

## The International Standardization of National Security Law

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What could be more national than national security law?

National security law establishes the way that each state handles threats to its government, its values, and its very existence. And what could be more specific than what makes each state feel threatened? The U.S. government tolerates right-wing militias, but Germany cannot abide neo-Nazis. While the United States once hunted down communists as a national threat, Italy at the same time elected them to parliament. The United Kingdom and Russia responded with force to the secessionist movements in Northern Ireland and Chechnya, respectively, while Czechoslovakia split apart peacefully without violence or even many second thoughts. Greece has accepted repeated mass strikes and demonstrations that virtually shut down the country, while Thailand forcibly cleared its capital's city center of protestors who had camped out peacefully and left the rest of the country's infrastructure untouched. In short, what constitutes a threat to one country might be acceptable normal politics to another. And one would expect national security law to respond to these very different senses of danger in very different ways.

But if nationally specific national security law seemed the norm before 9/11, developments since seriously challenge that view, at least when it comes to fighting terrorism. After 9/11, anti-terrorism laws that have very similar shapes have been put into effect in countries that are otherwise radically different. Countries as varied as Canada,<sup>1</sup> Germany,<sup>2</sup> Indonesia,<sup>3</sup> China,<sup>4</sup> and Vanuatu<sup>5</sup> enacted laws that took extraordinarily similar

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1. See generally KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA (2003).
2. See Russell A. Miller, *Balancing Security and Liberty in Germany*, 4 J. NAT'L SECURITY L. & POL'Y 369 (2010).
3. See Hikmahanto Juwana, *Indonesia's Anti-Terrorism Law*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 295 (Victor Ramraj, Michael Hor & Kent Roach eds., 2005).
4. See Jacques deLisle, *Security First? Patterns and Lessons from China's Use of Law To Address National Security Threats*, 4 J. NAT'L SECURITY L. & POL'Y 397 (2010).
5. The Permanent Mission of the Republic of Vanuatu to the United Nations, Rep.,

approaches to fighting terrorism: criminalizing new terrorism-related offenses like conspiracy, planning, recruitment, incitement and indirect assistance, cracking down on terrorism financing, increasing surveillance of the resident population, and tightening border controls. Country after country made at least some changes to its legal system to adopt anti-terrorism policies that followed this common template.<sup>6</sup>

Comparative law has some ready-made ways to characterize legal similarities apparent across legal systems. Some countries come in legal “families” that pass on common legal traits like hereditary characteristics.<sup>7</sup> Some countries take legal “transplants” urged on them by countries ahead in legal development.<sup>8</sup> Still other countries “borrow”<sup>9</sup> legal ideas observed in other countries. Moreover, legal ideas may “migrate” like people in international space, settling into hospitable places after long travels.<sup>10</sup> Each of these mechanisms results in the movement of legal ideas from one time or place into a legal system at another time or place. Despite the different mechanisms involved (inheriting, pushing, pulling, and going with the flow), all of the usual models share a common assumption: laws of different countries converge through the movement of legal ideas horizontally from one domestic legal system to another.

But none of those theories explain why so many countries adopted similar laws in such a short time period after 9/11. That is because the development of legal resemblance in anti-terrorism laws has a different cause. For perhaps the first time in history, and surely with the fastest speed, legal systems around the globe adapted to a changed world by responding to the same threat for the same reason: all states were commanded to fight global terrorism in a common template forged by international organizations. And, perhaps more uniquely, most actually did

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transmitted by note verbale dated April 18, 2003 addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, U.N. Doc. S/2003/497 Annex (Apr. 28, 2003), *available at* <http://www.un.org/en/sc/ctc/resources/1373.html> (“Vanuatu” hyperlink). For other member states’ reports on their anti-terrorism policies filed with the Counter-Terrorism Committee of the U.N. Security Council, see generally <http://www.un.org/en/sc/ctc/resources/1373.html>.

6. COUNTER-TERRORISM COMM., SURVEY OF THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 1373 (2001) BY MEMBER STATES, U.N. Doc. S/2009/620 (Dec. 3, 2009), *available at* <http://www.un.org/sc/ctc/pdf/GIS2009.pdf> [hereinafter SURVEY].

7. Jaakko Husa, *Legal Families*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 382 (Jan Smits ed., 2006).

8. *See generally* ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

9. *See generally* Symposium on *Constitutional Borrowing*, in 1 INT’L J. CONST. L. 177–324 (2003).

10. *See generally* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

so.<sup>11</sup>

## I. THE LEGAL REVOLUTION IN INTERNATIONAL ORGANIZATIONS

In this international web of legal influence, change radiated out from the U.N. Security Council. On September 28, 2001, as the World Trade Center still smoldered within miles of U.N. headquarters, the Security Council passed Resolution 1373.<sup>12</sup> Acting under Chapter VII of the U.N. Charter,<sup>13</sup> which makes resolutions binding on all member states and therefore makes noncompliance at least theoretically subject to sanctions, the Security Council required states to change their domestic laws to fight terrorism in specific ways. Resolution 1373 mandated that states:

- Criminalize terrorism in domestic law by making terrorism and ancillary offenses especially serious crimes with especially serious punishments.
- Take “the necessary steps to prevent the commission of terrorist acts.”
- Cooperate with the criminal investigations of other states, and share information with them about suspects and threats.
- Block terrorism financing by freezing assets of individuals and groups on Security Council lists, by ensuring that no funds reach terrorists or terrorist groups through domestic channels, and by providing that any financing of terrorist activity is criminalized in domestic law.
- Block the use of the state’s territory by terrorist groups through suppressing recruitment of terrorists, eliminating their access to weapons, and denying safe haven to any of their members.
- Ensure that terrorists cannot travel internationally by stepping up border controls, increasing the security of travel documents, and examining more closely claims for refugee and asylum status.<sup>14</sup>

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11. SURVEY, *supra* note 6.

12. S.C. Res. 1373, Sept. 28, 2001, U.N. Doc. S/RES/1373.

13. U.N. Charter Chap. VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, *available at* <http://www.un.org/en/documents/charter/chapter7.shtml>.

14. The elements listed here are the core elements of Security Council Resolution 1373. Resolutions enacted after Resolution 1373 built on its basic framework. *See, e.g.*, S.C. Res. 1624, Sept. 14, 2005, U.N. Doc S/RES/1624 (requiring states to prohibit by law incitement to commit terrorist acts). For U.N. Security Council resolutions, see generally <http://www.un.org/documents/scres.htm>.

The U.N. Security Council framework for fighting terrorism included an ambitious list of things for states to do, focusing on domestic changes that would present a united front against terrorism when enacted in parallel across all U.N. member states.

From a legal perspective, however, the Security Council framework for fighting terrorism was most stunning for requiring all member states to change domestic law in order to carry out the Security Council's requirements. Previous Chapter VII Security Council resolutions had generally been more specific and less directed at domestic law. For example, Security Council resolutions had blocked arms sales to particular countries, authorized both peacekeeping missions and international tribunals for discrete conflicts, and warned outlier states not to engage in certain conduct lest they be subject to sanctions regimes.<sup>15</sup> Security Council resolutions did not require large-scale change of domestic law, certainly not of all member states at once. Resolution 1373 therefore started a new era for the Security Council,<sup>16</sup> which now has the capacity to require all U.N. member states to change their domestic laws in parallel in order to tackle common threats.<sup>17</sup>

Once the Security Council enacted Resolution 1373, a whole host of other international organizations followed suit by signaling their support for the resolution. Regional bodies eagerly joined in the task of designing frameworks for fighting terrorism and requiring their member states to comply. They adopted much the same program as did the U.N. Security Council, typically citing Resolution 1373 in their resolutions and action plans as the motive and the inspiration for their efforts. As a result, in addition to requirements from the Security Council, regional bodies also compiled a mandatory "to do" list requiring states to criminalize terrorism, block terrorism financing, take steps to root out terrorist groups in their territories, and harden borders while increasing surveillance. Not only did regional bodies take these steps, but they took them quite promptly after Resolution 1373 went into effect.

In fall 2001, the European Union created an action plan to fight terrorism that tracked the essential aspects of Resolution 1373.<sup>18</sup> The EU

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15. See BLANCA ANTONINI ET AL., SECURITY COUNCIL RESOLUTIONS UNDER CHAPTER VII (Blanca Antonini ed., 2009), available at <http://www.fride.org/publication/655/security-council-resolutions-under-chapter-vii>; see generally ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

16. Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT. L. 901 (2002).

17. Resolution 1373 was followed by a series of resolutions adding more state mandates to the Resolution 1373 framework. In addition to developing systems for fighting terrorism, the Security Council required states to enact laws to fight proliferation of weapons of mass destruction. See S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). But Resolution 1373 was the first U.N. resolution requiring states to adopt common laws in parallel to create a global web of legal interdiction.

18. In particular, the action plan commits the EU to work within the U.N. framework,

also sped up initiation of the European Arrest Warrant to create a Europe-wide system for arrests and prosecutions of terrorists.<sup>19</sup> A few months later, the EU announced the creation of Eurojust to coordinate some aspects of terrorism investigations across Europe.<sup>20</sup> In spring 2002, the EU promulgated a Framework Decision on Terrorism specifying how terrorism offenses were to be defined in the laws of EU member states.<sup>21</sup> And the EU has continued its anti-terror campaign by pushing member states to enact many more regulations, including extensive rules about blocking terrorism financing and freezing the assets of suspected terrorists. The EU has been a strong defender of Resolution 1373 and has vowed to encourage states to implement it.

While the EU might have the most elaborate strategy for responding to terrorism and supporting the implementation of Resolution 1373, it is not the only regional body to have taken action. The African Union (AU) held a number of high-level meetings in fall 2001 and announced a plan of action explicitly intended to bring Resolution 1373 to African states.<sup>22</sup> The Association of South-East Asian Nations (ASEAN) also developed a detailed regional plan to fight terrorism “especially taking into account the importance of all relevant U.N. resolutions.”<sup>23</sup> The Organization of American States, which had already created an Inter-American Committee against Terrorism before 9/11,<sup>24</sup> sprung into action and developed new action plans in fall 2001, culminating in the adoption in 2002 of the Inter-

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to criminalize terrorism and build European institutions for cross-border coordination, to stop terrorism financing, and to proceed multilaterally. *See* European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, [http://ec.europa.eu/justice\\_home/news/terrorism/documents/concl\\_council\\_21sep\\_en.pdf](http://ec.europa.eu/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf).

19. *See* European Comm., Directorate-General for Justice, Prosecuting Criminal and Guaranteeing Individuals’ Rights More Effectively In Free Movement Europe, Aug. 6, 2010, [http://ec.europa.eu/justice\\_home/fsj/criminal/extradition/fsj\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm) (describing the adoption of common judicial instruments and coordination of judicial practice across the EU); European Comm., European Arrest Warrant Replaces Extradition Between EU Member States, Aug. 6, 2010, [http://ec.europa.eu/justice/policies/criminal/extradition/policies\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice/policies/criminal/extradition/policies_criminal_extradition_en.htm) (describing the procedure followed once a European Arrest Warrant is issued).

20. *See* Eurojust, Homepage, <http://www.eurojust.europa.eu> (describing Eurojust’s mission to improve EU cooperation in investigations and prosecutions).

21. *See* European Comm., Directorate-General for Home Affairs, Crisis Management and Fight Against Terrorism, [http://ec.europa.eu/justice\\_home/fsj/terrorism/fsj\\_terrorism\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/terrorism/fsj_terrorism_intro_en.htm) (summarizing the EU strategy for combating terrorism).

22. African Union, The Peace and Security Agenda: Preventing and Combating Terrorism in Africa, [http://www.africa-union.org/root/AU/AUC/Departments/PSC/Counter\\_Terrorism.htm](http://www.africa-union.org/root/AU/AUC/Departments/PSC/Counter_Terrorism.htm) (summarizing AU actions taken after 9/11 to combat terrorism and AU resolutions adopted before 9/11 regulating activities that could contribute to terrorism).

23. *See* Association of Southeast Asian Nations, ASEAN’s Stance on Terrorism, <http://www.aseansec.org/12636.htm> (discussing the results of a series of ASEAN meetings dedicated to preventing terrorism during 2001-2002).

24. *See generally* Inter-American Committee against Terrorism, Organization of American States, <http://www.cicte.oas.org/Rev/En>.

American Convention against Terrorism.<sup>25</sup> The Organization for Security and Co-operation in Europe adopted an action plan in fall 2001 explicitly tracking the U.N. framework for fighting terrorism.<sup>26</sup> The South Asian Association for Regional Cooperation (SAARC) pledged its support for Resolution 1373 by reinforcing its existing SAARC Convention on the Suppression of Terrorism.<sup>27</sup> Practically every major regional organization in the world signed onto the program outlined by Resolution 1373 and added its moral and legal force to the effort to get states to comply.

Member states overwhelmingly applauded these efforts – and rapid changes in domestic anti-terror laws followed around the world. While international law famously has compliance problems, such problems seemed to disappear here. All 192 U.N. member states filed at least one report with the Security Council’s Counter-Terrorism Committee (CTC), a subsidiary body that was created to monitor and enforce compliance with Resolution 1373. These reports explain how states have implemented Resolution 1373. By August 2006, 107 countries had filed four reports, and 42 had filed five.<sup>28</sup> The reports show that there was extraordinary uptake of the new anti-terrorism framework. As early as 2003, CTC experts said that 30 countries had fully complied with the resolution, 60 countries were well on their way toward complying, 70 countries intended to comply but were unable to do so without assistance, and only 20 states resisted compliance.<sup>29</sup> The CTC then launched a program to facilitate the provision of technical assistance to member states that needed help in order to speed their compliance.<sup>30</sup> More recently, in November 2009, the CTC, by then no longer compiling quantitative assessments of compliance as it had previously done, reported a significant additional uptake of Resolution 1373’s mandate:

Most States in the Western Europe and other States, Eastern Europe, and Central Asia and the Caucasus regions have introduced comprehensive counter-terrorism legislation. More than half of the

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25. Inter-American Convention Against Terrorism, June 3, 2002, AG/RES. 1840 (XXXII-O/02), available at <http://www.cicte.oas.org/Rev/En/Documents/Conventions/AG%20RES%201840%202002%20English.pdf>.

26. Org. Sec. Co-operation Eur., The Bucharest Plan of Action for Combating Terrorism, Dec. 4, 2001, MC(9), at 3-4, available at [http://www.osce.org/documents/cio/2001/12/670\\_en.pdf](http://www.osce.org/documents/cio/2001/12/670_en.pdf).

27. The SAARC Convention (Suppression of Terrorism) Act, Apr. 26, 1993, available at [http://www.kadrigamarinstitute.lk/html/pdf/SAARC/SAARC%20Convention%20on%20Suppression%20of%20Terrorism\\_1993.pdf](http://www.kadrigamarinstitute.lk/html/pdf/SAARC/SAARC%20Convention%20on%20Suppression%20of%20Terrorism_1993.pdf).

28. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT. L. 275, 286 (2008).

29. *Id.* at 285.

30. See U. N. Sec. Council Counter Terrorism Comm., Technical Assistance, July 29, 2010, <http://www.un.org/sc/ctc/capacity.html> (discussing the CTC’s role in facilitating capacity-building initiatives among member states).

States in South Eastern Europe and almost half of the States in South America have comprehensive counter-terrorism legislation. In Africa, Western Asia, Southeast Asia, Central America and the Caribbean, many States do not have comprehensive counter-terrorism legislation in place, although most do have some elements in place.<sup>31</sup>

Such widespread compliance with the Resolution 1373 framework makes the anti-terrorism campaign an extraordinary example in international law.<sup>32</sup> The success is especially noteworthy in light of what Resolution 1373 required states to do, which was to make changes in some of the most sensitive areas of domestic law. After 9/11, national security law was not so national anymore.

## II. STANDARDIZATION – MORE OR LESS

Seen from the great height of global comparison, the number of new anti-terrorism laws that criminalize terrorism, block terrorism financing, develop new international monitoring mechanisms to spot terrorists, and increase vigilance about the international movements of persons is extraordinary. Up close, however, widespread compliance looks less like a tightly coordinated strategy than diverse variations on a theme.

National efforts to criminalize terrorism well illustrate the variety in national anti-terrorism laws. When Security Council required states to criminalize terrorism, it did not define “terrorism” because no such definition exists in international law. Terrorism is an irreducibly political offense, and, not surprisingly where politics are involved, disagreements can run deep.<sup>33</sup> The Security Council required states to do something it had not been able to do. How was any state to know what “terrorism” is?

Regional bodies tried to fill the gap. The EU developed a Framework Decision that defined terrorism. But the definition is very broad. Terrorism was defined to encompass attacks against both persons and property carried out in order to intimidate a population, pressure a government or international organization, or destroy “the fundamental political, constitutional, economic or social structures of a country or an international

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31. SURVEY, *supra* note 6, at 43.

32. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (documenting that in regard to human rights treaties, states have a poor record of compliance).

33. See Mahmoud Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, 4 J. INT. CRIM. JUS. 1031 (2006) (describing how negotiations for drafting an international treaty on terrorism broke down); Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT. CRIM. JUS. 933 (2006) (proposing ways to reach consensus).

organization.”<sup>34</sup>

The AU adopted an even broader definition of terrorism. In its Convention on the Prevention and Combating of Terrorism, an act must pose only a risk of harm to count as terrorism, and even then that risk can affect a wider variety of interests than those set forth in the European definition, including life, physical integrity, freedom, and property.<sup>35</sup> As in the EU definition, though, this risk must be accompanied by a certain political motivation. But then the list of criminalized actions goes on to include “any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act” defined as terrorist.<sup>36</sup>

Other regional organizations created their own definitions that exhibited similar problems of vagueness and overbreadth. In general, terrorism has been defined as a crime against persons or property with a particular political motivation, sweeping to include all related and ancillary acts in the vicinity. It is also generally true that the edges of the crime are not well-defined and that many activities of legitimate political opposition could be circumscribed by enforcement of anti-terror laws.

The EU and AU definitions well illustrate the broad a range of action that these terrorism definitions can cover. National definitions are often substantially less precise than regional ones. For example, in response to the anti-terrorism campaign after 9/11, France amended its criminal code to include a new offence:

Being unable to account for resources corresponding to one’s lifestyle when habitually in close contact with a person or persons who engage in one or more of the activities provided for by [the articles defining terrorism] is punishable by 7 years’ imprisonment and by a fine of €100,000.<sup>37</sup>

It would be hard to comply with this law unless one knows that French authorities believe one’s friends are engaged in terrorist activities.

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34. Council Framework Decision of 13 June 2002 on combating terrorism, 2002 O.J. (L 164) *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:HTML>.

35. Org. African Unity, OAU Convention on the Prevention and Combating of Terrorism Art. 1(a), *available at* [http://www.africa-union.org/root/AU/Documents/Treaties/Text/Algiers\\_convention%20on%20Terrorism.pdf](http://www.africa-union.org/root/AU/Documents/Treaties/Text/Algiers_convention%20on%20Terrorism.pdf).

36. *Id.* at Art 1(b).

37. Code pénal Française Art. 431-2-3 (inserted by Law No. 2003-239 of 18 March 2003 Art. 45, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March, 18 2003). An English translation has been made available by the Equal Rights Trust, <http://www.equalrightstrust.org/view-subdocument/index.htm?id=67> (John Rason Spencer, trans.).

After signing onto the OAU Convention on the Prevention and Combating of Terrorism, Ethiopia passed a new anti-terrorism law that also went well beyond even the AU's broad definition, specifying that terrorism is any act that might endanger or increase a risk to persons, property, public services, and environmental resources while the perpetrator was attempting to coerce the government or intimidate a segment of the population.<sup>38</sup> In addition to criminalizing terrorism, the law also criminalizes planning, preparation, conspiracy, attempt, rendering support, encouragement, and other acts. Moreover, the crime of terrorism is punishable by death. Human Rights Watch has condemned the law by saying that it provides "the Ethiopian government with a potent instrument to crack down on political dissent. . . . It would permit long-term imprisonment and even the death penalty for 'crimes' that bear no resemblance, under any credible definition, to terrorism."<sup>39</sup>

Other countries also eagerly expanded existing definitions of terrorism. The United States already had a crime of "material support for terrorism" on the books before 9/11, but it was substantially broadened after 9/11 to include "any . . . service, . . . training, [or] expert advice or assistance" to a terrorist organization.<sup>41</sup> Critics have said that, on its face, this would include giving legal advice to a terrorist organization that tells the organization not to commit any violent acts!<sup>42</sup> The definition of "material support" is sufficiently vague that it was challenged before the Supreme Court. The Court upheld the law on a 6-3 vote over a vigorous dissent,<sup>43</sup> and the media reaction has been very critical of the Court's majority.<sup>44</sup> Other worries about the material support law include the fact that a person

38. F.D.R.E. Draft Anti-Terrorism Proclamation, Jan. 2009, available at [http://www.ethioguadian.com/ETG\\_PDFS/090415DraftAntiterrorismLaw.pdf](http://www.ethioguadian.com/ETG_PDFS/090415DraftAntiterrorismLaw.pdf). The draft law was passed unchanged. *Ethiopia Endorses Anti-Terrorism Law Unchanged*, SUDAN TRIBUNE, July 9, 2009, available at <http://www.sudantribune.com/spip.php?article31755>.

39. Human Rights Watch, *Analysis of Ethiopia's Draft Anti-Terrorism Law*, June 30, 2009, available at <http://www.hrw.org/node/84132>.

40. 18 U.S.C. §2339A (2009).

41. 18 U.S.C. §2339B (2009).

42. David Cole, *The Roberts Court Free Speech Problem*, N.Y. REV. BOOKS, Aug. 19, 2010 (discussing the Roberts Court's decision in *Holder v. Humanitarian Law Project* that upheld these extensions to the material support statute even when support consists of speech. Cole served as counsel for petitioners before the Supreme Court in that case).

43. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2009). Justices Ginsburg, Breyer and Sotomayor dissented on the grounds that the law infringed constitutionally protected rights of speech and association. Perhaps surprisingly, Justice Stevens joined the majority in this case. Documents in the case include lower court decisions and certiorari petitions, which are available at [http://www.scotuswiki.com/index.php?title=Holder%2C\\_Attorney\\_General\\_v.\\_Humanitarian\\_Law\\_Project](http://www.scotuswiki.com/index.php?title=Holder%2C_Attorney_General_v._Humanitarian_Law_Project).

44. Editorial, *The Supreme Court Goes Too Far in the Name of Fighting Terrorism*, WASH. POST, June 22, 2010, at A18; Editorial, *Terror and Free Speech*, L.A. TIMES, June 22, 2010, at A12; Editorial, *A Blow to Free Speech*, COURIER-JOURNAL, June 24, 2010, at A8; Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 22, 2010, at A26.

may not challenge the designation of an organization as a terrorist group as part of his or her defense against the criminal charge of providing material support to that group.<sup>45</sup>

In its anti-terrorism law enacted in 2006, Russia defined terrorism as an ideology:

Terrorism shall mean the ideology of violence and the practice of influencing the adoption of a decision by state power bodies, local self-government bodies or international organisations connected with frightening the population and (or) other forms of unlawful violent actions.<sup>46</sup>

Acts performed on the basis of this ideology are criminalized, including “arranging, planning, preparing, financing and implementing an act of terrorism; instigation of an act of terrorism; . . . recruiting, arming, training and using terrorists; informational or other assistance to planning, preparing or implementing an act of terrorism; popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity.”<sup>47</sup> This array of ancillary offenses includes many that bear on constitutionally protected rights of free speech, association, and belief.

We could include many more definitions of terrorism gathered from countries all over the world but the general point is clear. After Resolution 1373, global security law requires the criminalization of terrorism, so states must have a criminal prohibition of terrorism on the books. But, as reflected above, the new laws are often vague, overbroad, and intrusive on rights (speech and association in particular). Moreover, the new laws do not criminalize the same things.

The same can be said of the bans on financing terrorism. The Security Council requires states to block terrorism financing by freezing the assets of people and groups listed through opaque processes carried out within the Security Council. Most states have indicated in their periodic reports to the Security Council that they have found a way to do so directly without an intervening decision of a domestic body to confirm the order. For example, France reports that requests to freeze assets of terrorist suspects are handled in an “automatic” fashion.<sup>48</sup> Names pass directly from the Security Council

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45. *Constitutional Implications of Statutes Penalizing Material Support to Terrorist Organizations*, Testimony of David Cole Before the United States Senate Committee on the Judiciary, May 5, 2004, available at <http://www.bordc.org/resources/cole-materialsupport.php>.

46. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 35-FZ (Federal Law on Counteraction of Terrorism) Art. 3(1)*, available at <http://www.legislationline.org/documents/action/popup/id/4365>.

47. *Id.* at Art. 3(2).

48. Second supplementary report submitted by France to the Counter-Terrorism

Sanctions Committee to French banks which have a standing order – without a separate order of the French government – to freeze all assets of those on the U.N. lists. As Spain noted in its 2003 report to the CTC, a system of “automatic reception of international treaties” makes it “not necessary . . . to adopt an internal law in order for these treaties to produce a direct effect in our system.”<sup>49</sup> In Bulgaria, the list of those against whom freeze orders could be issued was passed from the Security Council’s Sanctions Committee directly to the Bulgarian Council of Ministers, which ordered the specific freezes on the proposal of the Minister of the Interior, bypassing both courts and parliament.<sup>50</sup>

As courts began to review these “automatic” freezes, however, the Security Council attempted to put in place some minimal internal review to permit those on the list to request that their names be removed.<sup>51</sup> There have been a few “de-listings,” but the procedure by which such de-listings occur is far from transparent (except that it is done by the same staff that performs the original listings). The Security Council still has no independent mechanism for reviewing these freeze orders to determine if those affected are properly on the list. Moreover, the states called upon to freeze the assets of specific individuals and organizations generally do not know what information caused those on the list to be included in the first place because the Security Council will not share this information. It is therefore impossible for states to hold hearings at which the evidence that caused the listings can be presented and challenged. As a result, those who have been listed by the Security Council Sanctions Committee are in a legal limbo. They suffer the effects of the sanctions but have no effective

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Committee pursuant to Security Council resolution 1373 (2001), U.N. Doc. S/2003/270 Annex (Mar. 3, 2003), at 8, *available at* <http://www.un.org/en/sc/ctc/resources/1373.html> (“France,” then “S/2003/270” hyperlink).

49. Permanent Representative of Spain to the United Nations, Letter dated 30 May 2003 addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, U.N. Doc S/2003/628 Annex (June 9, 2003), *available at* <http://www.un.org/en/sc/ctc/resources/1373.html> (“Spain,” then “S/2003/628” hyperlink).

50. Second supplementary report to the National Report on the Activities of the Republic of Bulgaria to Counteract Terrorism in implementation of Resolution 1373 (2001) of the UN Security Council on measures that the UN Member States need to take in the fight against terrorism, U.N. Doc. S/2003/632 Enclosure (May 30, 2003), at 3, *available at* <http://www.un.org/en/sc/ctc/resources/1373.html> (“Bulgaria,” then “S/2003/632” hyperlink).

51. The Security Council created a “focal point” within the U.N. Security Council Sanctions Committee to provide a process that those affected by freezes could activate to have their listings reconsidered. *See* U. N. Sec. Council Sanctions Comm., Focal Point for Delisting, <http://www.un.org/sc/committees/dfp.shtml> (providing information on the history and functioning of the focal point). The Security Council procedures seemed designed to head off an adverse judgment of the European Court of Justice (ECJ), which was at the time considering the legality under European law of asset freezes made pursuant to Security Council listings. The measures, though noted by the ECJ, did not succeed in heading off the Court’s critique of the program.

recourse to challenge them.

In this area, domestic courts have started to push back and oppose the requirements of the Security Council to implement automatic freezes without offering some form of procedural review. Actions taken by states (and it is after all states that actually perform the asset freezes) typically require some fair procedure as a matter of domestic constitutional law by which those who are the objects of these draconian sanctions can confront and mount a challenge to the evidence against them. In the cases that have been decided so far, the local or regional law that requires fair procedure tends to win out over the international law that leaves space for none.

In the *Kadi* case, the European Court of Justice, the highest court of the European Union, was the first major court to wrestle with this question in a substantial way.<sup>52</sup> The court obviously found the proper solution difficult to determine when the sanctions were ordered by an international organization whose own charter apparently superseded the EU treaties that provide the field of primary law for the ECJ.<sup>53</sup> In fact, the Court of First Instance, the lower court in the European Union system, had been swayed by precisely that argument: that the U.N. Charter trumped the EU treaty framework.<sup>54</sup> But the ECJ developed a clever way out of this bind. Arguing for the autonomy of community norms, the ECJ found that the regulation by which the Security Council resolutions had been made operative within the EU failed to protect both procedural norms and the right to property in foundational EU law. And so the court prospectively voided the EU regulations. Of course, this left the Security Council framework intact, for the court acknowledged that it had no jurisdiction to rule on the legality of the Security Council resolutions, only on EU law.

The ECJ's decision required the EU to come up with another way to bring the Security Council framework into European law if it still intended to comply. The EU nominally revised its regulation on this topic, but the new regulation is under challenge for being only barely different from the old one.<sup>55</sup>

Other courts are also starting to consider these cases, and the ECJ has

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52. Yassin Abdullah Kadi v. Council of the European Union, 2008 E.C.R. C-402/05 P, C-415/05 (Sept. 3, 2008), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>.

53. See U.N. Charter Art. 103 (requiring that the U.N. Charter be placed above all countervailing international instruments: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

54. Case, Yusuf & Al Barakaat Int'l Found. v. Council and Comm'n., 2005 E.C.R. T-306/01 (Sept. 21, 2005), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:281:0017:0018:EN:PDF>.

55. Euan MacDonald, *Kadi: Recent Developments* (May 1, 2009), <http://globaladminlaw.blogspot.com/2009/05/kadi-recent-developments.html>.

modeled one way for courts to grapple with the issue by examining domestic regulations for their domestic constitutionality, while leaving the international framework intact. The new U.K. Supreme Court recently voided the orders-in-council by which the Security Council's asset freezes were brought into U.K. law on the theory that the rights of property and fair procedure could not be so heavily infringed without an act of Parliament behind such extraordinary intrusions.<sup>56</sup> The Canadian Supreme Court recently wrestled with the same issue, though addressing the consequences of Security Council listings for the international travel of those listed.<sup>57</sup> The draconian Security Council listings framework requires states to freeze assets immediately even though the domestic actor directing the freezes has no information that justifies them. And the same is true for other consequences of the listing process, like affording those listed the right to travel, as the Canadian case makes clear. As this one-size-fits-all framework is brought into law in one country after another, the framework will not necessarily survive local judicial review, and the system of global terrorism law will be fragmented.

I could go on through the whole list of Security Council requirements under the Resolution 1373 framework. In each area, implementation has generated issues that parallel those seen in the criminalization of terrorism and the creation of "automatic" asset freezes.<sup>58</sup> The international mandate to fight terrorism in the same way has generated an extraordinary level of compliance, but that compliance has been customized at the level of member states, resulting in a set of laws that may not in fact provide the common legal framework that the architects of the Security Council anti-terrorism resolutions had in mind.

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56. Her Majesty's Treasury v. Mohammed Jabar Ahmed; Her Majesty's Treasury v. Mohammed al-Ghabra; R (on the application of Hani El Sayed Sabaei Youssef) v Her Majesty's Treasury, (2010) UKSC 2 (appeal taken from [2008] EWCA Civ 1187). The official report of the decision is available at [http://www.supremecourt.gov.uk/docs/uksc\\_2009\\_0016\\_judgment.pdf](http://www.supremecourt.gov.uk/docs/uksc_2009_0016_judgment.pdf).

57. Abdelrazik v. Minister of Foreign Affairs [2009] F.C. 580 (Can. S.C.C.).

58. For example, with respect to the requirement that states improve their law-enforcement capacities to take internationally shared information and use it to find terrorists within their own borders, the latest progress report of the Counter Terrorism Executive Directorate (CTED) was decidedly mixed:

The level of interagency cooperation and coordination needs to be improved in most States. Although most States have access to INTERPOL criminal databases, in many States the use of this information is not consistent, effective, or widespread. Many States lack centralized databases and sufficient forensics capabilities to engage in complex counter-terrorism investigations. Most States are aware of the need for regional and international cooperation and have created relationships and mechanisms to facilitate early warning and a basic level of information-sharing. Nevertheless, regional and international cooperation in counter-terrorism matters requires further strengthening.

SURVEY, *supra* note 6, at 46.

### III. THE INTERNATIONAL ANTI-TERROR CAMPAIGN AS PARALLEL PLAY

In 1932, when child psychology was going through its developmental revolution,<sup>59</sup> Mildred Parten developed the concept of “parallel play.”<sup>60</sup> Parallel play describes the behavior of pre-school children who relate to other children by playing with the same types of toys and engaging in the same types of activities but not actually interacting with these other children to play coordinated games. Children engaged in parallel play are typically absorbed in their own activity, and they play beside rather than with each other. Developmental psychologists think that this stage is preparatory to the more fully integrated play that comes later.

It’s always risky to move from psychological models to social ones, but the similarities here are suggestive. At this stage in the development of standardized national security law, the global effort to create a common system of law around the world looks more like parallel play than like the coordinated games that the architects of the Security Council framework may have wished to initiate. Many countries have indeed enacted laws that cover the same activities – criminalizing terrorism, blocking terrorism finance, engaging in domestic monitoring of terrorism suspects and checking their international travel. But the laws that have been enacted are quite different in their specifics so that the precise “terrorist” activity that would fall into the net of suspicion in one country may fall through that net in another. Moreover, the laws that have been enacted in many countries come with substantial dangers to other values that are also part of the international system, particularly commitments to international human rights of liberty – free speech, freedom of association, freedom of conscience, and freedom from detention or confiscation of property without fair procedure. Despite the extraordinary levels of compliance with the Security Council framework, the attempt to spur international standardization of national security law has not created a global unified front against terrorism. And the measures taken in the name of global security law are doing collateral damage to other international legal principles.

There are two ways one might react to this assessment that the standardization of national security law has resulted in a huge amount of both legal change and legal damage while falling short of actual coordination. The two positions might be illustrated by the first lines and the last lines from Woody Allen’s movie *Annie Hall*: a) the food is so bad and the portions are so small, and b) I’d tell my brother he is not a chicken, but I need the eggs.<sup>61</sup>

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59. See JEAN PIAGET, *THE CHILD’S CONCEPTION OF THE WORLD* (2009 [1929]).

60. Mildred B. Parten, *Social Participation Among Preschool Children*, 27 J. AB. & SOC. PSYCH. 243 (1932).

61. Int’l Movie Database, Memorable Quotes for Annie Hall, <http://www.imdb.com/>

In the “bad food” joke, the laugh comes from the thought that if the food were really that bad, one wouldn’t want more. In the anti-terror campaign, those who are critical of the Security Council’s drive for a common world-wide legal framework as being short on fair procedure, abusive of rights, and responsible for giving autocratic executives of repressive states more power, may nonetheless want to have effective international law to fight global terrorism. But it is hard to see just how one could have a more effective anti-terror system given that the system must include governments that the world happens to have at the moment, including some that will do dreadful things when given the chance. The problem with the rights-violating aspects of the Security Council framework, then, is not with the intentions of the Security Council, but with the terrible quality of governance in many states in the world – and that is not the Security Council’s fault.<sup>62</sup>

In the “eggs” joke, the laugh comes from the fact that the narrator is locked in the same delusion as his brother while looking for a cure only for his sibling. In the anti-terror campaign, those who are critical of the Security Council framework for attempting to fight terrorism in a global one-size-fits-all fashion may themselves be caught up in a global fight against terrorism launched from the perspective of their own national or regional law. The critique of the Security Council framework, then, does not start from the assumption that the anti-terror campaign is an overreaction to a threat, but instead argues that certain specifics of that campaign should have been better constructed to accord with the values of the rights-protective states.<sup>63</sup>

The two reactions each focus on different harms caused by the Security Council’s anti-terrorism framework. In one (the bad food critique), global anti-terrorism law allows rogue states to do worse things than they might otherwise attempt, while in the other (the necessary eggs critique), global anti-terrorism law doesn’t allow angelic states to do the better things to which they might aspire. But even though the two sorts of harm are quite different, they both pull in the same direction from a policy perspective. By largely ignoring the human rights consequences of the anti-terror campaign,<sup>64</sup> the Security Council has pulled down both good and bad states

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62. This seems to have been the view of the late Thomas Franck in his last appearance at the American Society for International Law meeting in a panel on The Security Council and the Rule of Law.

63. This seems to be the view of the ECJ in the *Kadi* case and the U.K. Supreme Court in the *Ahmed* case on asset freezes. *See supra* notes 52 and 56. The problem of both courts was not with the need to freeze assets, but with the procedures to be put in place to test that the freezes were applied to the appropriate people. Given that the Security Council could not or would not share the information, the constitutionally required procedures were nearly impossible to put into place.

64. At the start, the disdain for human rights issues was palpable. The CTC

into common policies that on balance have done serious harm to the possibility of values-based governance around the world. And, given that the policies that states have adopted in compliance with the new global security mandates are not truly coordinated in the way that they deal with terrorism, the international standardization of national security law has so far failed to produce the seamless web of legal interdiction that the Security Council aimed to achieve.

The creation of global security law to fight the global terrorist threat seems like an obvious thing to try to accomplish if one is an internationalist. Before 9/11, the main problem with such an approach may have been the difficulties associated with organizing such a coordinated campaign. With the rise of Security Council “legislation” after 9/11, however, the ability of international organizations to create such a framework has exceeded the internationalists’ wildest dreams. Internationalists have solved the usual international law dilemma – that one can only move forward in creating international legal obligations through widespread consent – by short-circuiting such consent with Security Council action. Binding global security law now exists, at least on paper.

In the first near-decade of the implementation of this new international law, however, comparative law (that is to say, the domestic laws of states) provides a different sort of barrier to globally coordinated action against terrorism than the internationalists may have envisioned. Even if international legal obligations now require domestic law to be changed in particular ways, the variety in domestic implementing frameworks will nonetheless reproduce local rather than global standards. Local standards are very different – with emergency decrees infringing human rights posing

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prominently displayed on its website for its first few years of its existence a quotation from Sir Jeremy Greenstock, the CTC’s first chair:

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States’ reports and take up their content in other forums.

U.N. Sec. Council Counter-Terrorism Comm., Protecting Human Rights While Countering Terrorism, <http://www.un.org/en/sc/ctc/rights.html> (statement made in a briefing to the Security Council on 18 January 2002). Slowly, and far from completely, the CTC has been taking on board the human rights critique and has launched some recent attempts to address the problems. A working group within the CTED now reviews national policies for human rights compliance, but that has come very late and it is not clear what happens when human rights abuses are twinned with otherwise “effective” policies. *Id.* (providing the current statement of human rights concerns at the CTED). United Nations General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, delivered to the Human Rights Council by Martin Scheinin*, U.N. Doc. A/HRC/13/37 (Dec. 28, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37.pdf>.

no problem in some places while statutes attempting constitutional compliance are nonetheless found constitutionally problematic in others, and with rights-abusive implementation the norm in some places, even as the same measures would be blocked in other places. As a result, states in the global anti-terror campaign will for the foreseeable future resemble pre-school-age children caught in parallel play, rather than mature people engaged in truly cooperative and responsible action.

The global anti-terror campaign may appear to have broken down the international law barrier to creating a binding legal framework applicable to all states. But that just tossed the problem of global coordination over to the comparatists, who could easily have predicted that the variety of national legal systems would produce hugely varying responses to the same mandates. The world is not yet a place where globally coordinated action will produce a world-wide web of legal interdiction. As the U.N. Security Council assesses the successes and failures of its global security law project to determine what to do next, it should consider not just the failures of coordination among states in the way that global security law has been enacted, but also the collateral damage done to domestic constitutional law and international human rights law in the process.