U.S. NATIONAL SECURITY REQUIRES A LEGALLY BINDING INTERNATIONAL DEFINITION OF TERRORISM: DOES A BROADER DEFINITION OF TERRORISM PUT US IN THE PROPER CONDITION TO PUNISH THOSE WHO CHALLENGE OUR NATIONAL SECURITY?

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I. Introduction

The term national security includes many principles. One of the fundamental principles of national security is deterrence and putting ourselves in a "proper condition to punish" those who might challenge our national security. The creation of a legally binding international definition for terrorism will give us the strongest footing for deterrence, retribution, retaliation, and punishment of those who would threaten our national security. "Preserving the national security of the United States requires safeguarding individual freedoms and other U.S. values, as well as the laws and institutions established to protect them." In essence, national security encompasses the protection of the fundamental values and core interests necessary to the continued existence and vitality of the state.

Arguably terrorism is simply an attack against the very nature and security of a nation’s values and institutions. Therefore it is necessary that the international community remain vigilant in its pursuit of a legally viable and sustainable definition of terrorism because the social values, infrastructure, and economic prosperity are all affected by our national pursuit of terrorists and terrorism as it is currently defined by the international community. We must always ask ourselves, in the context of national security, whether “a particular policy further[s] U.S. security or economic interests while preserving the U.S. Constitution.” At the essence of this principle are questions of the rule of law, under the U.S. Constitution and the

2 See infra note 121 (Referring to Thomas Jefferson’s quote on the principles of deterrence and national security).
3 See Jordan, supra note 1, at 4.
4 Id.
5 Id.
7 See Jordan, supra note 1, at 4.
social and economic costs incurred when a nation pursues terrorism, poorly defined, at great costs to its own national security and vitality.

Terrorism can only be defined as aggression of a non-state actor against a nation state.8 “[For] a state enemy, if determined on violence, has no alternative but to turn to terrorism . . . Thus for all enemies of liberal democracies · whether state, group, or individual · terrorism is a likely recourse . . . [Terrorism] is now established as a method of violence against liberal states.”9

“The historical difficulty of democracies, which is rooted in a healthy abhorrence of war and a mirror imaging of the good faith motives of others, is placed under particular stress when aggressive attack is concealed . . . But, more often in the contemporary international system aggressors rely on sophisticated and secret support for terrorist attacks . . . By denying these attacks, the aggressors seek to compound the problem of the world community in responding to them and to receive the protection of the very system of world order they are attacking. This strategy of secret warfare [terrorism] is destroying the very fabric of the international system against aggressive attack.”10

Essential to our international system’s ability to hold responsible and prosecute these secret attackers is a viable, workable, and sustainable legal definition of terrorism, “in international criminal law, violations of customary international law may produce individual criminal responsibility. But then, the crime must be clearly defined and must be included by international agreement in the subject matter jurisdiction of the international criminal tribunal [for] the perpetrator is to be brought to justice.”11 Therefore, “[a] key aspect to resolving international disputes is customary international law.”12 This customary international law provides much of the foundation for any determination of criminality by an individual or group. Customary international law has not yet defined or criminalized terrorism beyond the laws for war crimes, and terrorism is not expressly included or defined in the subject matter jurisdiction

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8 See generally Omar Malik, Enough of the Definition of Terrorism (2000).
9 Id. at XI-X.
11 Johan Van der Vyver, Prosecuting Terrorism in International Tribunals, 24 Emory Int’l L. Rev. 528, 531 (2010).
12 Ellen S. Podgor & Roger S. Clark, Understanding International Criminal Law 7 (2d ed. 2008).
of the International Criminal Court (ICC).\textsuperscript{13} “[I]nternational law does not outlaw terrorism per se, but only prohibits certain types of violence (which in some instances include acts of terror violence).”\textsuperscript{14}

The fact that similar non-direct asymmetrical warfare tactics have been used by terrorist groups, freedom fighters, and liberation armies does not change the essential nature of these deeds: regardless of the nobility of the cause, some means and methods must be outlawed.\textsuperscript{15} This truism argues for a robust definition of terrorism that should be presented before the International Criminal Court (ICC). Yet, “[t]errorism was deliberately omitted from the subject matter jurisdiction of the ICC and is not expressly mentioned as a crime that can be prosecuted in the ICTY (U.N. International Criminal Tribunal for the former Yugoslavia).”\textsuperscript{16} The U.N. has set some precedent in this regard because “[terrorism] is mentioned by name in the jurisdictional provisions of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the Special Court for Sierra Leone.”\textsuperscript{17} Yet, “[t]he events of September 11\textsuperscript{th}, 2001, perhaps more than anything else, underscored the need to bring terrorism within the jurisdiction of the ICC.”\textsuperscript{18}

Generally, “throughout the years, international tribunals have allowed for the prosecution of conduct that requires international condemnation.”\textsuperscript{19} The tribunals have been created under the powers of the United Nations Security Council’s powers for the maintenance of international peace and security.\textsuperscript{20} Many of the “special courts [have been established] to handle crimes of an international magnitude.”\textsuperscript{21} These included the Nuremberg Trials, the Tokyo Tribunal, the ICTY, the ICTR, and the Special Court for Sierra Leone mentioned above.\textsuperscript{22} Nevertheless, one of the most important and “famous aphorism[s] [about the interplay of international criminal law came out of the Nuremberg Trial], it asserted that: crimes against international law are committed by [persons] not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\textsuperscript{23} “In reality... both . . . the State and the individual may

\textsuperscript{13} See Van der Vyver, supra note 11, at 531-32.
\textsuperscript{14} Id. at 533.
\textsuperscript{15} Id. (paraphrasing Judge Greve’s quote).
\textsuperscript{16} See Van der Vyver, supra note 11, at 534.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 540.
\textsuperscript{19} See Podgor and Clark supra note 12, at 205.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} See Podgor and Clark, supra note 12, at 207.
be responsible for breaches of international law... Indeed, the significant conceptual breakthrough in the Nuremberg analysis was the understanding that responsibility of the State did not preclude responsibility of the individual.”

“This intellectual [jurisprudential] move is at the [foundation] of all the subsequent exercises in punishing international crimes outside the domestic judicial apparatus.”

The principles of the Nuremberg Trial, “served an important role in the drafting of later international documents... [on genocide] and [human rights].

“The Nuremberg Principles issued by the International Law Commission in 1950 provided that individuals could be held liable for crimes in international law, irrespective of whether the conduct was [already defined] as a crime under international law.” Individuals could be held accountable for crimes against, “peace, war crimes, and crimes against humanity” under international law.

The legal reasoning of the Nuremberg Trials for individual culpability was also applied with regards to genocide at the Tribunals for Yugoslavia (ICTY), Rwanda (ICTR) and the Special Court of Sierra Leone.

This jurisprudential reasoning was continued and applied during the Special Tribunal for Lebanon in 2007.

The Special Court for Lebanon also included the subject matter jurisdiction for terrorism, a definition of terrorism, and the “power to try in absentia where the accused has... not been handed over to the tribunal by the State authorities concerned.”

These developments which were codified by the U.N. between 1998 and 2002 led to the development of the ICC and began to bridge the gap in international law that has created our present day conundrums and inefficiencies regarding an internationally agreed upon and legally sustainable definition for terrorism. Also, it can be shown that international criminal law as supported by the Rome Statute, which came into force on July 1, 2002 supports prosecution of terrorist acts like that of September 11th, 2001 since it stated in “The Preamble, “the need for universal jurisdiction to proceed as a united front to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes... The independent permanent International Criminal Court is established.

24 Id. at 207-8.
25 Id. at 208.
26 Id. at 210.
27 See Podgor and Clark, supra note 12, at 207.
28 Id.
29 See generally Podgor and Clark, supra note 11, at 215-18.
30 See Podgor and Clark supra note 11, at 222.
31 Id. at 222.
32 Id. at 229.
to have jurisdiction over the most serious crimes of concern to the international community as a whole.”

As will be discussed later, our national security apparatus is most resilient when we are in a “condition to punish” those that have threatened our national security. A robust definition of terrorism which is firmly held and legally sustainable under the principles of Nuremberg Trial, the International Law Conventions, subsequent U.N. Tribunals, and the Rome Statutes that created the ICC may give the international community the force, consistency, and legal efficiency to create sustainable deterrence against transnational criminal terrorist actors.

II. Background

Though the concept of terrorism has been around for centuries, the modern definition of terrorism has evolved into a very pliable and malleable legal construct. A malleable legal construct is a problem for legal scholars and practitioners because the law demands consistency. Legal consistency creates confidence in practitioners and fosters credibility among the citizenry where the law is applied. When a malleable legal definition for terrorism is applied across the globe the result is inconsistent legal application. This inconsistency undermines the confidence of our international legal system. The inconsistency of legal definitions for terrorism also creates tremendous inefficiencies for our legal systems. The inefficiencies of our international legal systems create substantial and unrecognized costs because of the inconsistencies in the modern definition of terror. The economic costs and lost opportunity costs created by a malleable and amorphous definition of terrorism are arguably too expensive given the many other challenges to our national and global infrastructure. A consistent legal definition for terrorism will limit inefficiencies and costs to our national and global economic systems and infrastructures.

This paper endeavors to discuss: 1) the recent uses of the term terrorism, 2) a brief history of the uses of the term terror, 3) the historical legal imperatives that demand constancy of legal principles, 4) a discussion of terrorism under legal penal law theories, 5) the current problems in defining terrorism, 6) a view of terrorism as a military means, 7) the costs of too broadly defining terrorism, and 8) the recent U.S. Supreme Court Cases’ definitions of terrorism. The discussions are chosen to show that a malleable and amorphous

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33 Id. at 229-30.
34 See infra note 121 (Referring to Thomas Jefferson’s quote to John Jay).
definition of terrorism may seem prudent at the onset when a nation-state has been recently assaulted by terrorism and its actors but this approach is tremendously inefficient and ultimately very costly to national and global legal systems, infrastructures, legal consistency, and citizenry confidence.

Ultimately, with this paper, I hope to offer a rationale to clarify and give certainty to our legal definitions of terrorism and the terrorists that commit these acts, and to begin a discussion of the costs and inefficiencies that can potentially dismantle the confidence in our national and global legal systems. The esteemed Harvard professor, Richard Baxter once noted, “We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise, it is ambiguous, and above all it serves no operative legal purpose.”

Our political and social fetish with terrorism and terrorists is extremely costly to our nation’s financial resources, infrastructure, and international political capital. Ultimately, this obsession fueled by such an imprecise legal definition, undermines the national security, liberty, and common good that arguably a broader definition of terror has desperately tried to defend.

III. The Recent Uses of the Term Terrorism Have Broadened the Definition

The role of the terrorist in modern international political power has continued to grow. This growing role for terrorism in the international political landscape has increased the interest on the part of states to broaden the definitions of terrorism for the expressed good of stability and security of society. Arguably, the broader definitions give nation-states greater flexibility and allow for pursuit and prosecution of terrorists’ acts across the globe. Even the slightest connections to terrorism or acts of terror can be legally pursued as the definitions of terrorists’ acts have broadened to encompass a wider range of activity and a greater number of persons.

The problems with the premise of broadening the definition of terrorism is that a broader definition means detaining, interrogating, and trying more terrorists, and risking a definition that grows so broadly it loses its meaning. The impacts of these two problems are:

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36 See 18 U.S.C. § 2709(b)(1), (2) (2010) (The USA Patriot Act, in which Congress broadened the scope of investigations and relevant categories necessary to protect against international terrorism. The U.S. Code gives expanded legal, interpretive authority to FBI officials in relation to international terrorism).
firstly, that the current legal system is already overburdened and the immigration courts and detention facilities are bursting at the seams within the already strained American penal system; and secondly, that the stated interests in stability and national security are actually greatly threatened by an imprecise definition of terrorism because the resources necessary to contain such an expanding definition would have to be equally limitless. Even when some of the short term interests of the various nation-states that wish to pursue these terrorist threats are met, the expanding definitions of terrorism have become very burdensome in terms of economic costs, lost opportunity costs, strain on the penal system’s infrastructure, and social costs to international good will and the elemental principals of liberty such as due process.

IV. A Brief History of the Word Terrorism and its Uses

The efforts to define and limit terrorism over the centuries have been noble but extremely challenging because societies have used sporadic acts of violence to control and influence political decisions and powers for millennia. Authors like Walter Laqueur, the noted international terrorism scholar, have predicted that a working definition of terrorism will always continue to elude the international community.37 Yet, “the inability to secure a working definition of terrorism makes it more difficult to secure the [international] cooperation . . . necessary to deal [effectively] with global political violence . . . and [challenges] liberal societies to learn to protect themselves at a cost that is not so great as to destroy their very values.”38 “There is always hope that terrorism as a political force will end but the stark reality is that “[c]onflict is an immutable part of human nature and terrorism is a present method.”39

Actually, the first uses of the term terror in the western political lexicon began with The Reign of Terror during the French Revolution of the 1700’s. The Reign of Terror actually referred to the swift and decisive force used by the state of France to quell the rebellious, insurgent forces. The only commonality that this use of the term terror has with our current use of the term is that it was a means of political force, and this political force was used in a manner that usurped and disrupted the existing rule of law. The French government, during The Reign of Terror, sought quick non-legal remedies to resist the attacks on its “legitimate” sovereignty. The original use of the term terror in the western lexicon was for political purposes. The French government usurped the legal principles of the rule of law and due process by force to quell an insurgency. The original use of the term terror is also directly connected to the

37 See Malik, supra note 8, referencing generally WALTER LAQUER, THE AGE OF TERRORISM (1987) and his other works.
39 Id. at Preface.
dismantling and undermining of an existing rule of law for the purposes of establishing political power and expediency.

Since the attacks on American soil on September 11, 2001 that were led by the Muslim transnational group al-Qaeda, the definitions of terrorism have become increasingly broad. After the attacks on U.S. soil by al-Qaeda on September 11, 2001, “the legal approach to terrorism... became one of ‘forward-leaning’.” The President’s speech following the attacks of 9/11 stated that “full resources would be used to bring those responsible to justice, [and that] no distinction would be made between terrorists who committed these acts and those that harbor them.” This position was vigorously supported in Ron Suskind’s book, The One Percent Doctrine, in which he carefully explained that “even the most minimal chance of a manifested terrorist activity must be acted upon as if it were of the greatest certainty.” This is to say that previously held definitions of terrorist acts and actors would be amended as necessary to protect the urgent security needs of the nation. The U.S. administration became more aggressive with those identified or connected to the acts of 9/11. Many nations followed the U.S.’s lead regarding the identification, detention, and interrogation of any person tangentially connected with the attacks of 9/11, as the following quote denotes:

Increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this: terrorism is terrorism . . . what looks, smells and kills like terrorism is terrorism.

The assumptions of our national and international leaders, with respect to terrorism, seem to be founded on the principle that using the broadest definition will produce better results. Better results have generally meant that western nations can detain, attack, and quell disruptive insurgent efforts within and outside of their boarders under the umbrella of efforts in support of the global war on terror and national security.

This broadened approach to defining terrorism was created during the crisis and aftermath of 9/11. A definition of terrorism that was broadened in response to an attack on American soil and

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40 DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, 172 (2009).
41 Id. at 172.
42 President George W. Bush, Speech to Address the Nation After the Attacks of 9/11 (Sep. 11, 2001).
nurtured by a nation in crisis could ultimately have negative effects and consequences on our ability to maintain core legal principles. The principles of law that undergird our social dependence on the rule of law must be firmly rooted in coherency and consistency. Coherency and consistency are necessary elements for the solid legal framework that precedes the unlimited force of the state to punish the offense.\textsuperscript{46} It seems in the midst of the debate, anxiety, and turmoil of post 9/11 on American soil, we have cast our proverbial nets by defining terrorism too broadly, and now we run the risk of pulling everything from the sea of this global turmoil and unrest onto our American boat because of this overly broad definition of terrorism.\textsuperscript{47}

V. Historical Legal Imperatives on the Principles and Purposes of Law

Through the centuries, societies have debated the origins and purposes of law. Nevertheless, a stable, working society, in which individual rights and corporate concerns are balanced, is a beginning to understanding the purposes of law, social contract, and governance.\textsuperscript{48} We must be cognizant of the fact that definitions are powerful and tend to serve the agendas of those who have invested in the definition.\textsuperscript{49} Definitions involve an exercise of power and can set the political agenda.\textsuperscript{50} Therefore, an internationally recognized and legally binding definition must comport with grandest notions of the purposes for the law.

In \textit{The Law}, by Frederic Bastiat, he stated that the purpose of law was a collective organization of individuals’ natural rights into lawful defenses of these rights.\textsuperscript{51} This collective organization cannot exist for the sole purpose of destroying or subjugating an individual right. In \textit{The Path of Law}, Oliver Wendell Holmes stated that “a legal duty... is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.”\textsuperscript{52} Holmes took great care in his statements on the law to distinguish between morality and the law, but the core of his thesis was predictability of

\textsuperscript{46} \textit{See generally} Thomas Hill Green, \textit{Anglo-American Philosophies of Penal Law}, 1 J. AM. INSTITUTE CRIMINAL L. & CRIMINOLOGY 19 (1910).
\textsuperscript{47} \textit{See generally} Malik, supra note 8, at xix.
\textsuperscript{48} \textit{John Rawls, A Theory of Justice} (1972).
\textsuperscript{49} \textit{Peter Sederberg, Terrorists, Myths, Illusions, Rhetoric, and Reality} (1989).
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Fredrick Bastiat, The Law}, 6 (1850).
\textsuperscript{52} Oliver Wendell Holmes, Jr., \textit{The Path of Law}, 10 HARV. L. REV. 457, 457 (1897).
the courts. According to Holmes, Justice is premised on predictability. Therefore, for a court to properly administer justice, as an arm of the state, it must be consistent and predictable in its interpretation of the laws and its offenders. The justice of a court of law cannot adequately be achieved without a consistent legal framework and rules for legal interpretation.

LEGAL THEORIES ON PENAL LAW AS A LENS INTO DEFINING TERRORISM

The principles of law and legal reasoning found in Bestiat and Holmes are continued by other legal theorists on penal law and punishment theory. In Thomas Hill Green’s writings on social contract and penal law, he asserts that the right to ‘free life’ is elementary to almost every developed legal tradition. From this individual freedom derives the basic premise of our social contract with the state. The state defends and protects its citizens under the precepts of this agreement. The power of the state is derived from associated groups. This gives the state the right to prevent actions which interfere with the social good. This right that belongs to the group eliminates the need for private retribution or vengeance. Retribution and “regulation of private vengeance” belong to the state. Although, “the state cannot be supposed capable of vindictive passion.” The state must be governed by higher principles of the common good. “The concept of vengeance is [a] quite inappropriate...action of . . . the state on the criminal.” The basic principles of international law, criminal law, and punishment theory are violated when the definitions of a crime are modified, abridged, changed, or broadened after the offensive act. The power and credibility of the state must remain above the moral pining of the populace. This ensures credibility. The state’s response to an offense should always, “be prospective rather than retrospective.” Crimes and offenses against the state are not supposed to be defined ex post facto. This is a violation of basic international and legal norms.

The lack of international unity and cooperation in the age of terrorism [has] naturally led to today’s diverse processes by which states prosecute and punish suspected transnational terrorists. The different legal standards that states use to try transnational terrorism.

53 Id.
54 Id. at 20.
55 Id.
56 Id. at 22.
57 Id. at 22.
58 Id. at 22.
59 Id. at 31.
terrorists are as divergent as domestic legal systems throughout the world. . . . Such varying legal processes make it difficult to prevent and eliminate future terrorist attacks. . . [and] introduces doubt to the legitimacy of those judicial proceedings. Altogether, these separate state solutions to terrorism often fail to respect principles of international law.62

Based on the above assertion by the author Joseph Anzalone, the international legal community has failed to concretize a definition of terrorism. This failure to create a legal definition causes great harm to the credibility of the system, fails to support to proper pursuit of terrorism, and disables any possibility for true coordinated deterrence of terrorism. Successful deterrence is one of the most commonly held principles of penal law.63 Therefore, failure to have an internationally agreed definition of terrorism destabilizes the international legal community, creates greater unattended costs, and diminishes efficiency toward a greater common good.

VI. Defining Terrorism

Most every group that has tried to define terrorism over the last century has dissolved without a legally solid definition. The League of Nations initially attempted to define terrorism at the beginning of the Cold War. After the formation of the United Nations, various committees have been formed throughout the years for the prohibition and definition of terrorism, but no internationally agreed upon standard could be resolved.64

Currently, there are well over 200 definitions of terrorism used throughout the world.65 This reality exists because, “countries disagree on how to define ‘terrorism’ and who should be identified as terrorists.”66 Therefore, “[d]efining terrorism has remained a major block to reaching international agreement on terrorism.”67 This major block has increased international economic and social cost, and reduced judicial efficiencies. “[S]ome commentators...argue that [a]
definition [of terrorism] is both technically impossible and/or undesirable on policy grounds.” Nevertheless, “terrorism remains a political term describing various acts and methods of political violence.” Yet, “[t]he problem of finding [a] consensus on a universal definition [of terrorism] is, at this stage, more a political than a legal or semantic problem.” The most useful legal definitions of terrorism should not be developed in crisis by nation-states that have recently experienced asymmetric or insurgent transnational attacks. This will only create a politicized and shifting definition of terrorism, and a definition of terrorism without legal authority. Nonetheless, it should never be the state of the legal community to allow ad hoc definitions of international crimes or mercurial definitions that meet the whims and agendas of political ends.

In 1996, the U.N. formed an Ad Hoc Committee to address the proliferation of terrorism. The biggest hurdle for this committee was the definition of terrorism. The Ad Hoc Committee reformed after the September 11, 2001 attacks on the U.S. by al-Qaeda. The U.N. discussion after 9/11 came very close to a mutually agreeable definition, but Israeli occupation of Palestine and subsequent discussions of differences between terrorists, freedom fighters, and state-sponsored acts of violence seemed to derail the measurable progress toward a definition of terrorism.

Prior to the Ad Hoc Committee’s progress following the al-Qaeda attacks of 9/11, the U.N. Committee actually created an informal working definition of terrorism in 1996: Table 9: United Nations Ad Hoc Committee on Terrorism: Informal Text of Art. 2 of the Draft Comprehensive Convention:

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or

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69 Id. at 2.
70 Schmid, supra note 45, at 390.
71 Id. at 388.
72 Id.
context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.\textsuperscript{73}

The problem with almost any comprehensive definition of terrorism is that the range of actions, causes, and motives is almost unreasonably broad.\textsuperscript{74} “The description [of] ‘terrorist’ has been applied across a wide spectrum, which has included Winston Churchill for his bombing of German cities in the Second World War . . . to] Saddam Hussein for his chemical extermination of [the] Kurds...The academic study of terrorism has encompassed the whole and extensive spectrum of activities...The approach has been to trawl the sea for all its inhabitants and to dissect them in search of common characteristics...[A] more fruitful approach is to identify those...that pose the [greatest] problem, and to confine attention to them.”\textsuperscript{75} This is to say our emphasis should be on defining terrorists’ actions for political violence against international democratic states during times of peace.\textsuperscript{76}

**THERE ARE LEGAL PROBLEMS ASSOCIATED WITH DEFINING TERRORISM AS A MILITARY MEANS TO A POLITICAL OBJECTIVE**

The struggle of the international community to define terrorism over the last several generations and through the development of the United Nations only serves to highlight the necessity of a proper legal framework. A solid legal framework for terrorism gives support for the proper investigation, prosecution, and rendered justice for terrorism and its actors. Yet, the necessity for this legal framework still begs the question whether terrorism properly defined is a crime, a military means, or a political ends. The U.N.’s definition favors defining terrorism as an international crime. There are several pros and cons to that approach since each state has vastly different criminal law, but on the other hand, any definition that shows terrorism as a means to a political end lends support to the argument that some terrorists could be seen as enemy combatants under the United Nations’ definition for Armed Conflict under Common Article 3.\textsuperscript{77}

To define terrorism as a means to a political end gives greater credibility to the terrorist actor and serves to legitimate the illegitimate and criminal use of force by illegal transnational groups. This may add to the burden of the state to legally prove its legitimate legal interests and may create a shift in the burden of proof for the

\textsuperscript{73} See Schimd, supra note 45, at 387-88. (referencing U.N. Information Draft Definition of Terrorism).

\textsuperscript{74} Malik, supra note 8, at 2. (discussion of the most comprehensive terrorist definition to date that was completed by ALEX P. SCHMID AND ALBERT J. JORGNMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE (1988). ).

\textsuperscript{75} Malik, supra note 8, at xviii.

\textsuperscript{76} Id.

\textsuperscript{77} See generally Geneva Conventions (GC), United Nations Common Article 3 (1949).
state.\textsuperscript{78} If the illegal terrorist act is actually a means to a politically motivated end then the act begins to look and sound a lot like warfare. This is not necessarily a favorable position for developed western states because the U.N. provides certain legal protections and relaxations under its international laws of armed conflict to freedom fighters and enemy combatants.\textsuperscript{79}

Carl Von Clausewitz, the great 18\textsuperscript{th} Century Prussian military theorist and savant on political rhetoric and use of force, stated in his treatise \textit{On War} that:

\begin{quote}
We maintain . . . that war is nothing but a continuation of political intercourse, with a mixture of other means. We say, mixed with other means, in order thereby to maintain at the same time that this political intercourse does not cease by the war itself, is not changed into something quite different, but that, in its essence, it continues to exist, whatever may be the form of the means which it uses, and that the chief lines on which the events of the war progress, and to which they are attached, are only the general features of policy which run all through the war until peace takes place.\textsuperscript{80}
\end{quote}

To further this concept of warfare as an extension of political agenda, American military author Thomas X. Hammes, in his book \textit{The Sling and The Stone}, addresses the changing face of warfare over the centuries and discusses how smaller, less developed nations have continued to use increasingly less direct methods of warfare because they are facing the “goliaths” of western imperialism.\textsuperscript{81} Hammes states, that “[this newly developed generation of warfare] uses all available networks – political, economic, social, and military - to convince the enemy’s political decision makers that [victory is] either unachievable or too costly. . . . like all wars, [this new form of warfare] uses [all] available weapon systems [means] to [change the enemy’s political position].”\textsuperscript{82}

Though Hammes traces the lineage of the modern terrorism tactics through Mao Tse-tung\textsuperscript{83}, many military leaders have employed

\begin{itemize}
\item \textsuperscript{78} See recent Supreme Court case discussions: \textit{Al-Marri v. Wright}, 487 F.3d 160 (4th Cir. 2007); \textit{Al-Bihani v. Obama}, 590 F.3d 866 (D.C. Cir. 2010).
\item \textsuperscript{79} See generally Geneva Conventions (GC), United Nations Common Article 3 (1949). The determination of the proper categories for freedom fighters and enemy combatants is a very detailed process under the laws of war and first generally requires an analysis of the type of conflict. International laws of war may not always apply. See also discussion Gary Solis, \textit{THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR} (2010). The U.S. is not a signatory to GC additional protocol 2 which provides exceptions for freedom fighters.
\item \textsuperscript{80} \textit{CARL VON CLAUSEWITZ}, \textit{ON WAR} (1832).
\item \textsuperscript{81} \textit{THOMAS X. HAMMES, THE SLING AND THE STONE} (2004).
\item \textsuperscript{82} \textit{Id.} at 2-3.
\item \textsuperscript{83} Hammes, \textit{supra} note 81, at 3. (Hammes traces the development of this new generation of warfare from Mao Tse-tung People’s War during
similar indirect military tactics throughout history to effect political change. This paradigm for a new generation of warfare allows for smaller nations and transnational groups to forward their political agendas through the use of indirect attacks on the political stability of nations they may perceive as a threat or as the aggressor against the transnational group’s political will. To echo this point, from the fields of terrorism scholarship, Laqueur notes, “the new terrorism is different in character, aiming not at clearly defined political demands but at the destruction of society and the elimination of large sections of the population.”

Hammes’ concept of David versus Goliath in The Sling and The Stone is problematic because it adds to the broadness of the definition of terrorism and may lessen our legal defenses. This broader definition of terrorism is further complicated when Hammes’ concept of emerging warfare is read through the lens of political conflict as posited by Clausewitz, which argues that warfare is simply an extension of political discourse. If terrorism is a legitimate means of warfare by a defenseless and inferior opponent then terrorism becomes more difficult to prosecute as an international crime.

If Hammes is correct on any level, then the objective and goals of terrorist organization’s insurgency have been achieved, because “their agenda was never military victory but the disruption of the social fiber and stability of the [state] superpower.” If the legal scholars Holmes and Bastiat are correct in their assertions of the purposes of law, then a stable, working social system is largely founded in a strong adherence to and consistency of the rule of law. It is highly improbable that we can continue on the path to global security and international continued cooperation without a coherent development and definition of the legalities and illegalities of terrorist acts as a means of legitimate political discourse, warfare, or international crime.

Terrorism currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of non-retroactivity. If the law is to admit the term, [an] advanced definition is essential on grounds of fairness, and it is not sufficient to leave [the] definition to the unilateral interpretations of States. [A proper] [l]egal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately it must do so

China’s Revolution. Mao’s tactics exploited the few advantages that a small revolutionary movement have against a state’s power with a large and well-equipped army. People’s war strategically avoids decisive battles, since a tiny force of a few dozen soldiers would easily be routed in an all-out confrontation with the state. Instead, it favors a three stage strategy of protracted warfare, with carefully chosen battles that can realistically be won).

85 Hammes, supra note 81.
without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression.\textsuperscript{86}

These principles challenge us to understand that there are social, political, and economic costs associated with each of the various “lines on which the events of the war progress.”\textsuperscript{87} The enemy’s goal is to convince his adversary that the costs of conflict are too great.\textsuperscript{88} Whether terrorism is best defined within the scope of military means or not, the objectives of terrorism and warfare are similar in terms of victory, deterrence, and maintenance of the underlying social infrastructure that we endeavor to protect. These are all costs, and we must be mindful of them because the terrorist enemy is quite mindful of our perceived and real costs and the effects of these costs have on the underlying stability of our democratic social structures.\textsuperscript{89}

\textbf{VII. The Costs and Limits of Defining Terrorism Too Broadly}

Implicit in the edicts of any country to battle its enemies at all costs, is the question of whether there exists a balance between the rule of law and the security of the state. Some political scholars argue that there is always an inherent tension between the rule of law and national security. The question is whether one principle should be held and lauded over the other, or should the principles be balanced. The great Roman leader Cicero stated that “during war the laws are silent.” Yet, his classic refrain does not consider the costs to a society when the rule of law is broken. This precept of a Roman emperor and conqueror does not discuss the consequences from which a modern democratic society may not easily repent when the rule of law is broken without regard for the economic, social, moral, and jurisprudential costs associated with such an attack on the basic principles of the rule of law. Though, we must also consider that maybe the Roman statesman’s precept is simply admonishing us to limit the scope and time period which our laws are silent, because to do otherwise has great and indelible consequences.

After 9/11 in the U.S., the following position was formed and written in support of an abridgement of the rule of law in support of the war on terrorism: “Enemies, unlike criminals, are out to destroy us. They must be fought and crushed, not pursued and punished.”\textsuperscript{90}

\textsuperscript{86} Saul, supra note 68, at 11. (internal quotation omitted).
\textsuperscript{87} See Clausewitz, supra note 80.
\textsuperscript{88} Hammes, supra note 81.
\textsuperscript{89} See Spencer, supra note 65. (citing Walter Laqueur’s comments).
\textsuperscript{90} Anne-Marie Slaughter, Beware the Trumpets of War: A Response to Kenneth Anderson, 25 HARV. J.L. & PUB. POL’Y 965, 965 (2002), citing Kenneth Anderson, What to do with Bin Laden and Al Qaeda Terrorists?: A
This clear clarion call that our nation should engage in war against terrorists and terrorism is enticing and in many ways satisfying, yet it is a position that does not speak of costs. There is no balancing in this assertion. The principles are simple: there has been an attack at or near the main battery of the U.S. social and economic infrastructure, this attack was committed with intent, malice and aforethought, the attack caused great damage to innocent civilians and took civilian lives. These principles set the moral ground for a full and complete retaliation of the greatest U.S. military force. For anyone who agreed with this position, the al-Qaeda attacks of 9/11 demanded full military force and retribution as the only reasonable response.

We must neutralize terrorists before they strike. To respond to this threat of terrorism, the Department has pursued an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal. The overriding goal is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who violate the law and threaten our national security . . . we will not permit, and we have not permitted, our values to fall victim to the terrorist attacks of September 11.91

It is not the intent of my paper to show disagreement with this aforementioned proposition, or to vilify the proponents of the necessity of military response, but simply to add to the discussion an element of costs, and to assert that costs should as often as possible be an element of our social calculations.92 It is an unsustainable position to continue to broaden our legal definitions in hopes of “catching” more conspirators to terror.93 We cannot fight and crush every opponent of the U.S. American ideology across the globe regardless of distance, adequacy of reach, or practicality.94 To wage a complete battle against global terrorism in its broadest forms assumes that we have unlimited capacity and resources.95 Even for one of the greatest free nations in history and one of the most

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92 Michael Gordon and Bernard Trainor, Cobra II: THE INSIDE STORY OF THE INVASION OF IRAQ (2006)(Many within the Bush administration were tremendous heralds for a more balanced approach and cost benefit analysis as the Global War on Terror began).
93 See generally Malik supra note 8.
95 Id.
competent and capable military forces on the globe, this type of hubris can itself become a costly arrogance and have tremendous deleterious effects on our nation’s resources, its military, economy, and legal systems. The current U.S. national debt is more than $15 trillion dollars. In 2000 the national debt was $5 trillion dollars. The national debt was $8 trillion and rising in 2006. This deficit rose from an annual surplus of $200 billion dollars in 2001 to an annual deficit of $400 billion dollars by 2006. This deficit happened during just the first five years U.S. National Security Strategy focused the defense budget on the Global War on Terrorism. Invectives which encourage our nation to attack transnational terrorism in all its forms and manifestations across the globe, potentially unravel the developments in international progress toward rule of law agreements, and “turn back the clock on one of the most important legal developments over the past half-century [which is] the individualization of international law . . . [these invectives] betray our deep commitment to the rule of law as part of our national identity, by substituting vengeance for punishment.”

Notably, the greatest political minds have disagreed on this very point of tension between radical and passionate pursuit of our enemies, and patience and insistence on the rule of law. Benjamin Franklin reminded his fellow colonists that "[anyone] that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." For Franklin, liberty was the supreme good, and a people capable of surrendering its freedoms in exchange for security were not fit for self-governance, or even safety. A century later, Abraham Lincoln appeared before Congress to justify his unilateral decision to suspend the writ of habeas corpus. “Are all the

98 Gordon supra note 94 at 80.
99 Id.
101 Slaughter supra note 90 at, 966.
103 Id.
laws, but one...to go unexecuted, and the government itself go to pieces, lest that one be violated.\textsuperscript{104}

Edmund Burke, the great British politician and political philosopher once commented in his political manifesto that civil liberties cannot exist unless a state exists to vindicate them: "[t]he only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.\textsuperscript{105}

Burke’s sentiments highlight Franklin’s thesis and echo the principles of justice which cannot rightfully be acquired by quiet usurpations of our civil liberties and due process or a muffling of the rule of law. Ironically enough, Burke’s retort to avoid excess, passion, and retribution as a means to lawful order was developed in the context of and in response to the \textit{Reign of Terror} in France during the late 1700’s, and Franklin’s command was fashioned during our nation’s \textit{Revolutionary War}. Arguably, these two statesmen knew something of the false balancing of liberties and national securities during times of war and its potential social costs.

Throughout history leaders have struggled to balance national security and human rights. Yet, “[t]he dichotomy between freedom and security is not new, but it is false.”\textsuperscript{106} The proposition that liberty and national security are competing or mutually exclusive positions should be challenged. “In the article \textit{The Corruption of Civilizations}, Professor Timothy Kuhner denies that security and liberty are competing sides in a zero-sum game... ‘Our security is often best served by adhering to our political values and cultural influences.’\textsuperscript{107} Therefore, any premise that asserts that our national security is best served by disruption of our commonly held domestic legal principles, or widely held international law principles must be challenged directly on the foundation of legal history, the principles of human rights, and social utility.

\textbf{VIII. Principles the U.S. Supreme Court’s Decisions on Terror and the Rule of Law and the Effects on Efficiency}

As the war on terror continues the U.S. courts have tried nobly to defend the principles of law under the constitution. The U.S.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} Dinh, \textit{supra} note 91 at, 400, quoting Edmund Burke, and citing \textsc{Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline} (1996).

\textsuperscript{106} \textit{Id.}

federal courts have resisted attempts to undermine the consistency of judicial review and the rule of law. The courts have upheld the protections of Due Process for foreign nationals in the United States, in cases like *Al-Marri v. Wright*, 487 F.3d 160 (2007), where a legal resident of the U.S. was unlawfully declared an enemy combatant, detained and transferred to military custody under the Military Commissions Act (MCA). The case held that the President did not have inherent constitutional authority to order seizure and indefinite military detention of a civilian.

The question of efficiencies and economy should derive naturally from the facts of the family of cases similar to *Al-Marri v. Wright*. In *Al-Marri* the defendant was held for more than four years without criminal charge or due process.\(^{108}\) “He was initially taken from his home [in the U.S. and detained], although the Government has never alleged that he is a member of any nation’s military, has fought alongside any nation’s armed forces, or has borne arms against the United States anywhere in the world . . . he has been so held, without acknowledgement of the protection afforded by the Constitution.”\(^{109}\) The court held in *Al-Marri* that, “the president of the United States did not have inherent Constitutional authority ... to order... indefinite military detention of legal resident[s] who had not been shown to fit the legal definition of ‘enemy combatants’, [since Congress] strictly limited summary detentions of ‘terrorist aliens’, and also contravened legal residents’ uncontestable due process rights.”\(^{110}\) The illegal detention of *Al-Marri* a legal resident and citizen of Qatar was reversed and remanded, but there were real calculable financial, resource and infrastructure costs that that were paid for by our nation’s citizens because of these decisions. For our nation to arrest, interrogate, and hold an infinite number of detainees without legal cause is extremely costly in a number of areas. Yet, the policy is justified by the “The One Percent Doctrine”,\(^{111}\) which in principle avoids any discussion of cost or risk analysis as its major premise.

In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), nearly opposite facts lead to an opposite determination by the court. The defendant is a Yemeni citizen, not an American legal resident and the defendant fought with the Taliban in Afghanistan. He petitioned the U.S. District Court for the District of Columbia for a writ of habeas corpus.\(^{112}\) The District Court found that, “international laws-of-war

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\(^{109}\) *Id.*

\(^{110}\) *Id.* at 161.

\(^{111}\) See Suskind, *supra* note 43.

\(^{112}\) J. Taylor Benson, *International Laws-Of-War, What Are They Good For? The District of Columbia Circuit in Al-Bihani v. Obama Correctly*
carried no authority in United States courts because they had not been implemented into domestic law by the political branches.”

The question is not simply whether the court correctly decided the cases under the proper legal precedent, but whether this process of detaining and prosecuting the widest number of possible affiliates to various transnational political groups that are misaligned to the American politic should be given trial and appeal under the limited resources of our already overly-burdened Immigration, Military, and Federal court systems. To use the words of author Omar Malik, we are guilty of broadly “trawling the [terrorist waters] for all of its inhabitants.” It is futile for the courts to dissect these terrorists cases in search of commonality when there are no legally agreed upon definitions of terrorism. This is an economically unfeasible, legally unreasonable, and socially unsustainable proposition upon which we have embarked.

IX. Conclusion

The current use of the term terrorism is too broad to be legally useful. The international legal community is rendered less efficient because of the lack of usefulness of the increasingly broad definitions of terrorism and terrorists. Because of this inefficiency in our legal processes regarding terrorism, the U.S. has been hit directly with immeasurable, unaccounted, and nearly insurmountable costs to our financial institutions, infrastructure, and national security resources.

After hundreds of attempts to define the term in legally meaningful ways, the international community is consistently stalled by roadblocks and fundamental disagreements of policy. The values of a stable definition before the law are numerous, but the stability of an efficient legal system and proper due process must be counted among these as most highly valued. Without the stability and credibility of our legal system, the essential trust and credibility of our legal process necessary for government begin to erode. “Giving in to the urge to combat terrorism before trying to understand or define it...[can only be done at] the expense of [great social] frustration.”

It is imperative that the legal community continue to harden our definitions of terrorism so that we can firmly fasten to it our indelible legal principles of penal law and international law to include due process. The reasoning principles of the legal community must give consistency to the terms and processes for prosecuting global Clarified That International Laws-Of-War Do Not Limit The President’ Authority to Detain Enemy Combatants. 44 CREIGHTON L. REV. 1277, 1278, citing Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

113 Id. at 1278.
114 Malik, supra note 8, at xix.
115 Id. at xviii.
terrorism and help resist the emotive tendency to define terrorism in increasingly inflammatory, politically, and internationally incendiary terms.

Carrying enormous emotional freight, terrorism is often used to define reality in order to place one's own group on a high moral plane, condemn the enemy, rally members around a cause, silence or shape policy debate, and achieve a wide variety of agendas . . . Terrorists became the mantra of our time, carrying a similar negative charge as communist once did. Like that word, it tends to divide the world simplistically into those who are assigned the stigma and those who believe themselves above it. Conveying criminality, illegitimacy, and even madness, the application of terrorist shuts the door to discussion about the stigmatized group or with them, while reinforcing the righteousness of the labelers, justifying their agendas and mobilizing their responses.\footnote{116 See Schmid, supra note 45. (citing PHILLIP HERBST, TALKING TERRORISM: A DICTIONARY OF THE LOADED LANGUAGE OF POLITICAL VIOLENCE, 163-64 (2003)(internal emphasis omitted)).}

These inflammatory labels and ideologies have no place in our legal lexicon.

To varying degrees, the concepts and principles of “terror” for the ends of political purposes have been apparent throughout history. These means of political influence through violence have been used from Babylon through the period of the Greeks and Romans. The Peloponnesian Wars, the fall of Rome, Sun Tzu, and other great military and political leaders of history have all captured the ideas of power, fear and “terror” as a thesis to gaining, usurping, or maintaining power. “Kill one - Frighten ten thousand.”\footnote{117 Quote attributed to SUN TSU, THE ART OF WAR.} Therefore, arguably whenever the force is applied in an atypical manner and whenever the force applied is unexpected or unpredictable: the force applied to achieve the political end is often defined as “terror”. This is not reason enough to silence our rule of law. We cannot allow to thrive the concept of “one man’s terrorist is another man’s freedom fighter.”\footnote{118 Comment often attributed to Yasir Arafat.} We cannot allow our nation to undermine due process and the rule of law because this gives terrorists and terrorism the success of its main objectives, which is to destroy our peace and stability.\footnote{119 See generally Omar Malik, supra note 8. See also Hammes discussion, supra note 81.}

Since the end of the Cold War and the reduction in nation-state supported terrorism, the potential for leakage WMD material and expertise to transnational terrorist groups has increased.\footnote{120 Malik, supra note 8, at xi.} Given this reality, the extremely high global costs of failing to deter terrorism because we do not have a sustainable definition has now
been added to all of the other previously mentioned social, systemic, and opportunity costs, because of this stalled international process. The total costs of a failed and excessively broad definition of terrorism are excessively high. Our nation cannot afford the social costs of inadvertently legitimizing international terrorism, nor can this nation afford to lend support to state actors who may be inclined to use a broadened definition of terrorism as an umbrella under which they may perform acts of war that cannot be attributed to the state. It is in our nation’s best interest, and in the best interest of the international community to be extremely specific and particular about our definitions of terrorism and terrorist groups. These terms should not be diluted or broadened under the premise that a wider net will catch more fish, or that a greater outline will cast a wider shadow against the backdrop of our enemies. The sharpest, most concise and most direct definition will always serve the legal profession the best because of the greater efficiency of time, resource, and effort.

“The justest dispositions possible in ourselves will not secure us against [war].

It would be necessary that all other nations were just also. Justice indeed on our part will save us from those wars which would have been produced by a contrary disposition. But how to prevent those produced by the wrongs of other nations? By putting ourselves in a condition to punish them. Weakness provokes insult and injury, while a condition to punish it often prevents it.”