permitted by law for warrantless arrests.

The authority for the warrantless arrest in the act would be based on information obtained as a result of the surveillance under section 7 and examination of bank deposits under section 27 of the Human Security Act.¹⁶⁴ A person should be arrested without warrant only if there is sufficient ground and if in the presence of the arresting officer and in his personal knowledge, a person is about to commit or has committed a crime. Under the Act, all persons suspected of being terrorists will be put under surveillance and if evidence is found confirming the suspicion, the person will be arrested, without a judicial warrant but only an authorization from the Anti-Terrorism Council.

7. Special Court

The Act also provides that the Justices of the Court of Appeals designated as a special court to handle anti-terrorism cases, after satisfying themselves of the existence of probable cause in a hearing called for that purpose, may authorize in writing any police or law enforcement officer and the members of his or her team to examine, or cause the examination of, the deposits, placements, trust accounts, assets, and records in a bank or financial institution and gather relevant information about such assets from a bank or financial institution belonging to person or group suspected or charged with the commission of terrorism or members of judicially declared outlawed organizations.¹⁶⁵ The written order of the Court of Appeals may be obtained after an *ex parte* application of a police or law enforcement official.¹⁶⁶ The information obtained from this inspection may be used against a person charged with or suspected of committing the crime of terrorism.¹⁶⁷

The deposits and other assets of any person suspected of or charged before a competent Regional Trial Court for the crime of terrorism or the crime of conspiracy to commit terrorism or of a judicially declared and outlawed organization or group of persons shall be seized, sequestered, and frozen in order to prevent their use, transfer, or conveyance for purposes that are inimical to the safety and security of the people or injurious to the interest of the State.¹⁶⁸

8. Provisions that Aim to Protect Human Rights

The Act contains provisions geared towards upholding human rights by providing the person arrested or detained for the crime of terrorism or conspiracy to commit terrorism the right to be informed of the nature and

164. HUMAN SECURITY ACT OF 2007, § 18.

165. *Id.* § 27.

166. *Id.* § 28.

167. *Id.* § 35.

168. *Id.* § 39.

cause of his arrest, right to counsel and right to avail the service of a physician or physicians of choice.¹⁶⁹ No threat, intimidation, or coercion, and no act which will inflict any form of physical pain or torment, or mental, moral, or psychological pressure on the detained person, which shall vitiate his free-will, shall be employed in his investigation and interrogation.¹⁷⁰

The police or other law enforcement custodial unit in whose care and control the person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism has been placed under custodial arrest and detention shall keep a securely and orderly maintained official logbook, which is hereby declared as a public document and opened to and made available for the inspection and scrutiny of the lawyer or lawyers of the person under custody or any member of his or her family or relative by consanguinity or affinity within the fourth civil degree or his or her physician at any time of the day or night without any form of restriction.¹⁷¹ Persons charged with the crime of terrorism, if entitled to bail, will nevertheless be restricted in their travel and may also be placed under house arrest.¹⁷²

The Commission on Human Rights (CHR) is given the concurrent jurisdiction to prosecute public officials, law enforcers, and other persons who may have violated the civil and political rights of persons suspected of, accused of, or detained for the crime of terrorism or conspiracy to commit terrorism.¹⁷³ It is instructive to note that the CHR has been seeking this prosecutorial function for a long time.

A Grievance Committee composed of the Ombudsman, as chair, and the Solicitor General, and an undersecretary from the Department of Justice (DOJ), as members, is also created to receive and evaluate complaints against the actuations of the police and law enforcement officials in the implementation of this Act.¹⁷⁴

The Act also enforces a ban on extraordinary rendition of persons suspected or convicted of the crime of terrorism unless their testimony is needed for terrorist-related police investigations or judicial trials in the said country and unless his or her human rights, including the right against

169. *Id.* § 21.

170. HUMAN SECURITY ACT OF 2007, § 24.

171. *Id.* § 23.

172. *Id.* § 26.

173. *Id.* § 55.

174. *Id.* § 56.

torture, and right to counsel, are officially assured by the requesting country and transmitted accordingly and approved by the DOJ.¹⁷⁵

A Joint Oversight Committee composed of members of Congress is also created to oversee and review the implementation of this Act, particularly the provisions that authorize the surveillance of persons suspected of or charged with the crime of terrorism.¹⁷⁶

The Act also contains provisions which provide for payment of money in the concept of liquidated damages to a person who has been wrongfully accused. If the person suspected of or charged with the crime of terrorism or conspiracy to commit terrorism is found, after his investigation, to be innocent by the investigating body, or is acquitted, after his arraignment or his case is dismissed before his arraignment by a competent court, the seizure, sequestration, and freezing of his bank deposits, placements, trust accounts, assets, and records shall forthwith be deemed lifted and the amount of Five Hundred Thousand Pesos (P500,000.00) a day for the period in which his properties, assets or funds were seized shall be paid to him in the concept of liquidated damages. The amount shall be taken from the appropriations of the police or law enforcement agency that caused the filing of the enumerated charges against him or her.¹⁷⁷ Upon acquittal, any person who is accused of terrorism shall be entitled to the payment of damages in the amount of Five Hundred Thousand Pesos (P500,000.00) for every day that he or she has been detained or deprived of liberty or arrested without a warrant as a result of such an accusation.¹⁷⁸

VII. CONCLUSION

Terrorism is an international phenomenon, which in recent years has contributed to dramatic changes in the realm of international law. Five years after the attacks on the World Trade Center, the United Nations adopted a global strategy to combat terrorism. The framework hinged upon international cooperation and suppression of all forms of terrorist activities without disregarding respect for human rights. Terrorist attacks are now being considered in the same nature as an *armed attack* against a State that would justify counter-terrorist measures under the banner of collective self-defense. The United States has advanced the doctrine of enemy status and embarked on an aggressive war against those suspected of harboring and aiding terrorists. The principle of non-intervention in domestic affairs appears to take a backseat in the war against terrorism.

¹⁷⁵. *Id.* § 57.

¹⁷⁶. HUMAN SECURITY ACT OF 2007, § 59.

¹⁷⁷. *Id.* § 41.

¹⁷⁸. *Id.* § 50.

Although the framework is in place, counter-terrorist measures are still dependent on domestic laws for implementation. Against this backdrop, the importance of a universal operative definition of terrorism becomes important and necessary. Terrorism has been defined in many different ways. An organization may be listed as a Foreign Terrorist Organization by the United States and yet is not considered as such by Russia. The definition is a political discretion. However, the effectivity of a strategy dependent on international cooperation and waged against a non-State organization depends on a common characterization of terrorism. Terrorist activities are not always confined within a particular territorial jurisdiction and the war against terrorism cannot be won nor will perpetrators be brought to justice if they continue to be considered as terrorists in one part of the world but freedom fighters in another. Terrorism is said to be a war without borders and it is a continuing challenge to the international community that might just catalyze the change towards a new era of international law.