

U.C.L.A. Law Review

The Destabilizing Effect of Terrorism in the International Human Rights Regime

Wadie E. Said

ABSTRACT

This Article explores the counterterrorism apparatus maintained by the United Nations from a critical perspective. It argues that the international counterterrorism regime reflects American and European priorities and structures to a significant degree, a situation that positions the threat of Islamist terrorism as preeminent. The existence of this regime results in significant distortion to concepts and laws governing citizenship, national security, and civil liberties, not to mention overstating the threat of terrorism itself. Further, there is a clear racial component in linking the terrorist threat to Islam itself, the majority religion in many countries of the Global South, specifically those in Africa and Asia. The result is a system of counterterrorism enforcement that countenances religious and racial bias in service of a public safety rationale, without questioning the costs—racial, societal, or otherwise—that rationale requires.

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INTRODUCTION

In the wake of the March 2019 Christchurch mosque shootings, New Zealand Prime Minister Jacinda Ardern issued a pledge never to speak the name of the perpetrator, twenty-eight-year-old Australian national, Brenton Tarrant, as she wished to deny him the notoriety he desired from his actions.¹ While hers was certainly a brave and principled stance, it is not at all clear if such a position would be even possible had the shooter been a Muslim and the target not a mosque. The global construct of Muslim as the prototypical terrorist would almost certainly require that we know the person's name in order to reinforce the narrow view of terrorism as a nonstate, Islamist phenomenon. With that said, it is not clear how much the UN counterterrorism project makes the world safer from terrorism. Whatever the case may be, its perpetuation of the Muslim-as-terrorist trope allows for the relaxation of human rights standards when that presumptively terrorist population is targeted. More thought and effort are necessary to get out of the restrictive and reductive constructs behind our modern conceptions of what terrorism is and who is, in fact, a terrorist.

In light of the coronavirus pandemic, to describe the international counterterrorism architecture as destabilizing might seem exaggerated. After all, an airborne pathogen that can affect literally anyone and—at the time of writing—has already resulted in millions of cases and hundreds of thousands of deaths, not to mention a complete halt to economic and social life worldwide, has truly been destabilizing. The international counterterrorism regime, as represented by the UN counterterrorism agencies and their respective policies, deals with a problem that can be politicized and debated, much like the threat from the global pandemic cannot, at least on a scientific basis. As this Article argues, the international counterterrorism regime mirrors American and European priorities and structures to a significant degree, a situation that positions the threat of Islamist terrorism as preeminent. The existence of this regime results in significant distortion to concepts and laws governing citizenship, national security, and civil liberties, not to mention overstating the threat of terrorism itself.² Further, there is

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1. Calla Wahlquist, *Ardern Says She Will Never Speak Name of Christchurch Suspect*, *GUARDIAN* (Mar. 19, 2019, 4:00 PM), <https://www.theguardian.com/world/2019/mar/19/new-zealand-shooting-ardern-says-she-will-never-speak-suspects-name> [https://perma.cc/R4EY-G92V].
 2. See, e.g., Jennifer Schuessler, *Will a Pandemic Shatter the Perception of American Exceptionalism?*, *N.Y. TIMES* (Apr. 25, 2020), <https://www.nytimes.com/2020/04/25/arts/virus-american-exceptionalism.html> [https://perma.cc/3VYN-F5UJ] (“To some, the [coronavirus] crisis reveals the failure of the post-9/11 support to homeland security, with its

a clear racial component in linking the terrorist threat to Islam itself, the majority religion in many countries of the Global South, specifically those in Africa and Asia. To that end, this Article proceeds as follows. After this brief Introduction, Part I considers the current status of the international counterterrorism structure, as maintained by the organs and bodies of the United Nations, varied as they are. Part II analyzes the effects this structure has on larger countries' willingness to deploy extraordinary measures, such as denaturalization, on individuals marked as terrorists. Part III then lays out the generally destabilizing nature of the global counterterrorist regime more broadly.

I. THE UNITED NATIONS COUNTERTERRORISM REGIME

A brief look at the international system of what is referred to as "counterterrorism" reveals that what is to be countered has a particular identity and makeup and takes a particular form. On the substantive point of what constitutes the terrorist threat that must be countered, it bears noting that the whole counterterrorism enterprise suffers from the lack of an internationally agreed-upon definition of terrorism itself, even if there is a general consensus that the killing of civilians in peacetime for political ends constitutes terrorism.³ The resulting framework is one that reflects entrenched power structures and the interests of those countries most influential within the international system. The more powerful actors enjoy, therefore, if not actual legitimacy, then greater leeway in their actions in the fight against global terrorism as defined. This state of affairs signals to smaller nations that similar actions and repressive measures are, if not permissible, unlikely to result in any form of accountability. The resulting toll the international counterterrorism structure exacts on human rights, therefore, is clear when we understand the message: The prototypical terrorist is a nonstate actor of an Islamist bent. Specifically, a perusal of critical UN documents on

emphasis on external threats and military solutions. 'We've built a national security apparatus that turns out to be irrelevant to those things that actually threaten us,' said Andrew Bacevich, a historian and the author of "The Age of Illusions: How American [sic] Squandered Its Cold War Victory.'").

3. See, e.g., Ben Saul, *Defining Terrorism: A Conceptual Minefield*, in *THE OXFORD HANDBOOK OF TERRORISM* 34, 46 (Erica Chenoweth et al. eds., 2019). As Ben Saul explains:

Terrorism laws make most sense when protecting a democracy from violent adversaries, and less sense when they shield authoritarian states from those who rightly resist them. International agreement on terrorism in a diverse community of states is so difficult for this reason. Most minimally agree that the instrumental political killing of civilians in peacetime is terrorism. Beyond that, "terrorism" remains a contested terrain of diverse political and moral opinion.

Id.

terrorism betrays this bias. As discussed below, the terms and concepts employed—radicalization, preventing and countering violent extremism—and the phenomena identified, for example, the scourge of foreign fighters, all suggest what the fine print makes explicit: Terrorism is Islamist. To the extent that terrorist groups are named, the only ones identified are the Islamic State and al-Qaida.⁴ As demonstrated below, such a construct allows for the subtle and often imperceptible process of associating and affiliating Islam with terrorism. Based on the notion of guilt via a connection to illegal violence, the end result is that the chief international organization tends to identify terrorism with one of the major monotheistic faiths, a position that mirrors that of the United States and the other major world powers.⁵

Proceeding on a dual track, the United Nations houses two counterterrorism entities that signal the focus of the major international body when it comes to nonstate violence of a political nature. Perhaps it is inevitable, in an organization made up almost exclusively of nation states (or those aspirant nation states), that the complex and contested phenomenon of terrorism would be restricted to the acts of nonstate actors. The question of state terrorism is left unaddressed, as if it is simply not on the agenda, an almost certainly intentional oversight that prevents a true holistic treatment of the terrorism phenomenon, as discussed below. The first of these entities was created in the direct wake of the September 11, 2001 attacks in the United States, as the UN Security Council, pursuant to its own Resolution 1373, created the Counter-Terrorism Committee, which is made up of all fifteen members of the Security Council and charged with monitoring the implementation of that self-same resolution.⁶ Resolution 1373 called for combatting the financing of terrorism, as well as promoting international cooperation between member states to apprehend those implicated in carrying out such violent acts.⁷ To assist the Security Council in this task, the committee created

4. See G.A. Res. 72/284, The United Nations Global Counter-Terrorism Strategy Review, 54 (July 2, 2018), <https://undocs.org/en/A/RES/72/284> [<https://perma.cc/X9AB-EB7L>]. Occasionally, groups such as Boko Haram or al-Shabaab can make an appearance, but their presence reinforces the central point that terrorism is affiliated with Islamism. See U.N. Secretary-General, *Plan of Action to Prevent Violent Extremism*, 2, 16, U.N. Doc. A/70/674 (Dec. 24, 2015), <https://undocs.org/en/A/70/674> [<https://perma.cc/Q4FL-YDYD>].

5. Scholars in the American academy have long identified the practice of racializing Arabs and Muslims as terrorists, a practice that predates the September 11, 2001 attacks. See WADIE E. SAID, *CRIMES OF TERROR* 181–82 n.159 (2015); see also Caroline Mala Corbin, *Essay, Terrorists Are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455 (2017); Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001).

6. *About the Counter-Terrorism Committee*, U.N., <https://www.un.org/sc/ctc/about-us> [<https://perma.cc/7E2C-CBXC>].

7. *Id.*

an executive directorate, which comprises a professional staff, around half of whom are legal experts, to monitor compliance with and the implementation of Resolution 1373.⁸

More recently, and separate from the Security Council's limited and more elitist orbit, the UN General Assembly passed a resolution in June 2017 that created the UN Office of Counter-Terrorism, headed by an individual at the elevated rank of Under-Secretary-General, and touted as "the first major institutional reform undertaken by the Secretary-General."⁹ The goals of the office are shrouded in globalized jargon—"strengthen the delivery of United Nations counter-terrorism capacity-building assistance to Member States"—but seem geared toward adopting a uniform plan across the institution of the United Nations that can also be integrated into the domestic policies of the countries that make up its membership.¹⁰ The plan, dubbed the UN Global Counter-Terrorism Strategy and adopted via a General Assembly resolution in 2006, features four "pillars," and is considered a "living document," meaning that it is subject to review every two years by the entire General Assembly so as to be "attuned to Member States' counter-terrorism priorities."¹¹ The four pillars of the strategy are:

1. Addressing the conditions conducive to the spread of terrorism
2. Measures to prevent and combat terrorism

8. *Id.* Taken as a whole, the Security Council's counterterrorism regime, directly beholden as it is to the agendas of the five permanent members, has been criticized as negatively impacting human rights, the rule of law, and even overall global security and stability. See, e.g., Helen Duffy & Larissa van den Herik, *Terrorism and the Security Council*, in *THE OXFORD HANDBOOK ON THE INTERNATIONAL LAW OF GLOBAL SECURITY* (Robin Geiß & Nils Melzer eds., forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632897.

9. *About Us*, U.N. OFF. COUNTER-TERRORISM, <https://www.un.org/counterterrorism/about> [<https://perma.cc/Q5J4-P232>].

10. As described on their website:

The Office of Counter-Terrorism has five main functions:

1. Provide leadership on the General Assembly counter-terrorism mandates entrusted to the Secretary-General from across the United Nations system
2. Enhance coordination and coherence across the Global Counter-Terrorism Coordination Compact entities to ensure the balanced implementation of the four pillars of the UN Global Counter-Terrorism Strategy
3. Strengthen the delivery of United Nations counter-terrorism capacity-building assistance to Member States
4. Improve visibility, advocacy and resource mobilization for United Nations counter-terrorism efforts
5. Ensure that due priority is given to counterterrorism across the United Nations system and that the important work on preventing violent extremism is firmly rooted in the Strategy

Id.

11. *UN Global Counter-Terrorism Strategy*, U.N. OFF. COUNTER-TERRORISM, <https://www.un.org/counterterrorism/un-global-counter-terrorism-strategy> [<https://perma.cc/7A5X-S23K>].

3. Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard [and]
4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism[.]¹²

But within those broad parameters, we must decipher from an interstitial reading what the United Nations considers to be the terrorism threat of a global dimension by making reference to the activities of its counterterrorism bodies.

The Security Council, via a pair of resolutions, requires the Secretary-General to provide period reports on the threat posed by the Islamic State, as well as UN efforts to combat that threat.¹³ Outside this more specific type of focus on one particular group, the United Nations maintains a counterterrorist gaze that relies on an Islamist foe more generally. For example, in June 2018, the world body convened a "High-Level Conference of Heads of Counter-Terrorism Agencies of Member States."¹⁴ Outside the opening and closing sessions, both of which featured remarks by the Secretary-General António Guterres, two of the remaining four sessions focused on tactics and techniques to enact a unified strategy and international cooperation to fight terrorism as part of the United Nations's official policy on countering terrorism. The other two sessions highlighted the more concrete nature of the threat, one dealing with the danger represented by foreign fighters, and the other geared to combatting what it termed "violent extremism," especially on the internet and in new technologies.¹⁵ If there was any doubt as to what kind of foreign fighters were a concern, the conference made it clear: those individuals who flocked to Iraq and Syria to fight with al-Qaida and the Islamic State.¹⁶ The conference session pondered the future of these

12. *Id.*

13. U.N. Secretary-General, *Ninth Report of the Secretary-General on the Threat Posed By ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, U.N. Doc. S/2019/612 (July 31, 2019), https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2019/612 [<https://perma.cc/AG64-Z83Y>].

14. *High-Level Conference of Heads of Counter-Terrorism Agencies of Member States, 28–29 June 2018*, U.N. OFF. COUNTER-TERRORISM, <http://www.un.org/en/counterterrorism/hlc/index.shtml> [<https://perma.cc/W8BC-RU6X>].

15. *Programme*, U.N. OFF. COUNTER-TERRORISM, <https://www.un.org/en/counterterrorism/hlc/programme.shtml> [<https://perma.cc/PMM9-9KYV>].

16. See U.N. OFF. OF COUNTER-TERRORISM, SIDE-EVENT ON: FTF RETURNEES: PROSECUTION, REHABILITATION AND REINTEGRATION (2018), <http://www.un.org/en/counterterrorism/hlc/assets/pdf/HLC-Side-Event-FTF.pdf> [<https://perma.cc/83Z8-ZPQH>]. As described at the UN's High-Level Conference on Counter-Terrorism:

It is estimated that more than 40,000 individuals from almost 120 countries around the world responded to call from transnational terrorist organisations,

foreign fighters, as they now are beginning to return to their countries of origin, potentially representing a new threat to be confronted.¹⁷ As for stopping violent extremism, the UN concern with the phenomenon nearly mirrors that of the United States, which administers its own governmental counterterrorism program dubbed “Countering Violent Extremism,” that, despite its facially neutral moniker, is concerned with violent extremism of an Islamist bent.¹⁸ Violent extremism is an offshoot of the theory that individuals can be radicalized, a concept long-criticized as one targeting Muslims under the cover of racially neutral language.¹⁹ At this point we see the American concern with Islamist violence take its leading role as the chief threat to world order, as endorsed by the United Nations. While it is perfectly understandable for the United States to have its own national security priorities, the UN counterterrorism regime amplifies them and gives them pride of place in the international arena, without exploring or explaining their preeminence over other threats of global provenance.

The June 2018 conference spawned a series of “Regional High-level Conferences” in 2019 that are geared to “keep up the momentum on key counterterrorism issues and strengthen international cooperation” in advance of the “Second United Nations High-level Conference of Heads of Counter-Terrorism Agencies of Member States,” which took place virtually in July 2020 at the United Nations in New York.²⁰ Of the seven regional conferences convened so far, four have focused on countering violent extremism or radicalization,²¹ thus

like Al Qaida and ISIS, that used conflict zones as their safe haven. The unprecedented number of FTFs who flocked to the Syrian Arab Republic and Iraq, their diversity, composition, different motivations, and most importantly, the possibility of committing domestic terrorist acts upon their return has created challenges to officials, policymakers and practitioners.

Id. at 1. The issue of foreign fighters predates the current predicament in Iraq and Syria, as the United States and European nations had earlier highlighted the issue of foreign fighters in the Bosnian conflict that began in the early 1990s; regardless, the object of suspicion was the foreign fighter of an Islamist bent. See generally DARRYL LI, *THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY* (2020); Darryl Li, *A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption Under the “Global War on Terror”*, 44 COLUM. HUM. RTS. L. REV. 355 (2010).

17. See Leah West, *The Problem of “Relevance”: Intelligence to Evidence Lessons From UK Terrorism Prosecutions*, 41 MAN. L.J. 57 (2018) (discussing foreign fighter prosecutions in both the United Kingdom and Canada).

18. See generally Wadie E. Said, *Limitless Discretion in the Wars on Drugs and Terror*, 89 U. COLO. L. REV. 93, 127–28 (2018).

19. *Id.* at 126–27; see also Amna Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE L. REV. 809 (2013) (discussing critically the concept of radicalization and its purported association with Islamist terrorism).

20. *Regional Conferences*, U.N. OFF. COUNTER-TERRORISM, <https://www.un.org/counterterrorism/regional-conferences-0> [https://perma.cc/G766-K8CC].

21. *Id.*

reinforcing the linkage between Islamism and terrorism as the critical one in the eyes of the international community. Of the remaining three, one conference dealt with the issue of countering terrorism through the use of developing technologies, a second took up the purportedly pressing problem of terrorism financing through organized crime and illegal drug trafficking, and the third (and most recent meeting) addressed the problem of foreign fighters.²² The regional conferences were held for the most part in countries that are not known as bastions of human rights protections or boasting strong civil society institutions, such as the United Arab Emirates, Hungary, and Belarus, among others.²³ Even on a thematic basis, the conferences could struggle to maintain a cohesive focus. The link between terrorism and illegal drug trafficking, for example, was repeatedly stressed in the various declarations issued by UN and other governmental agencies in the conference's wake.²⁴ What that link is, and the evidentiary basis for such a conclusion, does not seem to have made it into the various public press releases generated by those in attendance. In this regard, the conference brings to mind the American experience with the alleged problem of "narcoterrorism," that is, terrorism funded by drug sales. Although Congress passed a law in 2006 that provided for enhanced criminal penalties for narcoterrorism, the law itself did not

22. *Id.*

23. *Id.*

24. Press Release, U.N. Off. of Counter-Terrorism, The UN Head of Counter-Terrorism Launches the "Dushanbe Process on Countering Terrorism and Its Financing in Central Asia", Welcoming the Adoption of the Dushanbe Declaration (May 17, 2019), https://www.un.org/counterterrorism/ctitf/sites/www.un.org/counterterrorism/ctitf/files/20190517_Press%20release_DushanbeConference_FINAL.pdf [<https://perma.cc/KW96-6UR6>]. In the press release, the Office of Counter-Terrorism quoted the Under-Secretary-General:

"Terrorists are increasingly adept at utilizing new technologies to raise funds and transfer money across borders" the Under-Secretary-General stated. "The nexus between organized crime and terrorist financing is a growing concern for many countries, especially in the Central Asian region, which faces the scourge of organized criminal activities and drug trafficking on a regular basis."

Id. at 1. A UN conference in Dushanbe similarly emphasized the link between terrorism and drug trafficking:

The conference concluded with a declaration emphasizing that "illicit drug trafficking continues to pose one of the major threats to international peace and security and undermine [sic] sustainable development, human rights and the rule of law." It calls upon "all States to promote and strengthen international co-operation in accordance with all their obligations under international law."

OSCE Supports High-Level Conference in Dushanbe on International and Regional Co-Operation on Countering Terrorism and Its Financing, ORG. FOR SEC. & CO-OPERATION IN EUR. (May 20, 2019), <https://www.osce.org/programme-office-in-dushanbe/420071> [<https://perma.cc/8SVP-TLA6>].

require a direct link between the drug activity and terrorism.²⁵ Despite massive prosecutorial and law enforcement resources made available to combat the problem, American narcoterrorism prosecutions have been few in number, and even those few seem to at best overstate the extent of the problem, much like the United Nation's recent foray into this area, riddled as it is with conclusory rhetoric instead of more objective data.²⁶ An October 2018 General Assembly session confirms the nebulous nature of the link between with drugs and terrorism, with a UN Official offering sweeping remarks—"Terrorism, fed by radicalization and violent extremism, is ever more interlinked with organized crime and the trafficking of people, drugs and arms, as well as corruption"—and individual country representatives giving random and unrelated remarks on the problems drug trafficking, human trafficking, illegal arms sales, and organized crime all present.²⁷ The result is a UN counterterrorism regime that mirrors American priorities, in terms of what threats exists and how to combat them, without bothering to explain convincingly why the United Nations and other nations should go along.

Unlike the American national security apparatus,²⁸ however, the UN counterterrorism regime enjoys an unlimited budget. In 2019, its Office of Counter-Terrorism launched a two-year appeal for funds to help it in its mission of "supporting and strengthening the capacities of Member States to respond to [the] global threat" of terrorism.²⁹ To convince those wealthy member states to

25. Said, *supra* note 18, at 109–17 (discussing the passage of 21 U.S.C. § 960(a), the statute providing for heightened penalties for illegal drug activity within the general context of terrorism).

26. Cf. *id.* at 112. Wadie Said explains:

While it is not clear how often federal authorities will make use of the statute to prosecute activity that lacks absolutely any connection—even a fabricated connection—between drugs and terrorism, the fact that the law is missing explicit language to that effect leaves open the possibility that drug dealers or possessors with no link to terrorism could find themselves convicted of narcoterrorism offenses.

Id.

27. Press Release, U.N. Gen. Assembly Third Comm., Illicit Drug Flows, Organized Crime Grow as Terrorism Spreads Across Borders, Third Committee Delegates Stress Amid Calls for Stronger Justice Systems, U.N. Press Release GA/SHC/4228 (Oct. 4, 2018), <https://www.un.org/press/en/2018/gashc4228.doc.htm> [<https://perma.cc/EUT9-M9LM>].

28. *Counterterrorism Spending: Protecting America While Promoting Efficiencies and Accountability*, STIMSON CTR. (May 16, 2018), <https://www.stimson.org/content/counterterrorism-spending-protecting-america-while-promoting-efficiencies-and-accountability> [<https://perma.cc/NTU7-6G6J>] (calculating that the United States has spent some \$2.8 trillion on counterterrorism between 2002 and 2017).

29. U.N. OFF. OF COUNTER-TERRORISM, UNOCT CONSOLIDATED MULTI-YEAR APPEAL, at i (2018) (quoting Vladimir Voronkov, Under-Secretary-General for Counter-Terrorism),

contribute to the effort, the appeal, in its corresponding brochure, hits many of the same notes referenced above. The introductory comment of the written appeal by the Under-Secretary-General of the UN Office of Counter-Terrorism, Vladimir Voronkov, makes plain the chief terrorism threat:

Although Islamic State in Iraq and the Levant (ISIL) has suffered defeats on the battlefield and lost swathes of territory once held in Iraq and Syria, it and other terrorist groups continue to carry out attacks against security forces and citizens in places of worship, marketplaces, train stations and airports throughout the world.³⁰

Interestingly, in a vague, almost throwaway, aside mentioning (without elaborating on) the threat posed by “[f]ar-right extremists,” Voronkov’s prefatory comments decline to describe such individuals as terrorists, thereby drawing an implicit distinction in the level of dangerousness between the two groupings.³¹ The appeal brochure features numerous photographs of individuals from Asia and Africa, many of whom are wearing traditional garb, and includes an index of countries hosting UN-sponsored projects on countering terrorism in some way or another, usually by “Countering Violent Extremism.”³² The focus is on countering the conditions in which terrorism can arise, and has a specific geographic location, and that location carries with it racial connotations. The countries are either majority Muslim or enjoy a significant Muslim population, and all are either located in Asia or Africa, with the sole European country hosting a UN counterterrorism program being Kosovo.³³ It therefore follows that practically all the faces in the appeal brochure are African or Asian, thereby sending the double message that terrorism originates in the Muslim world, and the international body needs to be involved in helping those countries of the Global South rid themselves of the scourge of terrorism. To date, the two largest contributing nations to the UN Trust Fund for Counter-Terrorism since its inception in 2011 are Saudi Arabia

https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/UNOCT_Multi-Year-Appeal_Website.pdf [https://perma.cc/8V44-YFZB].

30. *Id.*

31. Voronkov commented:

Using sophisticated technologies as well as traditional modes of communication, terrorists continue to actively recruit new followers while illicit transfers of financing, weapons and skills have been slowed but not stopped. Far-right extremists who challenge the values of tolerance, as well as our notions of community and social cohesion, have also gained strength. Hundreds of terrorists imprisoned in many countries, and other prisoners at risk of radicalization during incarceration, are soon to be released from prison creating further challenges for public safety and their reintegration back into society.

Id.

32. *Id.* at 87–94.

33. *Id.*

and Qatar, with the former giving \$110 million and the latter \$75 million, amounts that dwarf that of the next highest contributor, the European Union, with \$10 million.³⁴ Again, while not being explicit, the locus and nature of the threat are of the vast area and diversity of the Muslim world.

While not wishing to be repetitive, this brief review of the webpages of the various UN counterterrorism bodies and related documentation demonstrates the focus on terrorism as carried out and embodied by both al-Qaida and the Islamic State, the quintessence of violent Islamism. But the concentration on security and fighting terrorism brings presents the challenge of states arrogating to themselves too many powers that threaten and negatively impact global human rights protections. The United Nations, throughout its varied bodies and agencies, has recognized this potential, deeming the fourth pillar of its official counterterrorism strategy as respect for human rights and the rule of law. The UN Office of Counter-Terrorism, in its fundraising appeal, has a section in which it highlights those projects that promote human rights.³⁵ The concern for human rights and the impact of counterterrorism on civil society has extended beyond the UN Secretariat to the realm of the member states. In recognition of the potential for violations of human rights norms in the international counterterrorism realm, in 2005 the UN Human Rights Council—made up of member states of the General Assembly—created the position of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.³⁶ The position, which is filled by a prominent independent expert in the field, is for a term of six years, but it involves only conducting factfinding country visits, and issuing written reports and urgent appeals, without any concomitant enforcement authority.³⁷ The content of those reports reveal that the strong majority of complaints made to the Special Rapporteur from around the world since 2005 have been about restrictions on civil society in the name of national

34. *Id.* at 8–9.

35. *Id.* at 81–90.

36. *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx> [<https://perma.cc/9RHT-NYN5>] [hereinafter *U.N. OHCHR Special Rapporteur*]. The current Special Rapporteur is Fionnuala Ní Aoláin, an Irish law professor and expert in human rights law. *Id.* Initially, the Human Rights Commission created the position of Independent Expert on Terrorism in 2004, only to be replaced by the Special Rapporteur in 2005. See *Independent Expert on Terrorism*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Terrorism/Pages/IETerrorism.aspx> [<https://perma.cc/M9NQ-KBP2>].

37. See *U.N. OHCHR Special Rapporteur*, *supra* note 36.

security.³⁸ Specifically, the lack of universally accepted definitions of what constitutes terrorism and violent extremism has allowed governments to view a great deal of dissent and protest as a threat to national security.³⁹ As some 140 countries have passed counterterrorism laws since 2005, the negative implications the counterterrorism regime presents for fundamental freedoms like speech, protest, and political activism are clear.⁴⁰

II. DENATURALIZATION AS COUNTERTERRORISM

The negative implications for human rights are not limited to nonrepresentative governments. As the international system tells us that the threat posed by al-Qaida and the Islamic State is perhaps unique and demands particular focus and action, the world's most powerful democracies work both individually and in tandem to render terrorist suspects unworthy of citizenship, and a problem to be swept away. The examples here are Britain and the United States. In the post-9/11 world, Britain is considered the leading nation in citizenship stripping as a counterterrorism measure, even if such stripping renders an individual stateless.⁴¹ The most recent case making headlines is that of Shamima Begum, a British citizen of Bangladeshi origin who left the country in 2015 at the age of fifteen to live in the areas then under the control of the Islamic State. Stuck in a refugee camp in Syria and mother to baby recently born there, she asked to be allowed to return to Britain, only to have her family told that the authorities intend to denaturalize her.⁴² In July 2020, the Court of Appeal ruled that she should be allowed back into the country to contest her denaturalization; in February 2021, the UK Supreme Court unanimously ruled against Begum, finding that her rights were not breached when she was refused entry back into the UK.⁴³ In numerous cases, this type of denaturalization has been used strategically

38. See, e.g., Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders*, ¶ 4, U.N. Doc. A/HRC/40/52 (Mar. 1, 2019).

39. See *id.* ¶¶ 6–8, 19, 34–37.

40. See *id.* ¶ 3.

41. See Sangeetha Pillai & George Williams, *Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations*, 66 INT'L & COMPAR. L.Q. 521, 532–36 (2017).

42. Benjamin Mueller, *Family of Shamima Begum, ISIS Teenager, Says Britain Plans to Revoke Her Citizenship*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/world/europe/shamima-begum-citizenship.html> [https://perma.cc/WDD7-CL2T].

43. *Begum v. Special Immigr. Appeals Comm'n* [2021] UKSC 7, [11], [132]–[37] (appeal taken from Eng.); see also Dominic Casciani, *Shamima Begum Cannot Return to UK, Supreme Court Rules*, BBC (Feb. 26, 2021), <https://www.bbc.co.uk/news/amp/uk-56209007> [https://perma.cc/N9GV-73MR].

to render an individual subject to criminal prosecution in the United States, where criminal laws dealing with terrorism, specifically the ban on providing material support to designated foreign terrorist organizations (FTOs), promise a long prison sentence in a setting where communication with the outside world is severely restricted, over and above what individuals convicted of nonterrorism related crimes face.⁴⁴ Consider the case of Mahdi Hashi, a former British citizen who fled there to live in Somalia, his country of origin, after refusing to work as an informant for MI-5, the British internal security service.⁴⁵ Once there, the British authorities instituted denaturalization proceedings against him, a decision he tried to appeal by going to the nearest British consulate in Djibouti, which borders Somalia.⁴⁶ Upon arrival in Djibouti, the authorities detained him and subjected him to harsh interrogation, and then handed him over to the United States to face charges of materially supporting al-Shabaab, a Somali FTO; he was subsequently convicted after pleading guilty, and received a sentence of nine years in prison.⁴⁷ Whether or not the British authorities colluded with the American government may never be known, but at the least we can say that his former home country effectively banished him forever, as his appeal to have his citizenship rights reinstated failed.⁴⁸ Finally, even in cases where British nationals have not been denaturalized, the British and American authorities work together to help bring about a criminal prosecution. The recent case of the two British citizens who made up half of the Islamic State group known as the Beatles for their British accents, and notorious for acts of brutal violence, evidences this dynamic.⁴⁹ The British authorities agreed to cooperate with an American prosecution of the two individuals, who are being held by an American-backed Kurdish militia in Syria, by providing significant evidence of their criminal wrongdoing after the American authorities agreed to drop the death penalty as a possible sentence.⁵⁰

44. See SAID, *supra* note 5, at 121–43 (describing in detail, with numerous examples, the long prison sentences those convicted of terrorism crimes receive, as well as the extraordinary restrictions placed by the Federal Bureau of Prisons on their communications with the outside world).

45. See Said, *supra* note 18, at 107–08 (recounting Hashi's plight).

46. *Id.*

47. *Id.* at 108; Kamila Shamsie, *Exiled: The Disturbing Story of a Citizen Made UnBritish*, GUARDIAN (Nov. 17, 2018, 3:00 AM), <https://www.theguardian.com/books/2018/nov/17/unbecoming-british-kamila-shamsie-citizens-exile> [<https://perma.cc/QSB3-GBQ4>].

48. See Said, *supra* note 18, at 108.

49. Charlie Savage & Adam Goldman, *British Officials Worried About Angering Trump Over ISIS Captives*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/politics/british-isis-prosecution-beatles.html> [<https://perma.cc/3UXA-S993>].

50. Charlie Savage, *Barr Disavows Death Penalty for Two ISIS "Beatles" if Britain Shares Evidence*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/politics/barr-death-penalty-isis-beatles.html> [<https://perma.cc/Y37Q-VQXD>].

In October 2019, the pair was transferred to American custody in advance of facing capital charges in the United States for their role in the killing of American journalist James Foley, among other crimes.⁵¹ The Attorney General warned, however, that if the American request for evidence from the British authorities was not met by October 15, 2020, the pair would be turned over to Iraq, where they would almost certainly be executed with minimal due process.⁵² While these hurdles were eventually cleared with their extradition to the United States in October 2020,⁵³ the threat of rendition to a regime with an abysmal human rights record as a negotiation tactic is in and of itself representative of the precarious and ill-defined place human rights concerns occupy in decisions involving terrorism suspects.

The United States, which enjoys more significant legal barriers to stripping its citizens of their nationality as a counterterrorism measure, has engaged in practices that approximate denaturalization. There is some irony in this situation, as the material support ban allows for much more expansive criminal prosecution of terrorism suspects, even on the basis of protected speech and other nonviolent activities.⁵⁴ Constructively denying the return of individuals tarred with the terrorist brush, however, sends a strong message about which types of citizens are considered suspect. For example, a 2018 report by the State Department's Inspector General found that around thirty-one American citizens of Yemeni origin had their passports improperly seized by officials at the U.S. Embassy in Sana'a, Yemen's capital, between 2012 and 2013.⁵⁵ Such an action rendered them essentially stranded in the country, which is currently under sustained attack by a Saudi-led grouping of nations, wracked by outbreaks of disease and famine, and without a proper channel to appeal the passport confiscation.⁵⁶ Advocates for

51. Charlie Savage, *U.S. to Take Custody of ISIS Detainees*, N.Y. TIMES, Oct. 10, 2019, at A9; Bethan McKernan, Julian Borger & Dan Sabbagh, *US Takes Custody of British ISIS Pair*, GUARDIAN (Oct. 10, 2019, 3:59 AM), <https://www.theguardian.com/world/2019/oct/10/us-reportedly-takes-custody-of-two-british-isis-beatles> [https://perma.cc/7ZDB-3524].

52. Savage, *supra* note 50; Letta Tayler, "The Beatles" and the Bomber: Barr's Decisions on Executing Terrorists, JUST SEC. (Aug. 28, 2020), <https://www.justsecurity.org/72185/the-beatles-and-the-bomber-barrs-decisions-on-executing-terrorists> [https://perma.cc/RF42-ER5M].

53. See Adam Goldman & Charlie Savage, *Islamic State 'Beatles' Jailers Are Charged in Abuse of Murdered Hostages*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/us/politics/beatles-islamic-state.html>.

54. See, e.g., SAID, *supra* note 5, at 51–72.

55. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF STATE, ESP-19-01, REVIEW OF ALLEGATIONS OF IMPROPER PASSPORT SEIZURES AT EMBASSY SANA'A, YEMEN 10 (2018), https://www.stateoig.gov/system/files/esp-19-01_0.pdf [https://perma.cc/7LQX-M8K3].

56. See *id.* at 12; Hum. Rts. Council, Rep. of the Group of Eminent Int'l & Regional Experts on Yemen on the Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, ¶¶ 21–22, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020), <https://www.ohchr.org/>

these citizens believe that the number of people improperly deprived of their passports is actually in the hundreds, incidentally.⁵⁷ Most recently, the government has said it will not allow the return of an American-born woman, Hoda Muthana, who left the country in 2014 as a twenty-year-old to live in Islamic State controlled areas, as it believes her to be ineligible for citizenship as the daughter of a former Yemeni diplomat.⁵⁸ There had been a dispute about when her father left the diplomatic service, which is dispositive of her citizenship status, but her advocates believe that the fact she had previously been issued a valid passport is indicative of American nationality.⁵⁹ In November 2019, however, a federal court ruled that it was bound by the government's interpretation of her citizenship status and dismissed her lawsuit to have her American nationality restored.⁶⁰ Being formally stripped of citizenship or having it constructively denied, in addition to being questionable as a matter of international law, renders an individual subject to the harsh reprisals affecting anyone affiliated with the Islamic State. For example, in Iraq, the security services are engaged in a brutal backlash against those Sunni communities that were governed by the Islamic State, operating via guilt by association, kangaroo court trials and death sentences, and extrajudicial execution on a wide scale.⁶¹

This is an issue on a broad scale, as many European nations are refusing to repatriate citizens who had joined the Islamic State. While Central Asian nations such as Kazakhstan, Uzbekistan, and Tajikistan are engaging in serious efforts to repatriate their citizens with ISIS links, European nations are resisting taking their citizens back, either in whole or in part.⁶² Incidentally, while noting several criticisms of Kazakhstan's counterterrorism regime, the UN

Documents/HRBodies/HRCouncil/GEE-Yemen/2020-09-09-report.pdf [https://perma.cc/7AT4-V34T].

57. Gardiner Harris & Liz Robbins, *State Dept. Improperly Seized Passports of Americans in Yemen, Inquiry Finds*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/world/middleeast/state-department-passports-yemen-citizens-.html> [https://perma.cc/CWP9-B84E].
58. Rukmini Callimachi & Alan Yuhas, *Alabama Woman Who Joined ISIS Can't Return Home, U.S. Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/world/middleeast/isis-bride-hoda-muthana.html> [https://perma.cc/9SCA-V8CB].
59. *Id.*
60. See Charlie Savage, *American-Born Woman Who Joined ISIS Is Not a Citizen, Judge Rules*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/hoda-muthana-isis-citizenship.html> [https://perma.cc/TW29-EYNE].
61. See Ben Taub, *Iraq's Post-ISIS Campaign of Revenge*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/magazine/2018/12/24/iraqs-post-isis-campaign-of-revenge> [https://perma.cc/VVQ5-P9C9].
62. See Letta Taylor, *Western Europe Must Repatriate Its ISIL Fighters and Families*, AL JAZEERA (June 19, 2019), <https://www.aljazeera.com/indepth/opinion/western-europe-repatriate-isis-fighters-families-190619110248408.html> [https://perma.cc/KPJ5-337K].

Special Rapporteur for human rights and counterterrorism, Fionnuala Ní Aoláin, praised its government for working to repatriate its citizens from the Middle East.⁶³ In 2019, France allowed the return of fewer than one hundred children, but around four hundred remain detained in camps in the Middle East, their collective status in limbo.⁶⁴ Belgium has adopted a policy of permitting children under ten-years-old to return, with minor children over ten allowed back on a case-by-case basis, but around one hundred and sixty remain in the Middle East.⁶⁵ Both France and Germany, with some three hundred children in refugee camps, have policies of not accepting the return of adults with ISIS ties.⁶⁶ Only recently did Britain agree to accept orphans and unaccompanied children, provided that the authorities were convinced that they did not present a security risk; adults and their accompanying children remain unwelcome.⁶⁷ Of course, the Central Asian nations are majority Muslim countries and the cultural mistrust that surrounds Islam, so prevalent in Europe, does not exist there, thereby serving as a partial explanation of the hesitance of European nations to take back those particular nationals. Regardless of motivation, the failure to repatriate functions as a kind of unofficial denaturalization policy, albeit a collective one that is not subject to judicial review.

III. GLOBAL COUNTERTERRORISM'S DESTABILIZING NATURE

While the message that the international counterterrorism structure sends is that terrorists—Islamist terrorists—constitute a special problem requiring special attention, that same message is that the prototypical terrorist is a nonstate actor or population. What that means is that national liberation movements or vilified

63. See *id.*; *Preliminary Findings of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on Her Visit to Kazakhstan*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24637&LangID=E> [https://perma.cc/VQ6S-G5JJ].

64. See Keerthana Annamaneni, *For ISIS Children, Returning Home to Europe Meets Resistance*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/world/europe/isis-children-belgium.html> [https://perma.cc/G5BT-SR3Y].

65. See *id.*

66. See *id.* Germany has allowed a limited number of criminal prosecutions of its citizens for actions taken while members of ISIS, usually those with particularly egregious allegations. See, e.g., Melissa Eddy, *German Woman Goes on Trial in Death of 5-Year-Old Girl Held as ISIS Slave*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/world/europe/germany-isis-trial.html> [https://perma.cc/L9R2-3PVP].

67. See Elian Peltier, *U.K. Takes Back Children From Former ISIS Territory*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/world/europe/britain-isis-children-syria.html> [https://perma.cc/8BL7-EEM4].

minorities around the world are unlikely to have much of an ability to resist their subjugation by nation states, which by their very definition enjoy a legitimacy of armed action within their borders. This dynamic was evident early on in the post-9/11 world when Russia expressed its solidarity with the United States and attempted to frame the 9/11 attacks as a “global Chechnya,” thereby furthering the construct of its restive Muslim population as presumptively terroristic.⁶⁸ More recently, China has taken a similar tack with its Uighur population, going as far as to set up a series of detention camps in which somewhere around one million Muslim residents of Xinjiang province are being held.⁶⁹ One of the goals of the mass internment project is that the detainees disavow Islam and turn away from the “extremist” path.⁷⁰ While China and Russia, as permanent members of the Security Council, have veto power over any international efforts to hold them accountable, the existence of the UN counterterrorism apparatus, with its focus on nonstate Islamist terrorism, mutes the effect of any such efforts. The ability of minority groups to resist their subjugation therefore seems illusory. Even when state violence is broadly condemned at the international level, as it has been in the case of the Sri Lankan military’s defeat of the non-Muslim Liberation Tigers of Tamil Eelam movement in 2009, in which an estimated 40,000 civilians were killed, the possibility of real accountability is low.⁷¹ The dismal track record of nations exploiting the national security/counterterrorism narrative to engage in mass violations of human rights within their territories sadly remains a recurring theme of the modern nation state. Myanmar’s mass displacement and harassment of its Muslim Rohingya population and India’s military occupation of Kashmir are only two of the more prominent examples of the flaws in the international counterterrorism regime.⁷² With no legal framework for holding states

68. See John O’Loughlin, Gearóid Ó Tuathail & Vladimir Kolossov, *A ‘Risky Westward Turn’? Putin’s 9-11 Script and Ordinary Russians*, 56 EUR.-ASIA STUD. 3, 4–5 (2004).

69. Austin Ramzy & Chris Buckley, *‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html> [https://perma.cc/PU4C-R33L].

70. See James Millward, *‘Reeducating’ Xinjiang’s Muslims*, N.Y. REV. BOOKS (Feb. 7, 2019), <https://www.nybooks.com/articles/2019/02/07/reeducating-xinjiangs-muslims> [https://perma.cc/R4UG-R4NL].

71. *Alleged War Criminal Named Second-in-Command of Sri Lanka Army*, AL JAZEERA (Jan. 10, 2019), <https://www.aljazeera.com/news/2019/01/alleged-war-criminal-named-command-sri-lanka-army-190110161436349.html> [https://perma.cc/D3K8-7F3R].

72. It must be noted that the counterterrorism regime is not the only avenue for relief in the case of mass violations of human rights within a country’s borders. With respect to Myanmar, it is currently the subject of an action brought by the small African state, the Gambia, at the International Court of Justice (ICJ) and alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide

accountable for terrorism, however it is defined, and the targeted populations being Muslim, identified as presumptively terroristic in the international framework discussed above, obtaining relief or accountability for mass state violations of human rights seems remote.

CONCLUSION

The current UN counterterrorism regime offers no methodology for analyzing terrorism of the nonstate, and possibly the non-Islamist, variety. This is not merely an academic concern, as the right-wing mass shooting phenomenon has continued to increase in frequency and lethality, even outside the United States. As a result, there is currently a debate in the American context on the need for a domestic terrorism statute.⁷³ While there is a list of foreign terrorist organizations to whom the provision of material support is criminalized, there is no corresponding list of domestic terrorist groups.⁷⁴ In a recent article, Shirin Sinnar analyzed the use of terrorism charges and allegations, and identified the peculiar phenomenon of labeling Muslims as being engaged in international terrorism, even when they are American citizens acting entirely in the United States, a characterization that permits their prosecution on charges of material support to a foreign terrorist organization, something that is impossible in the context of domestic terrorism.⁷⁵ As Muslims are identified with terrorism in the American public consciousness, there exists the real and difficult question of

Convention) as a result of its treatment of the Rohingya population. In late January 2020, the ICJ issued a ruling ordering Myanmar to take the necessary measures to protect the Rohingya from genocide, as defined in the Convention; both Myanmar and the Gambia are parties to the Genocide Convention, and the ICJ has exclusive jurisdiction over its interpretation and implementation. See *Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.)*, Order, ¶¶ 79–81 (Jan. 23, 2020), <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> [<https://perma.cc/M3CH-AV67>]; Oumar Ba, *This Tiny African Country Got the World's Top Court to Investigate Myanmar for Genocide*, WASH. POST (Jan. 29, 2020, 4:00 AM), <https://www.washingtonpost.com/politics/2020/01/29/this-tiny-african-country-got-uns-top-court-investigate-myanmar-genocide/> [<https://perma.cc/E9RQ-9W59>] (noting that while “[t]he ICJ has not yet ruled whether genocide was committed,” it “demanded that Myanmar report back within four months on what steps it ha[d] taken” to prevent genocide of the Rohingya, and “preserve any evidence relevant to the genocide case”).

73. See generally Francesca Laguardia, *The Legal Divide Between Domestic and International Terrorism—Do We Need a Domestic Terror Statute?*, 55 CRIM. L. BULL. 1094 (2019); Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333 (2019); cf., e.g., Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259 (2017).

74. Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 865–66 (2019).

75. Sinnar, *supra* note 73.

whether labeling domestic acts as terrorism is the best method to overcome the bias at the heart of the counterterrorism legal regime. On the one hand, the religious/racial bias involved in such a framework is evident and needs to be reformed. On the other hand, there is the real question of whether giving law enforcement greater investigatory and prosecutorial powers to target domestic terrorism is the right course of action, given what heightened counterterrorism powers has meant for civil society and human rights.