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HUMAN RIGHTS QUARTERLY

The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas

*Rosemary Foot**

ABSTRACT

How resilient is the human rights norm in the counter-terrorist era? This question is explored through examining the record of two of the UN Security Council's counter-terrorist committees. The article argues that, initially, the procedures of these two committees damaged human rights protections, an outcome criticized by UN officials, human rights NGOs, and certain, mainly middle-power, states. Using the UN as a platform, they made the argument that a failure to ensure that anti-terrorist measures were in accordance with human rights standards would be counter-productive. As a result, Committee procedures have evolved and now give greater attention to the human rights consequences of counter-terrorist action.

* *Rosemary Foot* is Professor of International Relations and Swire Senior Research Fellow in the International Relations of East Asia, St Antony's College, University of Oxford. A number of recent publications have examined the relationship between human rights and counter-terrorist action, including her 2004 monograph *Human Rights and Counter-Terrorism in America's Asia Policy*.

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I. INTRODUCTION

A significant casualty of the struggle against terrorism has been respect for human rights. All those who have worked to promote human rights, in both domestic and international settings, have commented on the rise in the incidence of abuse. Not only do terrorists violate the lives of innocents, but state authorities, too, stand accused of acting indiscriminately, opportunistically, and illegally in their moves to counter terrorism. As UN Secretary-General Kofi Annan noted at the Madrid Summit in March 2005; "international human rights experts, including those of the UN system, are unanimous in finding that many of the measures that States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms."[1]

This attack on rights raises a number of important questions. How robust are commitments to the protection of human rights turning out to be as the struggle against terrorism unfolds? Has the concept of human security shown any staying power in an era when the security of the state has apparently become of more central concern? Has the steady embodiment of human rights ideas in treaties, and in state and non-state domestic, regional, and global institutions over the post-1945 period been able to impose any constraints on behavior in the twenty-first century?

This article investigates these questions by focusing on the counter-terrorist activities of the UN Security Council. Particular attention is given to the actions of the Council's Al Qaeda/Taliban Sanctions Committee and the Counter-Terrorism Committee, established under Resolutions 1267 and 1373 respectively. These two Committees have played crucial roles in sharpening state awareness of some of the methods deemed necessary to prevent or reduce the incidence of terrorist attacks. However, the procedures of these two bodies have also had negative consequences for the protection of human rights, a dangerous outcome in light of the argument that terrorism often thrives in conditions of political oppression and humiliation.[2]

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1. Press Release, Secretary-General, Secretary-General Offers Global Strategy for Fighting Terrorism, U.N. Doc. SG/SM/9757 (10 Mar. 2005), *available at* http://www.un.org/News/Press/docs/2005/sgsm9757.doc.htm. For some commentators, counter-terrorist action has been more effective in undermining personal security than any terrorist attack. Paul Hoffman, *Human Rights and Terrorism*, 26 Hum. Rts. Q. 933 (2004). Hoffman is Chair of the International Executive Committee of Amnesty International.
2. *See* Alan B. Krueger & Jitka Maleckova, *Education, Poverty and Terrorism: Is there a Causal Connection?* 17 J. Econ. Perspectives 119 (2003), who argue that terrorism should be "more accurately viewed as a response to political conditions and long-standing feelings of indignity and frustration that have little to do with economics." *Id.* The UN-established High-Level Panel on Threats, Challenges and Change stated in its report, United Nations, A More Secure World: Our Shared Responsibility 45 (2004), *available at* http://www.un.org/secureworld/report2.pdf. "Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse."

The argument unfolds in three main sections. The first discusses the progeny and characteristics of these two significant counter-terrorist Security Council Resolutions. This section further addresses the work performed by the Committees created by these Resolutions. In this section, I show the power of the Council to both signal an overriding concern to build state capacity to counter terrorism (prevention), and to undermine the terrorists' capacity to carry out deadly attacks (denial of assets). Initially this was done with little explicit reference to the impact on human rights.[3] This part also describes the augmentation of the resources of these two Committees and how this provided an opening to address some human rights concerns that arose from this overwhelming focus on prevention and denial. The second section investigates the renewal of attention to human rights—a renewal that has led to some recapturing of past UN commitments to human rights and human security. It also shows that the return to this focus on rights has not received explicit support from China, Russia, or the United States. Finally, I suggest some of the possible consequences of this evolution in committee practices in the absence of strong support from Washington.

Undoubtedly, in what follows more emphasis is placed on *how* these developments have taken place rather than *why* they have occurred. This results from the difficulties of determining the sometimes mixed motives behind the actions of a large number of states. These difficulties are compounded because non-permanent members of the Security Council only serve for two years; thus the membership and leadership of these counter-terrorist Committees has fluctuated over the period of this study. Often, the particular priorities of the Committee chairs have influenced the Committees' approach. However, close reading of published committee proceedings, interviews with UN officials, and some key members of Permanent Missions at the UN, together with discussions with human rights activists and scholars working on the UN, have provided insight into this evolutionary process.

From a more theoretical perspective, my findings reinforce the position that international and regional organizations have some autonomy and do not solely reflect the preferences of major states. The structure of the UN

3. There are, of course, other Security Council bodies working to counter terrorism. Resolution 1540, passed in April 2004, prohibits states from supporting non-state groupings attempting to acquire nuclear, chemical, and biological weapons. States are required to develop measures to prevent proliferation and to report to a committee on implementation. Resolution 1566 of October was passed after the Beslan school massacre. This resolution also established a committee to consider practical measures to adopt in reference to terrorist activities other than those dealt with by the Al Qaeda/Taliban Sanctions Committee. However, the 1267 and 1373 Committees are the most significant among the UN counter-terrorist efforts. For further discussion see, David Cortright, A Critical Evaluation of the UN Counter-Terrorist Program: Accomplishments and Challenges, paper presented at the Transnational Institute, Amsterdam 2–4 (28–29 Apr. 2005), *available at* http://www.tni/org/crime.

Security Council, with its five permanent members wielding veto power, is a particularly hard test of this proposition. States, of course, and especially the United States, will be shown to be crucial actors in decision-making and agenda-setting. The UN embodies certain values, norms, and ideas, some of which are in conflict, and many of which reflect or anticipate the reactions of major states. However, these values are not wholly determined by the desires of the most powerful governments.[4]

To advance the UN goals may require the informational resources of nongovernmental organizations (NGOs), as well as their capacity to shame governments into action. It may need the backing of certain middle-powers, and the serendipity associated with having the right individual, or committee chair, in the right place at the right time. However, the UN also has a reservoir of authority that encourages states to use it as a platform from which to mobilize others. This authority derives from the UN's global nature, its procedural rules, and capacity to imbue political processes with an aura of legitimacy based on a negotiated and demonstrated consensus. In addition, my argument shows how institutional design can mold outcomes in world politics. Overall, it supports the contention that institutions (both domestic and international) are social environments that political actors use to help sustain certain ideas—in this case, human rights—even at times of severe challenge.[5]

II. COUNTER-TERRORIST RESOLUTIONS AND THE WORK OF THE COMMITTEES

The Security Council's attention to terrorist threats increased markedly in the post Cold War era, with sanctions being imposed in this period against Libya, Sudan, and the Taliban regime in Afghanistan. On several occasions, the United States was the primary target of terrorist strikes. The 1993 bombing of the World Trade Center in New York, the August 1998 attack on the US embassies in Nairobi and Dar es Salaam, and the 2000 attack in Yemen on the USS *Cole*, moved terrorism up the US security agenda and Washington's response incorporated an operational role for the UN.[6] Security

4. S. Neil MacFarlane, *Charter Values and the Response to Terrorism, in* Terrorism and the UN 27–45 (Jane Boulden & Thomas G. Weiss eds., 2004).
5. Michael Barnett & Martha Finnemore, Rules for the World: International Organizations in Global Politics chs. 1–2 (2004); Kathryn Sikkink, Mixed Signals: U.S. Human Rights Policy and Latin America 18–22 (2004).
6. The range of reasons for Security Council activism in this era is covered well in Edward C. Luck, *The Uninvited Challenge: Terrorism Targets the United Nations, in* Multilateralism under Challenge: Power, International Order and Structural Change, 340–1 (Edward Newman, Ramesh Thakur, & John Tirman eds., 2006).

Council Resolution 1267, passed in October 1999 under Chapter VII of the Charter, imposed mandatory financial and aviation sanctions on members of the Taliban regime in Afghanistan as a result of the sanctuary they offered to Osama bin Laden and his associates. It also established a committee of the Security Council made up of all fifteen members to oversee state efforts to implement these sanctions. Later, the scope of the sanctions were made global in their effects since they involved financial, arms, and travel embargoes on the Taliban, bin Laden, Al Qaeda and all those in association with that organization wherever they might be located.[7]

The primary tasks of the 1267 Committee have been to target "individuals, groups, undertakings or entities associated with Al-Qaeda or the Taliban, or those controlled by their associates."[8] Names appear on a consolidated list as a result of information provided by one or more member states. Current members of the Security Council have sole power to review the justification for adding a name. Once a name is on the sanctions list, all states are expected to report on the steps they have taken to comply with Resolution 1267, as well as with subsequent related resolutions. Should individuals or entities assert that they have been wrongly listed, the aggrieved party has to request its state of residence or citizenship to petition on its behalf. This request can be denied.[9]

The terrorist assaults on US territory in September 2001 led to a sudden increase in the numbers of names on the 1267 list, some 466 as at the end of 2005 and most provided by the US authorities.[10] The increased workload and desire to enhance the levels of implementation of 1267 measures led eventually to an enhancement in the Committee's resources, most significantly in the establishment of an expert Analytical Support and Sanctions Monitoring Team (hereafter Monitoring Team) under Resolution 1526 of 30 January 2004. It replaced the five-person monitoring group previously established via Resolution 1363 of 30 July 2001, a group whose working practices had come under considerable criticism.[11] The new Monitoring Team, based in New York and charged with the task, *inter alia,* of reviewing state implementation of

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7. Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al-Qaeda/Taliban Sanctions*, 98 Am. J. Int'l L. 746 (2004)
8. *Id.*
9. Rosand, *Security Council's Efforts* 747–48; Chantal de Jonge Oudraat, *The Role of the Security Council, in* Terrorism and the UN, *supra* note 4, at 157. *See also* Watson Institute for International Studies, Brown University, Strengthening Targeted Sanctions Through Fair and Clear Procedures, at Tbl. 1, 27, Tbl. 3, 35 (Mar. 2006) (hereinafter Watson Report), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.p df. This report was sponsored by the governments of Switzerland, Germany, and Sweden. The author was fortunate in being able to take part in a workshop in New York, January 2006 organized by the Permanent Mission of Germany to the UN to discuss the first draft of this report.
10. Watson Report, supra note 9, at 27, Table 1.
11. Rosand, *Security Council's Efforts*, *supra* note 7, at 753–55.

1267 requirements, was also invited to draw up "concrete recommendations for improved implementation of the measures and possible new measures."[12] The reasons for the team's decision to make several recommendations that relate to an absence of due process are discussed below.

The 9/11 terrorist attacks resulted in the passage of Security Council Resolution 1373 on 28 September 2001 under Chapter VII provisions, like 1267. This significant resolution "imposed sweeping legal obligations on UN member states. It created an unprecedented campaign of nonmilitary, cooperative law enforcement measures to combat global terrorist threats."[13] Whether or not states were parties to other anti-terrorism conventions, they were required not only to freeze assets and deny terrorists safe haven, but also to "update laws and to bring terrorists to justice, improve border security and control traffic in arms, cooperate and exchange information with other states concerning terrorists, and provide judicial assistance to other states in criminal proceedings related to terrorism."[14] The Counter-Terrorism Committee (CTC) is also a committee of all fifteen members of the Security Council and was set up to monitor state implementation of these obligations, primarily through state provision of reports on the legislative and executive actions they were undertaking. All 191 member states produced one report in the first round, and many have provided reports in additional rounds. These reports were made public, but supplementary questions raised by the CTC were not. However, publicly available state responses provided indirect information about the lines of CTC questioning.[15]

Over time, the CTC has also had its resources enhanced. Originally deemed, by its first Chair, the body that obtained funding only after all other UN needs had been satisfied,[16] the CTC was revitalized by Security Council Resolution 1535 of March 2004 when it established a Counter-Terrorism Committee Executive Directorate (CTED). CTED was tasked to deal with the backlog of state reports and to act as a "broker" by putting states facing

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12. S.C. Res. 1526, ¶8, U.N. Doc. S/RES/1526 (30 Jan. 2004).
13. David Cortright, George A. Lopez, Alistair Millar, Linda Gerber, An Action Agenda for Enhancing the United Nations Program on Counter Terrorism 3 (Sept. 2004), *available at* http://www.fourthfreedom.org/pdf/Action_Agenda.pdf.
14. Eric Rosand, *Security Council Resolution 1373, the Counter-terrorism Committee and the Fight Against Terrorism*, 94 Am. J. Int'l L. 334 (Apr. 2003) [hereinafter Rosand, *Security Council Resolution 1373*]. *See also* the CTC website, *available at* http://www.un.org/Docs/sc/committees/1373/cted.html; Eric Rosand, *Resolution 1373 and the CTC: The Security Council's Capacity Building, in* International Cooperation in Counter-terrorism: the United Nations and Regional Organizations in the Fight Against Terrorism (Giuseppe Nesi ed., 2006).
15. Luck, *supra* note 6 at 342–43; Human Rights Watch Briefing Paper, *Hear No Evil, See No Evil: The U.N. Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort* 7–8 (10 Apr. 2004), *available at http://www.hrw.org/backgrounder/un/2004/un0804* [hereinafter *See Hear No Evil*].
16. U.N. SCOR, 4512th mtg., at 4, U.N.Doc. S/PV.4512 (15 Apr. 2002).

implementation difficulties in contact with those able to offer assistance. Resolution 1535 also authorized the CTC, through CTED, to make site-visits "with the consent of the State concerned, and to engage in a detailed discussion to monitor on the implementation of resolution 1373."[17] Some twenty professional posts, together with about twenty support staff, have been allocated to the CTED.[18]

The mandates of the 1267 and 1373 Committees overlap in some key areas. Both have had expert groups associated with them, groups that have some autonomy as a result of their specialist and professional knowledge. These expert groups are required to report regularly to the Committees on their findings and to make specific recommendations. Additionally, both Committees are supposed to be as transparent as possible and to take decisions on the basis of consensus (e.g. and with respect to 1267, when it comes to listing or de-listing names or agreeing to state visits). Despite the overlap in certain functional areas, the Committees basically operated separately in the first two years. Later, the Committees agreed that they would share more information and report jointly (together with the 1540 Committee) to plenary sessions of the Security Council.[19]

However, in other respects, the two Committees vary considerably. Whereas 1267 seeks to identify and impose constraints on named terrorists, 1373 seeks to institute a set of global standards with the objectives of preventing and deterring terrorism, as well as finding and prosecuting terrorists. The approach adopted in the two resolutions is also different. Resolution 1267 involves coercive measures that seek to punish or compel changes in the behavior of the groups or individuals listed. Resolution 1373 does not list targets but concentrates primarily on enabling activities by acting, as the first Chair of the Committee Sir Jeremy Greenstock put it, as a "switchboard" in order to put states in touch with those organizations and states which can provide training, information, and practical advice.[20] The first Chair of the CTC was adamant that, unlike the 1267 Committee, his Committee was

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17. S.C. Res. 1535, U.N. Doc. S/RES/1535 (26 Mar. 2004). The resolution is quoted in *Counter-Terrorism Evaluation Project, Recommendations for Improving the United Nations Counter-Terrorism Committee's Assessment and Assistance Coordination Function* 6 (Sept. 2005). This report contains much valuable information on the workings of the CTC and CTED. Rosand refers to these state visits as a capacity to "'assess ground truth'; that is, on-the-ground-implementation of the resolution." *See* Rosand, *Resolution 1373 and the CTC, supra* note 14, at 83. As of the end of 2005, four country visits had taken place—to Albania, Kenya, Morocco, and Thailand—with at least two more in the planning stage (the Philippines and Algeria) and an aim to conduct ten such visits in all in 2006. CTED is subject to a sunset clause that will take effect (unless the mandate is renewed) in December 2007.
18. Rosand, *Resolution 1373 and the CTC, supra* note 14, at 84.
19. Cortright et al, *supra* note 13, at 21.
20. Thierry Tardy, *The Inherent Difficulties of Inter-Institutional Cooperation in Fighting Terrorism, supra* note 4, at 125.

neither a condemnatory body nor a sanctioning committee, a message that subsequent chairs have continued to send. Predominantly, CTC came to be seen as a technical body, working with, rather than against, states and international, regional, and sub-regional bodies to enhance capacities in the fight against terrorism. Experts suggests that this may be one key reason why states have been more willing to submit reports to the 1373 Committee than to 1267.[21]

With respect to the consequences of each Committees' activities on human rights, there are additional differences. The original 1267 Security Council Resolution made much reference to the Taliban regime's violation of human rights. However, the Committee's listing and de-listing procedures have attracted a great deal of criticism because of their failure to take account of the human rights and due process concerns associated with listing individuals.[22] The 1373 Resolution and the CTC, on the other hand, have been criticized for not making it clear in the original resolution,[23] or in the CTC's early responses to states' reports, that legislation and counter-terrorist measures had to be respectful of international humanitarian and human rights law. These criticisms will be discussed in more detail in what follows.

A. Institutional Signaling

Early on, observers noted the absence of concern with the human rights consequences of the Committees' actions and many believed this absence had added to a sense of impunity when it came to fighting terrorism. Immediately after 9/11, human rights professionals realized that the nomenclature of a "war on terrorism" would make it more difficult to protect rights in the course of that struggle.[24] Robert K. Goldman, appointed as the UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism, summarized in 2005 many of the points that were made after 9/11: "That resolution [1373], regrettably, contained no comprehensive

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21. Rosand, *Security Council's Efforts, supra* note 7, at 758–59.
22. As Iain Cameron has put it in reference to 1267: "the Security Council is now behaving as a "quasi-criminal" investigating, prosecuting and sentencing agency. It is starting to do things which were previously only done by national judges, police, prosecutors and intelligence officials." Iain Cameron, *Protecting Legal Rights: on the (in)security of targeted sanctions, in* International Sanctions: Between Words and Wars in the Global System 189 (Peter Wallensteen & Carina Staibano eds., 2005) [hereinafter International Sanctions]; Rosand, *Security Council's Efforts, supra* note 7, at 752.
23. S.C. Res. 1373, ¶ ¶ 3(f),3(g), U.N. Doc. S/RES/1373 (28 Sept. 2001), do refer to human rights, but in a way that warns of potential abuse of the claim to refugee status by those associated with terrorist acts.
24. Interviews at the Office of the High Commissioner for Human Rights, Geneva (Oct. 2005), New York (May–June 2006)(on file with author), confirm this early apprehensiveness. Names withheld to protect confidentiality.

reference to the duty of States to respect human rights in the design and implementation of such counter-terrorism measures."[25] He went on: "[T]his omission may have given currency to the notion that the price of winning the global struggle against terrorism might require sacrificing fundamental rights and freedoms."[26] In reference to the individual listing of terrorist suspects under bodies such as the 1267 Committee, Goldman noted that while the identification and freezing of assets of persons and groups involved in terrorism were "appropriate and necessary measures to combat terrorism," they entailed "severe consequences"; thus a "high degree of care" ought to be exercised to ensure that no person or group was placed there erroneously. He went on: "Yet, no relevant Security Council resolution establishes precise legal standards governing the inclusion of persons and groups on lists or the freezing of assets, much less mandates safeguards or legal remedies to those mistakenly or wrongfully included on these lists."[27]

The NGO Human Rights Watch (HRW) produced a report in 2004 which highlighted similar omissions. It pieced together information from the public record and concluded, *inter alia,* that "when governments describe new draft anti-terror or security laws containing provisions that rights-trained experts would readily recognize as inviting abuse, the CTC says nothing . . . when governments describe actions with major rights implications, the CTC does not even raise the issue."[28] HRW investigated the state reports of Egypt, Uzbekistan, Malaysia, Morocco, and Sweden and noted the Committee's failure to take up rights-related matters. The HRW publication also provided evidence of Committee questioning that may have reinforced a sense that the successful countering of terrorism required a trade-off to be made between human rights and security.[29] These findings were in tune with those of other UN human rights experts, especially when it came to consideration of the anti-terrorist legislation that states around the world were busy drafting or revising. Less than three months after passage of Resolution 1373, on Human Rights Day in December 2001, 17 UN Special Rapporteurs and independent experts of the UN Commission on Human Rights (UNCHR) voiced their

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25. *Promotion and Protection of Human Rights: Protection of human rights and fundamental freedoms while countering terrorism,* U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/2005/103 at 6, 21 (7 Feb. 2005)(*prepared by* Robert K. Goldman*).*
26. *Id.* at 6.
27. *Id.* at 21. The devastating consequences of being wrongly listed can extend well beyond the individual in question, to include their families, and in some cases their employees and those connected with associated companies. In July 2005, the UNCHR appointed Professor Martin Scheinin as the Special Rapporteur on the protection and promotion of human rights while countering terrorism. His first preliminary report was submitted to the UN General Assembly in September 2005. *Protection of human rights and fundamental freedoms while countering terrorism,* U.N. Doc. A/60/370 (21 Sept. 2005).
28. *See Hear No Evil, supra* note 15, at 3.
29. *Id.* at 8.

alarm over both the scope of the anti-terrorist laws that governments were adopting and the alacrity with which they were targeting groups such as "human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media."[30]

B. The Failure to Address Rights

How can we best explain this failure to consider the wider consequences of counter-terrorist action when designing the procedures of these Committees, or in the case of 1373, when framing the original resolution? Timing seems to have had something to do with it. True, challenges were launched against individual targeting even prior to September 2001. However, when the 1267 Committee first began its work in 1999, the sanctions were directed only at the known quantity of the Taliban regime, a government recognized by three states, which had few assets officially outside the country, operated mainly through the black market in illicit narcotics, and was already "awash with weapons" thus obviating the impact of any arms embargo.[31] Within a few weeks of 9/11, the US put about 200 extra names on the consolidated list, and these were immediately accepted because of the sympathy felt towards the US at that time.[32]

However, concerns soon began to quicken. This was especially so when some of these individuals and groups sought legal redress and initiated the appeals' processes in a number of predominantly European countries.[33] Three Somali Swedes, for example, were accused of association with an international financing network supposedly linked with terrorism and had their assets frozen. One of these individuals was running for public office in Sweden and protested that he had no knowledge of this assumed terrorist link. A public outcry ensued in Sweden because of the absence of legal recourse for the listed individuals. Further controversies—associated with the Chinese listing of the East Turkestan Islamic Movement, and Russian efforts to put several Chechen groups on the list—also had the effect of damaging the credibility of 1267 procedures.[34]

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30. *Quoted in* Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism, 8, *available at* http://www.ohchr.org/English/issues/terrorism/.
31. Chantal de Jonge Oudraat, *The Role of the Security Council, supra* note 9, at 157.
32. Rosand, *The Security Council's Efforts, supra* note 7, at 749.
33. The Monitoring Team's report submitted to the Security Council on 11 July 2005 refers to fifteen lawsuits filed in five member states challenging implementation of sanctions. U.N. Doc. S/2005/761, at 15 (6 Dec. 2005). Some five countries are involved, only two outside Europe.
34. Rosand, *The Security Council's Efforts, supra* note 7, at 749–50, 761, n.103.

CTC's failure to address human rights in the early years may have been partially due to the circumstances in which Resolution 1373 was pushed through. The apparently global reach and deadly aims of Al Qaeda was a threat for which most governments seemed ill-prepared and the impulse was to counter-attack, not to think about wider consequences. The killing of nearly 3000 innocents on 9/11 rightly resulted in concentration on tracking down the perpetrators and preventing repetition of similar horrific events. However, previous resolutions dealing with terrorist acts (for example, one passed in 1996 by the UN General Assembly, and another in 1999 passed by the Security Council) managed to combine attention both to victims' rights and to the need to advance anti-terrorist measures in strict conformity with human rights standards.[35] Indeed, Security Council Resolution 1269 adopted on 19 October 1999 shares a number of similarities with Resolution 1373 but not when it comes to making reference to human rights.

Thus, it seems likely that Resolution 1373—largely framed by the United States and promoted as an act of solidarity with Washington—may have been deliberately designed to reflect the US preference for fighting the global war on terror unhindered by what it saw as inapplicable or outdated humanitarian laws. Human rights NGOs worked energetically to try to persuade Security Council members to include in the Resolution a paragraph which stated that governments had to make sure that their anti-terrorist actions were in compliance with international humanitarian and human rights law. But these efforts were rebuffed.[36] As a former assistant to then White House Counsel Alberto Gonzales later put it in explaining the Bush administration's approach to countering terrorism, the war paradigm means that you are entitled to kill "a suspected adversary across from you, you're entitled to kill that person with no due process or advance warning whatsoever . . . [even though] that is going to mean sometimes hurting innocents in the process."[37] The Bush Administration left no room for the idea that terrorist suspects might have

35. U.N. G.A. Res. 186, U.N. Doc. A/RES/50/186 (6 Mar. 1996). It records serious concern "at the gross violations of human rights perpetrated by terrorist groups," and reaffirms that "all measures to counter terrorism must be in strict conformity with international human rights standards." S.C. Res. 1269, U.N. Doc. S/Res/1269, ¶ 2 (19 Oct. 1999), adopted by the Security Council called for "international cooperation . . . on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights."
36. Interview with human rights activist, 28 June 2006 (on file with author). Name withheld for reasons of confidentiality.
37. Bradford A. Berenson, Detention and Interrogation of Captured "Enemies": Do Law and National Security Clash, transcript prepared from a tape recording, The Brookings Institution, Wash. DC 13–21 (12 Dec. 2005). There have been a number of statements that confirm this as the general approach of the Bush administration. For example, the US Secretary of Defense stated on 11 January 2002 that captured Taliban and Al Qaeda fighters were "unlawful combatants" and as such not entitled to protection under the Geneva Conventions.

rights and instead concluded that unfortunately and unavoidably innocents would be swept up in a general move against alleged terrorist populations. The terms of the resolution also reflected the preferences of some other members of the Security Council whose own attempts to deal with those they too readily described as religious extremist-separatist-terrorists never strayed far beyond the adoption of "strike hard" campaigns.[38]

Moreover, the first Chair of the CTC, in striving to depoliticize the UN approach to terrorism, stated unequivocally that, while human rights matters were of concern to his Committee, other parts of the UN system held the expertise in this area and it should be their role to test whether states were operating in conformity with human rights standards.[39] Broadly, UN Secretary General Kofi Annan at first appeared to agree, but still intimated that the distancing of the CTC from wider consequences had perhaps gone too far. In a speech to the Security Council in January 2002 and just prior to Greenstock's report to that body, Annan acknowledged that the protection of human rights was not a main responsibility of the Council, and it did not need to duplicate the work of those whose responsibility it was. However, he pressed for the expertise of UN human rights bodies to be taken into account and for the Council to make sure that the measures it adopted did not lead to a curtailment on rights "or give others a pretext to do so." For him, there was no trade-off to be had between "effective action against terrorism and the protection of human rights. On the contrary . . . in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."[40]

These kinds of arguments, and others that will be discussed in the next section, slowly began to take effect, resulting in both Committees retreating from their original stances and embracing some concern with the human rights, or due process, implications of their work. The UN Security Council passed Resolution 1456 in January 2003. Resolution 1456 not only called on the CTC to intensify its efforts to obtain state compliance with Resolution 1373, but added that states had to ensure that the measures they were taking to combat terrorism were in compliance with international law, "in particular international human rights, refugee, and humanitarian law."[41] That resolution was a significant turning point since the phrasing on rights was repeated in subsequent counter-terrorism resolutions, including 1566 passed after the Beslan massacre, and 1624, passed after the bombings in London.[42] With

38. See for example, China's actions in Xinjiang in relation to the Uighur struggle for religious and cultural autonomy or independence. John Ruwitch, *China convicts 50 to death in "terror crackdown,"* Reuters, 13 Sept. 2004.
39. U.N. SCOR, 4453d mtg. at 5, U.N. Doc. S/PV.4453 (18 Jan. 2002).
40. U.N. SCOR, 4453d mtg., at 3, U.N. Doc. S/PV.4453 (18 Jan. 2002).
41. S.C. Res. 1456, ¶6, U.N. Doc. S/RES/1456 (20 Jan. 2003).
42. *Id.* ¶ 6; S.C. Res. 1566, U.N. Doc. S/RES/1566 (8 Oct. 2004); S.C. Res. 1624, U.N. Doc. S/RES/1624 (14 Sept. 2005).

the decision in 2004 to revitalize the CTC, came the appointment within CTED of an expert on human rights, humanitarian, and refugee law, who liaises with the OHCHR and nongovernmental human rights organizations and provides expert advice in reference to state reports. In the 1267 process, the Monitoring Team devised and recommended a number of improvements in the listing and de-listing procedures for individuals and groups, including better definition of the phrase "associated with Al Qaeda," standardized and more fully elaborated identification criteria, and an improved de-listing process that tried to increase opportunities for individuals to seek review of their status.[43] So far, the Monitoring Team has had more success in winning acceptance of improved procedures for listing than for de-listing.

III. REESTABLISHING A CONCERN FOR RIGHTS

Annan's 2002 remarks were an early attempt to ensure that human rights concerns would begin to be reflected in the procedures of these two influential Committees. The Secretary General's credibility in the area of human rights promotion was high. His close association with a period in the UN history when it had been more attentive to human rights and when he himself had argued that priority should be given to individual over state sovereignty ensured that.[44] In October 2001, he had set up a "Policy Working Group on the United Nations and Terrorism" which had a sub-group devoted to human rights consequences. Partly as a result of this, the final report of the Group, issued in August 2002, attempted to place human rights firmly at the centre of the UN role in countering terrorism. As it stated:

> [T]he United Nations must ensure that the protection of human rights is conceived as an essential concern. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful of international human rights obligations.[45]

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43. Not all of these recommendations have yet borne fruit. As the current Chair of the 1267 Committee put it in May 2006, states still wanted to see higher levels of consultation before a name was put on the list which would help to improve its quality. *See* UN News Service, Close cooperation among Security Council anti-terrorism panels urged by chairs (30 May 2006) *available at* http://www.un.org/apps/news/.
44. Kofi Annan, *The Fifty-Fourth session of the UN General Assembly: Two Concepts of Sovereignty* (18 Sept. 1999). In the contemporary reading of the UN Charter we were "more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them." UN Press Release, SG/SM/7136 (20 Sept. 1999).
45. Report of the Policy Working Group on the United Nations and Terrorism, U.N. G.A. 57th Sess., Item 162, Provisional Agenda, at 2, U.N. Doc. A/57/273-S/2002/875 (2002).

It cautioned against the UN offering "blanket or automatic endorsement of all measures taken in the name of counter-terrorism."[46] Specifically in reference to the CTC, as well as to the mechanism of targeted sanctions, it advocated a change in tone: states should be encouraged to view the implementation procedures as ways of improving democratic governance (and thus, by implication, not as opportunities to undermine it). It also successfully recommended that the OHCHR should publish a digest of the core jurisprudence of international and regional human rights bodies on protecting human rights in the struggle against terrorism and that the OHCHR convene a gathering of international, regional, and subregional organizations, as well as NGOs, on the topic. It suggested regular dialogue between the CTC and the OHCHR. The UN, it added, needed to send a "consistent, clear, principled message" at this time of difficulty, not only that "targeting of unarmed civilians is wrong in all circumstances," but also that "security cannot be achieved by sacrificing human rights."[47]

These were messages that were being reinforced elsewhere in the UN. UN High Commissioners for Human Rights briefed the CTC in late 2001 and twice in 2002. In September 2002, Mary Robinson provided guidelines and a list of possible human-rights-related questions the CTC could ask of states.[48] Robinson's successor, the late Sergio Vieira de Mello, in October 2002 reminded the Committee that the best and only way to defeat terrorism was by respecting human rights, promoting social justice and democracy, and upholding the rule of law.[49] The Vice-Chair of the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR), Sir Nigel Rodley, in June 2003, made one of the most potent and direct statements to the CTC. In response to the earlier CTC argument that it would leave the human rights components to other bodies within the UN system, Rodley noted that this was insufficient. UN human rights bodies—notably the UN Commission on Human Rights (UNCHR)—were simply too subject to political manipulation. Thus, any monitoring the UNCHR might undertake would be unreliable, he stated.[50] From a legal perspective, the findings of that and other UN human rights bodies would not carry the weight of

46. *Id.* ¶ 14.
47. *Id.* at 12.
48. Note to the Chair of the Counter-Terrorism Committee: a Human Rights Perspective on Counter-Terrorist Measures (24 Sept. 2002), *available at* http://www.un.org/Docs/sc/committees/1373/Briefings. However, while her office was permitted to put the guidelines on the CTC's website, she was denied permission to distribute them to states.
49. Speach by Sergio Vieira de Mello, The High Commissioner for Human Rights To the Counter-Terrorism Committee of the Security Council (21 Oct. 2002), *available at* http://www.un.org/Docs/sc/committees/1373/HC.htm.
50. Security Council Counter-Terrorism Committee UN Headquarters, briefing by Sir Nigel Rodley, Vice-chairperson Human Rights Committee, ¶ 5 (19 June 2003), *available at* http://www.unhchr/ch/huricane/huricane.nsf.

Security Council decisions adopted under Chapter VII provisions. Neither was his Human Rights Committee, a body set up under the ICCPR, able to monitor compliance. At most, it could deal only with about 15 reports per year, and almost a quarter of UN member states were not yet parties to the Covenant. Rodley reminded the Committee of one other pertinent fact: that it was no longer simply operating under Resolution 1373, but now had to take account of Resolution 1456 with its paragraph referring to the need for compliance with human rights law. He also pressed the CTC to start posing questions about the human rights dimensions of state reports. Significantly, he suggested as "eminently desirable" that the CTC "include human rights expertise among the complement of expertise it has at its disposal."[51] That individual could then frame the rights-related questions. Perhaps more importantly, the human rights expert's presence would avoid sending the signal that the CTC was "expecting measures to be taken that could be at odds with a State's human rights obligations."[52]

Other regional organizations were as active as the UN-appointed experts. Even before Annan's Policy Working Group had finalized its report, the Council of Europe, in July 2002, had agreed to a set of "Guidelines on human rights and the fight against terrorism," explicitly designed "to help States strike the right note in their responses to terrorism" and avoid the "temptation . . . to fight fire with fire, setting aside the legal safeguards that exist in a democratic state."[53] The Organization of American States adopted the Inter-American Convention Against Terrorism in June 2002, Article 15 of which made strong reference to the need for measures to be in compliance with human rights law.[54] These regional organizational perspectives were expressed at meetings of the CTC in 2003 and 2004. The spokesperson for the EU gave solid support for the appointment of a human rights expert in the revitalization of the CTC process, promoting this argument not just on behalf of EU members but, as it was put, also on behalf of acceding countries, candidate countries, the countries of the Stabilization and Association Process, potential candidates, and European Free Trade Association countries—a sizable number. The Rio Group of 19 Central and South American countries joined in the call for the creation of this post. States within these groupings

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51. *Id.* ¶ 11. Rodley, in recommending a human rights adviser to the Committee, was repeating a recommendation that had been made by both Mary Robinson and her successor, Sergio Vieira de Mello. Human Rights Watch also wrote to the first chair of CTED, recommending a human rights coordinator within CTED. *See Hear No Evil*, *supra* note 15, at 17.
52. *Id.*
53. *Guidelines on human rights and the fight against terrorism*, adopted by Comm. of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, at Pref (2002), *available at* http://www.coe.int/T/E/Human_Rights/h-inf(2002)8eng.pdf.
54. Inter-American Convention Against Terrorism, *adopted* (3 June 2002) *entered into force* (10 Jul. 2003), *available at* http://www.oas.org/juridico/english/treaties/a-66.htm.

used their individualized statements before the Committee to reinforce this message (Costa Rica, Mexico, Brazil, and Germany for example), as did some outside of these regions (such as Cameroon, Canada and Indonesia).[55] Mexico, in fact, was a crucial actor throughout the process, as noted in the next section. No state representative actually spoke against the establishment of this new position.

The CTED chair's own recommendation in mid 2004 that a human rights expert be appointed to his team,[56] and then the April 2005 decision by the UNCHR to appoint a UN Special Rapporteur on human rights and counter-terrorism, reflected this accumulating pressure. The extent to which this evolution in approach to counter-terrorism had become accepted policy was spelled out in the CTC's first report on CTED given to the Security Council in December 2005 just three months after CTED had become fully staffed. The report reiterated that states had to ensure that the measures they took to combat terrorism were in compliance with international law, "in particular human rights law, refugee law and humanitarian law." It reminded CTED that it had to take account of this "in the course of its activities."[57]

The 1267 Committee came under similar pressure and from several directions. Significant input came from the informal working groups containing academics, officials, and practitioners set up by some European governments, with three governments—Germany, Sweden, and Switzerland—taking a strong lead. Since 1998 they had been examining ways of developing and improving the effectiveness of targeted sanctions as an alternative to the notion of comprehensive sanctions. Comprehensive sanctions, adopted many times in the past, had lost support because they most severely affected already impoverished populations rather than the elites that ruled over them. These three governments sponsored three processes (Interlaken, 1998–2001; Bonn-Berlin, 1999–2001; and Stockholm 2001–2002). As the consolidated list of names expanded, these meetings gave progressively more

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55. U.N. SCOR, 4845th mtg., U.N. Doc. S/PV.4845 (16 Oct. 2003); U.N. SCOR, 4921st mtg., U.N. Doc. S/PV.4921 (4 Mar. 2004); U.N. SCOR, 5006th mtg., U.N. Doc. S/PV.5006 (19 Jul. 2004); U.N. SCOR, 5059th mtg., U.N. Doc. S/PV.5059 (19 Oct. 2004).
56. The vacancy for this post was put on the UN website on 23 November 2004. The organizational plan drawn up by the first head of CTED was endorsed by the CTC on 29 July 2004 and by the Security Council on 12 August. *See* U.N. Doc. S/2004/642. The plan stated that the team would have "expertise in every area covered by resolution 1373 (2001) and other relevant provisions of the declarations annexed to resolutions 1377 (2001) and 1456 (2003)." at 7. *See also* the discussion of the plan in U.N. Doc. S/PV/5059 (19 Oct. 2004); S.C. Res. 1526, ¶ 8, U.N. Doc. S/RES/1526 (30 Jan. 2004).
57. U.N. Doc. S/2005/800, at 4 (16 Dec. 2005). It is instructive that the CTC website now makes reference to the interest shown in the relationship between its work and human rights, outlining the history of that relationship in such a way as to attempt to refurbish its reputation as a Committee that always had taken the human rights consequences of counter-terrorist action seriously. *See* United Nations Security Council, Human Rights, *available at* http://www.un.org/sc/ctc/humanrights.shtml.

attention to the impact of sanctions on human rights and to the absence of due process for those named as terrorists. Recommendations included the need to develop proper procedures for delisting those who had been listed in error, or whose behavior had changed. They also recommended drawing up more precise criteria for granting exemptions on humanitarian grounds, as well as for dealing with the financial assets of those who had died but whose names had remained on the lists.[58] From the autumn of 2005, the three governments turned in a more focused way to developing proper legal safeguards for those named and for those who wished to challenge the designation.

However, as with the 1373 Committee, criticism of 1267 procedures came from states well outside the European region. In mid-2005, analysis provided to the 1267 Committee by its Monitoring Team showed that implementation of sanctions was hampered because countries across the globe were expressing concern about a lack of due process and clarity as to those who deserved to be listed. Some fifty states had "mentioned the need for due process and transparency in the Committee's listing and/or de-listing procedures."[59] Fifteen lawsuits were filed in five states and before the European Court of Justice. These suits, if decided against the UN, could directly challenge the compatibility between the sanctions regime and the protection of fundamental rights. The team argued that state criticism of the 1267 Committee risked the tainting of its entire work, undermining global support for its objectives. Not surprisingly, these judgments led the team to make a number of recommendations. While the Monitoring Team was unwilling to go as far as to suggest that named individuals could petition the Committee directly, it did suggest various ways in which they could be made less dependent on the state of residence or citizenship to have their cases for de-listing reviewed.[60]

The Monitoring Team made its arguments for improving procedures on the grounds that this would enhance the effectiveness of and participation levels in the sanctions procedure: it would mean that some states would be less leery of taking action against those listed. Other governments emphasized the need for change in order to retain support for the idea of targeted rather than comprehensive sanctions. They saw the former as a more humanitarian

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58. Details on these three processes are contained in Thomas J. Biersteker, Sue E. Eckert, Aaron Halegua & Peter Romaniuk, *Consensus from the Bottom Up? Assessing the influence of the sanctions reform processes, in* International Sanctions, *supra* note 22, at 15–30.
59. U.N. Doc. S/2005/761, ¶ 37 (6 Dec. 2005).
60. *See* U.N. Doc. S/2005/572 ¶ ¶ 24, 50–57 (9 Sept. 2005). UN Security Council Resolution 1617 of 29 July 2005 noted the need to provide additional identifying information and for the Committee to continue its work in refining the listing and de-listing procedures. U.N. Doc. S/RES/1617 (2005). *See also* Guidelines of the Committee for the Conduct of its Work, *adopted* 7 Nov. 2002, *amended* 10 Apr. 2003, *revised* 21 Dec. 2005.

and focused alternative to the latter and as a welcome alternative to armed humanitarian intervention.[61] But there was also a broader, more philosophical debate at work that affected the workings of both Committees. The debate comprised ideas about the enhancement of overall levels of security, the determination of the causes of terrorism, and the relationship between counter-terrorist action and democratic governance.

UN officials were particularly active in exploring these ideas, especially in their attempts to recapture a notion of security that reflected UN formulations first advanced in the 1990s.[62] At a UNCHR meeting in February 2002, Mary Robinson tried to rekindle interest in the idea of human security and its relationship to human rights and economic development. She acknowledged terrorism as a threat "to the most fundamental human right, the right to life," but reminded her audience that an effective counter-terrorist strategy likewise should not victimize innocent people.[63] Elaborating on this point, she argued: "Around the world, people feel insecure when their rights and the rights of others are at risk." Recalling the UNDP's 1994 *Human Development Report* she stated that it was still germane, because it placed the "human person at the centre of the security debate." The best long term guarantor for security was respect for human rights and the best way to root out terrorism was to make human rights central to a counter-terrorist strategy: "Impunity [for gross violations of human rights] induces an atmosphere of fear and terror. It produces unstable societies and de-legitimizes Governments. It encourages terrorist acts and undermines the international community's effort to pursue justice under the law."[64]

These sentiments were reinforced and repeated in several different venues. The UN Secretary-General reiterated that upholding human rights was not simply compatible with success in an anti-terrorist effort it was an essential part of it in his important 2005 address to the Madrid Summit. In fact, he considered upholding human rights the most effective strategy for dealing with terrorism. On the other hand, violating rights provoked hatred and distrust of governments precisely among those parts of the population

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61. Biersteker, et al, *Consensus from the bottom up? Assessing the influence of the sanctions reform processes, in* International Sanctions, *supra* note 22, at 15–30.
62. United Nations Development Programme (UNDP), New Dimensions of Human Security (1994). This is not to suggest that the UN was the only source of ideas about how to conceive security.
63. *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, U.N. ESCOR, ¶ ¶ 2, 9, U.N. Doc. E/CN.4/2002/18 (27 Feb. 2002).
64. *Id.* ¶ ¶ 26, 51.
65. Press Release, Secretary-General Offers Global Strategy for Fighting Terrorism, SG/SM/9757 (3 Oct. 2005), *available at* http://www.un.org/News/Press/docs/2005/sgsm9757.doc.htm. A Task Force of the Secretary General set up to give content to that strategy reported in April 2006. *See Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy, Report of the Secretary-General*, U.N. Doc. A/60/825 (27

from which terrorist leaders recruit.[65] Louise Arbour, appointed UNHCHR in July 2004, argued on Human Rights day in December 2005, "even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually improves human security. Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and for its neighbours." On the other hand, "pursuing security objectives at all costs may create a world in which we are neither safe nor free."[66] A year earlier, before the Human Rights Committee, Arbour explicitly laid out her thinking on security. History was "replete," she said, with examples of the "terrible linkage" between violence and violations of rights. There could be "no genuine personal security if rights are in peril, any more than legal guarantees can exist in an environment of fear and anarchy."[67]

These kinds of arguments merged with those made in the human rights community, within regional organizations, and in certain state capitals. As functionary bodies, the Al-Qaeda/Taliban Committee and the CTC evolved in response.

IV. STATE POWER AND INSTITUTIONAL ADAPTATION

The idea that powerful states were behind these adjustments in the procedures of the 1267 and 1373 Committees, or were the source of the revised phrasing of anti-terrorist resolutions from the time of the passage of Resolution 1456, is unsupported by evidence. Mexico, in fact, played a crucial role. Under Foreign Minister Castenada, the government made the decision to open up its own human rights practices to international scrutiny and to promote human rights protections overseas. In spring 2002, Mexico tried unsuccessfully to get the UNCHR to pass a resolution that referred to the need to counter terrorism within a human rights framework. However, it successfully promoted the same resolution in the General Assembly in the autumn, and this became the basis for Resolution 1456 of January 2003.[68]

Apr. 2006). The Secretary General commented that "defending human rights runs like a scarlet thread through the report. It is a prerequisite to every aspect of any effective counter-terrorism strategy." U.N. Doc. SG/SM/10440, GA/10457 (2 May 2006), *available at* http://www.un.org/News/Press/docs/2006/sgsm10440.doc.htm. (*See also* note 2 above). The UN General Assembly adopted a global counter-terrorism strategy reflecting this on 8 Sept. 2006. *See available at* http://www.un.org/terrorism/strategy/.

66. *Statement by the UN High Commissioner for Human Rights*, Human Rights Day (7 Dec. 2005).
67. Address of the High Commissioner for Human Rights Louise Arbour to the 81st Session of the Human Rights Committee (12 July 2004), *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/FEC66240ABED211BC1256ECF006F6D26?opendocument.
68. U.N. Doc. A/RES/57/219 (4 Dec. 2002).

I have described this Resolution as a signal moment for the move from counter-terrorist measures to measures that consider what Annan described at the high-level Security Council debate of that resolution as the "'collateral damage' of the war on terrorism: damage to the presumption of innocence, to precious human rights, to the rule of law and to the very fabric of democratic governance."[69] At that 2003 foreign-ministerial level meeting, Germany, Mexico, and Chile supported the thrust of the Secretary-General's remarks, noting that counter-terrorist action had to respect human rights law. China and Russia, however, both stated that the fight against terrorism needed to be based on the UN Charter and on international law—code words for a more traditional reading of the Charter and of Article 2(7) with its stress on non-interference in domestic affairs. The US Secretary of State, Colin Powell, made no reference—direct or indirect—to that portion of Annan's statement quoted above.[70] Yet, Resolution 1456 passed unanimously, and included the new paragraph that made reference to the need to take action in compliance with human rights, refugee, and humanitarian law.[71]

Middle-range states kept up the pressure. The 2004 reports of the Chair of the 1267 Committee, together with the responses of both permanent and nonpermanent members of the Security Council, show that the strongest criticisms of the human rights weaknesses in Committee procedures came from Germany, other EU members such as the Netherlands, Spain, and Latin American countries such as Brazil and Mexico.[72] In September 2004, a few days after another bomb explosion in Jakarta, Indonesia (not a member of the Security Council) requested to speak on 1267 business. It too lined up

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69. *Threats to International Peace and Security caused by terrorist acts*, S.C. Agenda, U.N. Doc. S/PV.4688, at 3, (20 Jan. 2003).
70. *Id.* at 1–27. Some of my 2006 interviewees in New York, knowledgeable about this process, commented on Chinese and Russian reservations about making reference to humanitarian and human rights law; others suggested that the United States was the major conservative force, with China and Russia content to let the US take the lead in attempting to stop change. When the "incitement to terrorism" Resolution, 1624, was passed unanimously on 14 Sept. 2005 during the Summit Meeting of the Security Council, the debate followed similar lines. President Bush, for example, failed to refer to the need to ensure anti-terrorist measures were in accordance with human rights standards, unlike the statements of a number of other delegations: for example, the Philippines, Argentina, Benin, Brazil, and Greece. *See* U.N. Doc. S/PV.5261 (14 Sept. 2005).
71. U.N. Doc. S/RES/1456/2003, ¶ 6, (20 Jan. 2003).
72. The German delegate noted:

> International law clearly stipulates that counter-terrorism actions must at all times respect due process and the rule of law. There can be no trade-off between human rights and effective security measures. Indeed, respect for human rights must remain an integral part of any comprehensive counter-terrorism strategy.

He also made reference to the report of the High-Level Panel on Threats Challenges and Change, which had also voiced its criticism of the lack of protection for fundamental human rights norms and conventions. *See* U.N. S.C., 5104th mtg., at 8, U.N. Doc. S/PV.5104 (17 Dec. 2004).

with these states and its government representative recorded support for a multilateral approach to dealing with terrorism "based on international law and respect for human rights."[73]

US statements at both meetings, however, stressed disappointment at state failure to comply with 1267 requirements, which warranted further committee investigation of the culprits and quite possibly, Council action. As the US representative warned: "When this solemn body invokes Chapter VII of the Charter in response to threats against international peace and security, there can be no satisfactory outcome by member States other than complete compliance in implementing the measures authorized by the Security Council."[74] He made no reference to the possibility that a lack of compliance in some instances might be a function of concern about the absence of fairness in procedures.

Briefings from the Chair of the CTC to the Security Council, and then comments on those briefings by participating states, reveal a similar pattern. European, Latin American, Canadian, and some African and Asian representatives expressed concern that the CTC had been operating without due regard for human rights, and some suggested that a failure to comply with Resolution 1373 might relate to the Committee's lack of concern about its impact on rights protection.[75] It was the same pattern in 2005 when the three Committees—the 1267, 1373, and 1540 Committees—reported together. In April 2005, the Greek government, then a non-permanent member of the Security Council, made a strong case in support of a UN strategy to combat terrorism that was compliant with due process and human rights standards. The French representative offered his support to the Secretary-General's approach outlined in Madrid, noting that, not only was respect for human rights an obligation for states, but it also would help prevent terrorism. The US representative stuck to his previous line: the best way the CTC could "contribute to the struggle against terrorism and help those on the front lines of that fight is by helping States to implement Resolution 1373 (2001) and by holding those that fail to do so, or that will not do so, accountable." The collective efforts would simply fail, he argued, unless states made implementation the "high priority it must be."[76] These statements suggested that the US

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73. U.N. S.C., 5031th mtg., at 29, U.N. Doc. S/PV/5031 (14 Sept. 2004). *See also* U.N. S.C., 5104th mtg., U.N. Doc. S/PV.5104 (17 Dec. 2004). The motives among such states include responses to domestic legal challenges and public opinion, the need to win over moderate Islamic forces within particular societies, and the desire to reinforce an identity as a democratizing state.
74. U.N. S.C., 5104th mtg., at 14–15, U.N. Doc. S/PV.5104 (17 Dec. 2004); U.N. S.C., 5031th mtg., at 7–8, U.N. Doc. S/PV/5031 (14 Sept. 2004).
75. *See, e.g.*, U.N. S.C., 4845th mtg., U.N. Doc. S/PV.4845 (16 Oct. 2003); U.N. S.C., U.N. Doc. S/PV.4921 (4 Mar. 2005); U.N. S.C., 5006th mtg., U.N. Doc. S/PV.5006 (19 Jul. 2004); U.N. S.C., 5059th mtg., U.N. Doc. S/PV.5059 (19 Oct. 2004).
76. U.N. S.C., 5168th mtg., at 10, 14–16, U.N. Doc. S/PV.5168 (25 Apr. 2005).

government believed human rights concerns to be unhelpful diversions and intimated a desire to turn the CTC into a more condemnatory body.

A number of factors explain why the human rights arguments had become difficult to resist: "discursive entrapment" coupled with the influence of identity; domestic political considerations; and the political nature of the UN Security Council.[77] Past Security Council commitments to protecting human rights and human security, as well as individual states' acceptance of this, were now difficult to disavow. Undoubtedly, there was discomfort among states that projected themselves as supportive of rights and democratic freedoms, a feature that was of particular importance to the European Union as it sought to impose such conditions on new candidates for membership.[78] Moreover, within European states in particular, legal challenges and revelations of abusive practices had stirred up considerable debate. Other states, such as Chile and Mexico, appeared keen to reinforce the sense that they had turned away from their authoritarian pasts.[79] Indonesia's actions reflected similar concerns and also were prompted by the government's desire to maintain good relations with Islamic groups within the wider society.

A number of states, as well as the UN Secretariat, wanted to retain a role for the UN in the struggle against terrorism. This goal encouraged a search for consensus. More cynically, there might have been the belief that the addition of this paragraph in Resolution 1456 and in subsequent Security Council counter-terrorism resolutions, together with the appointment of a human rights expert, would make no real difference to proceedings anyway. It is this problematic factor that forms the last section of this article.

V. TOO LITTLE, TOO LATE?

This article has shown how quickly states responded to the US call to participate in the "global war on terror" and noted how swiftly evidence accumulated at the UN and within NGOs that governments had picked up a signal that rights protections could more openly be sacrificed. Undoubtedly, the human rights regime was damaged as a result, perhaps to such a degree that the small changes noted above in 1267 and 1373 procedures and in the wording of Security Council resolutions have come too late. These

77. Interviews, personal and via e-mail, have been helpful to the development of these arguments.

78. For discussion of this process, including the teaching of new norms, see International Institutions and Socialization in Europe: Introduction and Framework (Jeffery T. Checkeled, 2007); see Special Issue 59 Int'l Org. (2005).

79. For one, ultimately pessimistic, discussion of Mexico's attempts to promote human rights internally and externally, see Human Rights Watch, Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox (May 2006), *available at* http://hrw.org/reports/2006/mexico0506/.

adjustments are too inconsequential, especially when compared with a US administration that signaled by its behavior and in the shaping of Resolution 1373 that it had accepted that the struggle against terrorism unavoidably would involve damage to human rights.

This is a powerful negative argument, but it is still too early to conclude that damage to the rights regime is fatal. The process of change in both Committees has been slow. Bureaucratic inertia (for which the UN is infamous), big power resistance, and the different priorities and working methods of Committee chairs[80] have probably been responsible for this. However, the moves that have taken place, as well as the arguments formulated, have provided openings for a deepening of procedures that are attentive to human rights. Over time, the new human rights official appointed to CTED might be able to pose rights-related questions directly to states, and participate in state visits at which recommendations can be made for better protection of rights while countering terrorism.[81] These potential developments may appear modest, but are typical of the way that human rights are promoted within the UN framework. Similarly, the incremental changes introduced into 1267 procedures could result in an independent appeals process for those seeking removal from the list.

Moreover, steadily increasing UN attention to human rights consequences seems likely because it would be extremely damaging to that body if it is not seen as upholding human rights: hence the danger associated with any European Court decision that found the organization to be in breach of fundamental rights. Human rights now influence the work of virtually all of the UN bodies and specialized agencies.[82] In the post Cold War era, the UN—including the Security Council—has emphasized that international peace and security requires attention to the protection of human rights. According to the High-Level Panel, contemporary readings of the Charter reflect the intentions of its founders who recognized the "indivisibility of security, economic development and human freedom."[83] The Charter's opening words

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80. Cortright has described the first four chairs of the CTC as follows:

> The first chair . . . established a record of political evenhandedness, fully in keeping with U.S. interests, and pushed the organizational agenda vigorously. The second chair, Inocencio Arias of Spain, was less energetic. In the view of many UN officials, CTC momentum lagged. In 2004 the chair went to Russia and its young UN ambassador Andrey Denisov, who tried to energize the Security Council program. Danish ambassador Ellen Loj took the chair in April 2005 with an ambitious agenda to enhance technical assistance and link it to expanded development assistance efforts.

Cortright, *supra* note 3 at 4.

81. Some members of UN delegations interviewed in New York in 2006 expressed support for these future developments. Confidential interviews (on file with author).

82. Julie Mertus, The United Nations and Human Rights: A Guide for a New Era (2005), convincingly demonstrates this.

83. United Nations, A More Secure World, supra note 2, at 1, *available at* http://www.un.org/secureworld/report2.pdf.

claim that the United Nations was created "to reaffirm faith in fundamental human rights" and "to promote social progress and better standards of life in larger freedom."[84] This understanding has made it difficult for Security Council Committees to ignore the persistent criticisms of their failure fully to protect human rights in an anti-terrorist era. In a more political vein, at a time of overwhelming US material power and a perceived preference for acting unilaterally, both Russia and China are determined to maintain a role for the UN Security Council in addressing international threats to peace and security. Many other states agree with this (though sometimes for different reasons), and this determination reinforces a search for basic consensus. This particular search for agreement has created a focal point around the idea of the UN Security Council playing its part in the struggle against terrorism but within a rights-based framework.

With respect to the US administration, however, the position is troubling. What is plain from the evidence presented above is that the United States has distanced itself from many of its core allies in its willingness to continue both the verbal and actual down-grading of concern about human rights in an anti-terrorist era. This isolation obviously is not helpful to sustaining global cooperation. A failure further to improve human rights protections will not help to engender compliance with anti-terrorist measures among those states which, in general, are better able both, to carry out such measures, as well as to offer support to those with less state capacity. But as Edward Luck notes, the isolation reflects an ambivalence that is well-established.[85] The US accords the UN an important but not a central role in anti-terrorist activities. If it finds that its particular approach to this struggle is being disregarded, the US could attempt to make the UN less prominent in the conduct of a campaign, which as Kofi Annan has said challenges the "core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflicts."[86]

VI. CONCLUSION

This study of evolutionary change in two of the United Nations most important committees dealing with terrorism shows the embedded nature of the idea of human rights within certain states, regional institutions, as well as in the UN itself. The changes to Committee workings, as well as

84. *Id.*
85. Luck, *supra* note 6, at 350.
86. *Id.* at 351; *Secretary-General Offers Global Strategy*, U.N. Doc. SG/SM/9757 (10 Mar. 2005).

the return to discussion of rights and human security have come about for three main reasons: the persuasiveness of the argument; role-playing and self-identification; and strategic calculation. Some officials expressed support for a rights-based framework in terms of the rightness of the idea. Underlying this was the notion that it represented appropriate behavior for certain democratic or democratizing states and organizations. For others, voicing support offered a way to ensure that those states troubled about dimensions of the Committees' work would remain willing to sustain their counter-terrorist efforts. This would also help to strengthen the position of the Security Council as a core actor when it came to dealing with terrorism. Others still chose to argue that human rights abuse increased the numbers of terrorist recruits, and thus measures that took no account of the consequences were counter-productive. No state spoke against the notion of developing counter-terrorist efforts that were more respectful of human rights; and the signal that came from silence could be countered by others willing to use the UN as an institutional platform from which to express this need for greater levels of respect.

Those that regularly decided to make the argument in support of a human rights framework (apart from the human rights NGOs, of course) were Secretariat officials, UN experts, certain middle-range states, and European and Latin American regional organizations. Although the United Kingdom and France, in their individual statements and as members of the Permanent-5, chose less often than other EU members to make the case, they did always associate themselves with an EU statement that invariably took a strong stand on the issue. The powerful states of China, Russia, and especially the United States decided either to keep quiet on the matter or to use ambiguous phrasing. The US overtly signaled its priority as being compliance with measures against terrorists. Meanwhile, it remained silent about collateral damage, even though this resulted in distancing from its natural allies.

Institutional procedures helped to facilitate the evolution in the Committees' approaches, described above. Over the course of the post Cold War era, the Security Council has been operating on the basis of consensus decision-making, and this model was explicitly chosen for the work of the 1267 and 1373 Committees. Perhaps more significant to the outcome is the agreement that Committee business would be somewhat more transparent than was usual. This meant that a number of Security Council meetings were open, any member state that wished to contribute to the debate could do so, and many reports were made public. In addition, both Committees had specialist teams appointed to them and those appointed at later stages have begun to use their expertise and professionalism to bolster the authority of team recommendations.

The power of the human rights norm has, then, been demonstrated within the setting of the UN; but in the wider international system its power

is not so clear. Severe damage has been inflicted, and the process of repair is complex and not helped by a US failure strongly to support international humanitarian and human rights law during the anti-terrorist campaign. Nevertheless, some recovery is a realistic expectation given the apparent embeddedness of the human rights idea in certain domestic, regional, and international institutions. If studies that support a correlation between the experience of severe human rights abuse and the recruitment to a terrorist cause are accurate, then this gives us another reason to welcome this initial finding.