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## Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for an International Solution

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# **Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for an International Solution**

## **ABSTRACT**

*In recent years, terrorist use of the Internet has been gaining in popularity, with more than several thousand radical or extremist websites in existence today. Because the Internet transcends physical and geographic boundaries, combating terrorist incitement on the Internet requires cross-border global cooperation. Although the international community has taken steps to combat the problem with United Nations Security Council Resolutions 1373 and 1624, the state parties to these resolutions have been unable to close the significant holes in the current international legal framework, and there is little evidence that terrorist use of the Internet for purposes of incitement is being prosecuted successfully. Certain states are limited by their own domestic legal framework, including the United States, which is significantly limited in its ability to combat incitement because of the constitutional restraints imposed by the First Amendment. Despite more aggressive legislation and the absence of any constitutional limitations, the United Kingdom has been similarly unsuccessful in combating and prosecuting incitement to commit terrorist acts. This Note compares the measures taken by the United States and the United Kingdom in combating terrorist use of the Internet for purposes of incitement, explains why such measures have been limited in effect, and extends lessons learned from these case studies to the international framework.*

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After Operation Enduring Freedom<sup>1</sup> removed the Taliban and denied safe haven to Al Qaeda in Afghanistan, Al Qaeda and its followers moved their base of operations to cyberspace.<sup>2</sup> By all objective measures, terrorist use of the Internet<sup>3</sup> has gained in popularity since then.<sup>4</sup> The U.S. Department of Homeland Security (DHS) documents several thousand radical or extremist websites in existence worldwide today,<sup>5</sup> compared with only a handful in 2000.<sup>6</sup> DHS believes that the versatility of the Internet has created a virtual safe haven for terrorist communication, recruitment, training, and preparation for attacks, defining a safe haven as “an area of relative security exploited by terrorists to indoctrinate, recruit, coalesce, train, and regroup, as well as prepare and support their operations.”<sup>7</sup> The United Kingdom’s Home Office, the lead government department for immigration and passports, drug policy, counter-terrorism and police, attributes the popularity of terrorist websites to the fact that they “are difficult to monitor and trace; they can be established anywhere and have global reach; they are anonymous, cheap and instantaneous; and

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1. Operation Enduring Freedom is a multinational military operation initiated in October 2001 to combat terrorism and bring security to Afghanistan in collaboration with Afghan forces. *Fact Sheet: Operation Enduring Freedom*, U.S. DEP’T STATE, JAN. 31, 2006, available at <http://usinfo.org/wf-archive/2006/060131/epf207.htm>. Operation Enduring Freedom operations led to the collapse of the Taliban regime and helped bring a measure of security and stability to Afghanistan for the first time in a generation. *Id.*

2. *Internet Jihad: A World Wide Web of Terror*, ECONOMIST, July 14, 2007, at 29-30 [hereinafter *Internet Jihad*].

3. It is important to distinguish “terrorist use of the Internet” from “cyberterrorism.” See Maura Conway, *Encounters with Internet-Based Counter-Terrorism: Assessing the Quiet Online ‘War on Terrorism’* 2-4 (Sch. of Law & Gov’t, Dublin City Univ., Working Paper, 2008), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/5/3/8/4/pages253846/p253846-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/3/8/4/pages253846/p253846-1.php). While “cyberterrorism” has been defined as “premeditated, politically motivated attack[s] against information, computer systems, computer programs, and data,” “terrorist use of the Internet” is a much broader concept that can refer to more mundane and everyday terrorist uses of the Internet, including the dissemination of information and terrorist recruitment. *Id.*

4. Steve Coll & Susan B. Glasser, *Terrorists Turn to the Web as Base of Operations*, WASH. POST, Aug. 7, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR2005080501138.html>. Gabriel Weimann, a professor at the University of Haifa in Israel, says there are more than 4,500 terrorist-related websites today, compared to only 12 websites 8 years ago. *Id.*

5. DEP’T HOMELAND SECURITY, COUNTRY REPORTS ON TERRORISM 2005: SUPPLEMENT: REPORT TO CONGRESS REQUIRED UNDER SECTION 7120(B) OF THE 9/11 COMMISSION IMPLEMENTATION ACT OF 2004, available at [http://www.globalsecurity.org/security/library/report/2006/c-rprt-terrorism\\_2005-sup02.htm](http://www.globalsecurity.org/security/library/report/2006/c-rprt-terrorism_2005-sup02.htm) [hereinafter DEP’T HOMELAND SECURITY, COUNTRY REPORTS ON TERRORISM 2005].

6. *Internet Jihad*, *supra* note 2, at 29-30.

7. DEP’T HOMELAND SECURITY, COUNTRY REPORTS ON TERRORISM 2005, *supra* note 5, at ch. 1.

it requires no special expertise to set up a website.”<sup>8</sup> The Home Office believes that extremists trying to evade detection in traditional spheres of activity are making more extensive use of the Internet to spread propaganda and incite others to terrorism.<sup>9</sup>

Terrorist use of the Internet is also burgeoning because monitoring the Internet is difficult and requires cross-border global cooperation.<sup>10</sup> Saudi Arabian authorities recently expressed concerns about the difficulty in obtaining cooperation to shut down extremist sites hosted by servers located outside their borders, in places like Europe and the United States.<sup>11</sup> Without international cooperation, terrorist groups’ websites that have been shut down in one state can simply find a new host in another state, thereby defeating the efforts of the original host state.<sup>12</sup> For this same reason, the European Union has launched a “Check the Web” initiative, an open-source monitoring and database creation project handled by the European Law Enforcement Organization (Europol), for the purposes of monitoring the Internet for terrorist use, especially recruitment, training, and propaganda.<sup>13</sup> No matter how much political will it may have, one state simply cannot resolve the problem alone. Accordingly, the international community is taking steps to cooperate and respond on a global scale.

While the Internet can serve many potential uses for terrorists, this Note will focus on measures by the United States and United Kingdom to combat terrorist use of the Internet for purposes of incitement to, and the glorification of, terrorism.<sup>14</sup> Part I will describe the international legal framework relevant to this issue, outlining the sources of international legal authority for efforts to combat incitement as well as the sources of international law that limit this authority in order to protect freedom of expression. Part II will examine the state-specific measures and respective tools that the

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8. HOUSE OF COMMONS, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBING IN LONDON ON 7TH JULY 2005, 2006, H.C. 1087, at 31, available at <http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf>.

9. *Id.*

10. Conway, *supra* note 3, at 12.

11. Christopher Boucek, *The Sakinah Campaign and Internet Counter-Radicalization in Saudi Arabia*, CTC SENTINNEL, Aug. 2008, at 1, available at [http://ctc.usma.edu/sentinel/CTCSentinel\\_Vol1Iss9.pdf](http://ctc.usma.edu/sentinel/CTCSentinel_Vol1Iss9.pdf).

12. *Id.*

13. Council of the European Union Working Party on Terrorism, Council Conclusions on Cooperation to Combat Terrorist Use of the Internet, 2007, 8457/2/07.

14. This Note focuses exclusively on the prosecution of suspected terrorists through the ordinary channels of criminal justice and does not discuss military commissions or any other extrajudicial proceedings.

United States and United Kingdom currently employ to combat incitement. Part III will present case studies from the United States and United Kingdom in order to compare their relative effectiveness in combating incitement, and their degree of compliance with United Nations Security Council Resolution (UNSCR) 1624<sup>15</sup> on prohibiting incitement to terrorism through law. Based on lessons learned from the legal frameworks of the United States and United Kingdom, Part IV will propose solutions to better address terrorist use of the Internet for purposes of incitement. Finally, Part V will conclude the Note by summarizing the issue and proposed solutions.

## I. THE INTERNATIONAL LEGAL FRAMEWORK

### *A. Combating Incitement to Terrorism*

Large-scale terrorist attacks, including those of September 11, 2001, in the United States and July 7, 2005, in the United Kingdom, have spawned a wide array of international and domestic counterterrorism laws. When the United Nations adopted UNSCR 1373 in response to the September 11th attacks, it demonstrated only minimal awareness of the issue of terrorist use of the Internet.<sup>16</sup> UNSCR 1373, focused primarily on preventing and suppressing the financing of terrorist acts,<sup>17</sup> merely called upon states to “find ways of intensifying and accelerating the exchange of operational information” on terrorist activities, including the “use of communications technologies by terrorist groups.”<sup>18</sup> The resolution also established a Counter-Terrorism Committee (CTC) to monitor implementation of the resolution and required states to report to the CTC on the steps they have taken towards implementation.<sup>19</sup> The deficiencies in UNSCR 1373 reflect the fact that important factual information surrounding the September 11th attacks had yet to be uncovered. The 9/11 Commission Report,<sup>20</sup> released in 2004, demonstrated the inability of financing laws alone to prevent acts of terrorism, and

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15. S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005) (calling on states to take certain measures relating to the incitement of terrorist acts).

16. See S.C. Res. 1373, ¶ 5, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

17. *Id.* ¶ 1(a).

18. *Id.* ¶ 3(a).

19. *Id.* ¶ 6.

20. THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 REPORT (2004).

revealed Al Qaeda's heavy reliance on the Internet in planning and coordinating the September 11th attacks on the United States.<sup>21</sup>

The United Kingdom's Home Office investigation into the July 7, 2005 London bombings revealed that the bombings were a low-budget operation carried out by four men, with no connections to Al Qaeda, who made extensive use of the Internet in carrying out their attacks.<sup>22</sup> In the aftermath of the July 7th bombings, the United Nations adopted UNSCR 1624,<sup>23</sup> a document demonstrating far more awareness of the challenges posed by terrorist use of the Internet than UNSCR 1373.<sup>24</sup> UNSCR 1624, sponsored by the United Kingdom, condemned incitement to terrorism and repudiated attempts at the justification or glorification (*apologie*)<sup>25</sup> of terrorist acts.<sup>26</sup> It also recognized the importance of acting cooperatively "to prevent terrorists from exploiting sophisticated technology, communications, and resources to incite support for criminal acts," and called upon all states to adopt such measures "as may be necessary and appropriate and in accordance with their obligations under international law to . . . [p]rohibit by law incitement to commit a terrorist act or acts."<sup>27</sup> Once again, states were required to report to the CTC on implementation of this resolution.<sup>28</sup> UNSCR 1373 and UNSCR 1624, taken together, form the foundation for current international efforts to combat incitement to terrorism on the Internet.

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21. Jack Kelley, *Militants Wire Web with Links to Jihad*, USA TODAY, July 10, 2002, available at <http://www.usatoday.com/news/world/2002/07/10/web-terror-cover.htm>. Federal officials found thousands of encrypted messages, dating from May 2000 through September 9, 2001, that had been posted in a password-protected area of a website on the computer of arrested al Qaeda terrorist Abu Zubaydah, the reported mastermind of the attacks. *Id.*

22. See Sarah Lyall, *London Bombers Tied to Internet, Not Al Qaeda*, Newspaper Says, N.Y. TIMES, Apr. 11, 2006, available at <http://www.nytimes.com/2006/04/11/world/europe/11london.html>.

23. See S.C. Res. 1624, *supra* note 15.

24. See S.C. Res. 1373, *supra* note 16.

25. S.C. Res. 1624, *supra* note 15, at Preamble.

26. Speaking on the adoption of UNSCR 1624, then Prime Minister Tony Blair said the Security Council had to take action against those who incite extremism "by fighting not just their methods, but their motivation, their twisted reasoning, [and] wretched excuses for terror." Press Release, Security Council, Security Council Meeting of World Leaders Calls for Legal Prohibition of Terrorist Incitement, Enhanced Steps to Prevent Armed Conflict, (Sept. 14, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>.

27. S.C. Res. 1624, *supra* note 15, ¶ 1(a).

28. *Id.* ¶ 5.

### *B. Combating Incitement While Preserving Freedom of Expression*

Measures taken to implement UNSCR 1373 and UNSCR 1624 must comply with other international legal obligations, including the obligation of states to protect and promote the right to freedom of expression. UNSCR 1624 recalls “the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights” (UDHR) and “the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights” (ICCPR) and declares that “any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR.”<sup>29</sup> The UDHR, adopted after World War II, was the first international instrument to guarantee the right to freedom of expression.<sup>30</sup> This protection was included in Article 19 of the ICCPR, which guarantees that “[e]veryone shall have the right to freedom of expression . . . includ[ing] freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>31</sup>

In this international legal framework, however, freedom of expression is not absolute. For example, Article 29(2) of the UDHR provides that the exercise of freedom of expression is subject “to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.”<sup>32</sup> Similarly, Article 20 of the ICCPR calls upon state parties to prohibit by law “[a]ny advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.”<sup>33</sup> Thus, international efforts to combat terrorist use of the Internet must conform to these protective<sup>34</sup>

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29. *Id.*

30. Article 19 of the UDHR provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, G.A. Res. 217A, at 74-75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> [hereinafter UDHR].

31. International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). [hereinafter ICCPR].

32. UDHR, *supra* note 30, at art. 29(2).

33. ICCPR, *supra* note 31, at art. 20(2).

34. International human rights law imposes positive obligations on the state to take effective preventative measures to protect the lives and physical integrity of everyone



and restrictive goals simultaneously. Moreover, measures taken by individual UN member states to combat terrorist use of the Internet for incitement must not only comply with their international legal obligations but also their domestic legal frameworks as well.

## II. STATE-SPECIFIC MEASURES: LEGAL TOOLS FOR COMBATING INCITEMENT

Given the pervasive and global nature of terrorism, it may be initially surprising that the September 11th attacks in the United States and the July 7th attacks in the United Kingdom were so influential in shaping the international legal framework for combating terrorism. However, when one considers that both the United States and the United Kingdom are two of the five permanent members of the United Nations Security Council,<sup>35</sup> this influence is less surprising. Despite their equally strong advocacy for international cooperation to combat terrorism, the United States and the United Kingdom have very different domestic legal systems that influence their ability to comply with international legal obligations to combat terrorist use of the Internet for incitement. In general, the United Kingdom is more willing to prosecute people for terrorist speech on the Internet, including incitement, while the United States is more conservative in prosecuting terrorist speech and incitement.<sup>36</sup>

### A. THE UNITED STATES' APPROACH TO INCITEMENT

#### 1. Constitutional Limits on Prosecuting Incitement and the Impact of the First Amendment

While the United States was a strong proponent of UNSCR 1373 and UNSCR 1624, it faces unique challenges in their implementation. In its June 2006 report to the CTC,<sup>37</sup> the United States emphasized that the First Amendment of the U.S. Constitution

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within their jurisdiction against the threat of terrorism. See House of Lords House of Commons Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, 2005-6, H.L. Paper 240, H.C. 1576, at 8, available at <http://www.parliament.the-stationery-office.com/pa/jt200506/jtselect/jtrights/240/240.pdf>.

35. Membership of the Security Council, <http://www.un.org/sc/members.asp> (last visited Mar. 16, 2009).

36. Don Van Natta, Jr., *Cleric Convicted of Stirring Hate*, N.Y. TIMES, Feb. 8, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE3DC143EF93BA35751C0A9609C8B63&sec=&spon=&pagewanted=2>.

37. See *supra* text accompanying note 18.

limits its ability to prosecute or criminalize incitement to commit acts of terrorism.<sup>38</sup> The report points out that the United States has long asserted its constitutionally imposed challenges in complying with international legal devices. For example, it points out that when the United States ratified the ICCPR, it did so subject to certain conditions.<sup>39</sup> Specifically, the United States filed a declaration with respect to Article 19<sup>40</sup>, stating that “fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent.”<sup>41</sup> In addition, the United States filed a reservation<sup>42</sup> to Article 20, which requires the prohibition of hatred that constitutes incitement to discrimination, hostility, or violence.<sup>43</sup> The reservation stated that Article 20 “does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”<sup>44</sup> The United States has made it clear that efforts to combat terrorist use of the Internet for incitement would invoke the same principles applied to incitement to discrimination or hate speech.<sup>45</sup>

In the United States, regulation of the Internet is subject to the same conventional First Amendment jurisprudence as the regulation of any other media.<sup>46</sup> In *Reno v. ACLU*, the U.S. Supreme Court found that the Internet is entitled to the full First Amendment protections afforded to other media like the print press, refusing to concede that it should be subject to the greater regulation allowed of broadcast media.<sup>47</sup> In particular, the prosecution or criminalization of incitement to commit acts of terrorism in the United States is limited to the strict set of circumstances set out in *Brandenburg v. Ohio*.<sup>48</sup> *Brandenburg* held that

the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where

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38. Response of the United States of America to the Counter-Terrorism Committee: United States Implementation of Security Council Resolution 1624 (2005), U.N. Doc. S/2006/397 (June 16, 2006) [hereinafter Response of the USA to the CTC].

39. *Id.*

40. *See supra* text accompanying note 31.

41. Response of the USA to the CTC, *supra* note 38, at 4.

42. *Id.*

43. ICCPR, *supra* note 31, at art. 20.

44. Response of the USA to the CTC, *supra* note 38, at 4.

45. *See supra* text accompanying notes 43, 44.

46. *See infra* text accompanying notes 47.

47. 521 U.S. 844, 868-70 (1997).

48. 395 U.S. 444 (1969).

such advocacy is directed to *inciting or producing imminent* lawless actions and is *likely to incite or produce* such action.<sup>49</sup>

Since the *Brandenburg* test requires proof of both the intent to incite or produce unlawful action and the likelihood that the speech will actually incite imminent unlawful action, the United States has not criminalized or prosecuted the mere publication of written materials as incitement.<sup>50</sup> Thus, the majority of terrorist propaganda found on the Internet today, if viewed as the mere publication of written material, cannot be prosecuted under U.S. criminal law.

## 2. Statutory Authority for Prosecuting Incitement and the Primacy of Material Support

Although traditional First Amendment jurisprudence limits the ability of the United States to prosecute incitement to the strict set of circumstances set forth in *Brandenburg*, the Patriot Act, signed into law on October 26, 2001, significantly expanded the authority of U.S. law enforcement agencies to use new and existing laws to fight terrorism.<sup>51</sup> In particular, the robust inchoate offenses and “material support” provisions in the Patriot Act permit the prosecution of preparatory acts to substantive criminal conduct, including incitement to terrorism.<sup>52</sup> An inchoate offense is “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.”<sup>53</sup> The three classic inchoate offenses, especially prominent in the context of terrorism prosecutions, are attempt, conspiracy and solicitation.<sup>54</sup> The “step” towards these inchoate terrorism offenses must have “material support.”<sup>55</sup>

The material support statutes, 18 U.S.C. §§ 2339(a) and (b), prohibit knowingly or intentionally providing, attempting to provide, or conspiring to provide material support or resources to a terrorist organization.<sup>56</sup> The Patriot Act broadened the definition of “material support” to include “any property, tangible or intangible, or service, including . . . training, expert advice or assistance . . . [or]

49. *Id.* at 447 (emphasis added).

50. Response of the USA to the CTC, *supra* note 38, at 4.

51. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered titles of U.S.C.) [hereinafter Patriot Act].

52. *See infra* text accompanying notes 56-58.

53. BLACK'S LAW DICTIONARY at 1111 (8th ed. 2004).

54. *Id.*

55. *See infra* text accompanying notes 56-58.

56. *See* 18 U.S.C. § 2339(a), (b) (2000).

communications equipment.”<sup>57</sup> Under the statutory language, terrorist use of the Internet could fall under intangible “property,” “service[s],” “training,” “expert advice or assistance,” or “communications equipment.” Thus, without necessarily referring to “incitement,” the Patriot Act criminalizes certain speech-related conduct that supports or encourages violent acts of terrorism, thereby allowing authorities to prosecute individuals as soon as they communicate the intent to commit an act of terrorism or conspire with others in working to carry out the act.<sup>58</sup> Since prosecutions under the “material support” statutes do not require that any act of terrorism actually occurred, the government is able to pursue a strategy of prevention of terrorism.

Other arrows in the United States’ quiver for criminalizing incitement to commit acts of terrorism are its criminal sedition and criminal solicitation laws. U.S. criminal sedition laws are intended to prevent the forceful overthrow of the government and therefore are often applicable to terrorist plots directed at the United States or planned for execution on U.S. soil.<sup>59</sup> For example, 18 U.S.C. § 2384 criminalizes seditious conspiracy, prohibiting two or more persons from conspiring “to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them.”<sup>60</sup> Additionally, 18 U.S.C. § 2385 allows the government to prosecute a person who “prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so.”<sup>61</sup> Moreover, the federal criminal solicitation statute, 18 U.S.C. § 373, allows U.S. authorities to prosecute anyone who “solicits, commands, induces, or otherwise endeavors to persuade” another person to engage in felonious conduct “with intent that another person engage in [the] conduct.”<sup>62</sup> Criminal solicitation is a free-standing offense, such that requesting the unlawful act is itself a crime, whether or not the offense is ever carried out, so long as the circumstances of such solicitation are “strongly corroborative” of such intent.<sup>63</sup> Thus, any terrorist using the Internet to incite others to commit violent acts of

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57. *Id.*

58. Response of the USA to the CTC, *supra* note 38, at 4.

59. See 18 U.S.C. §§ 2384, 2385 (2000).

60. 18 U.S.C. § 2384 (2000).

61. 18 U.S.C. § 2385 (2000).

62. 18 U.S.C. § 373(a) (2000).

63. MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 19A.01.

terrorism, whether or not on U.S. soil, could conceivably be prosecuted under one of the aforementioned federal statutes.

Even before the United States assumed international obligations to combat terrorism, these statutes were successfully applied to prosecute terrorists for speech-related crimes.<sup>64</sup> For example, in 1995 the U.S. District Court for the Southern District of New York convicted terrorist Sheik Omar Amad Ali Abdel Rahman of engaging in a seditious conspiracy to wage a war of urban terrorism, in violation of 18 U.S.C. § 2384, for his involvement in alleged terrorist plots to bomb New York City facilities and to assassinate certain people.<sup>65</sup> In its case against Rahman, the government relied heavily on Rahman's speeches and writings.<sup>66</sup> On appeal, Rahman contended that 18 U.S.C. § 2384 imposes an unconstitutional burden on free speech and the free exercise of religion in violation of the First Amendment because it criminalizes protected expression and is overly broad as well as unconstitutionally vague.<sup>67</sup>

The U.S. Court of Appeals for the Second Circuit rejected Rahman's claim, noting that "while the state may not criminalize the expression of views—even [if that] view [is] that [the] violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action."<sup>68</sup> The court added that speech which crosses the line beyond mere expression, becoming criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, is not protected simply because it is expressed through the medium of religious preaching.<sup>69</sup> The court found that Rahman's speeches were not simply the expression of ideas but rather "constituted the crime of conspiracy to wage war on the United States," subject to prosecution under 18 U.S.C. § 2384.<sup>70</sup>

In sum, the First Amendment protects the freedom of expression and prevents the United States from prosecuting individuals—including suspected terrorists—on the basis of speech alone.<sup>71</sup> However, federal statutes provide the authority to prosecute

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64. See *infra* text accompanying notes 65-70.

65. See Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. TIMES, Jan. 18, 1996, available at <http://www.nytimes.com/1996/01/18/nyregion/sheik-sentenced-to-life-in-prison-in-bombing-plot.html>; see 18 U.S.C. § 2384.

66. *Id.*

67. United States v. Rahman, 189 F.3d 88, 115-16 (2d Cir. 1999).

68. *Id.* at 115.

69. *Id.* at 116-17.

70. *Id.*

71. See *supra* Part II.A.1.

individuals for certain speech-related conduct, including incitement to terrorism when such incitement is deemed a significant “step” in the commission of, or material support for, other terrorism-related offenses, including attempt, conspiracy, and solicitation to commit acts of terrorism.<sup>72</sup>

### *B. The United Kingdom’s Legal Approach to Incitement*

Upon sentencing Abu Hamza al-Masri, the radical Muslim cleric convicted of inciting murder of Jews and other non-Muslims, Lord Justice Hughes, of the Court of Appeal of England and Wales, stated:

You are entitled to your views and in this country you are entitled to express them, but only up to the point where you incite murder or use language calculated to incite racial hatred . . . . No one can say now what damage your words may have caused. No one can say whether audiences acted on your words. The potential for both direct and indirect damage is simply incalculable.”<sup>73</sup>

Justice Hughes’s opinion best captures the United Kingdom’s more aggressive approach to combating terrorist use of the Internet for purposes of incitement. This aggressive approach is facilitated by the important fact that the United Kingdom does not have a written constitution that regulates the powers of the government and enumerates the fundamental rights and duties of its citizens as does the United States.<sup>74</sup> Unlike the United States, the United Kingdom need not adhere to constitutional provisions that can only be changed through the complex legislative procedure of amendment and ratification.<sup>75</sup> Therefore, the United Kingdom has been able to promulgate anti-terror<sup>76</sup> legislation without any constitutional constraints similar to those in the United States.

The primary weapon in the United Kingdom’s anti-terror arsenal is the Terrorism Act 2000.<sup>77</sup> In response to the changing nature and threat of international terrorism, Parliament enacted the Terrorism Act 2000 to replace the previous temporary anti-terror

72. See *supra* Part II.A.2.

73. Simon Freeman, *Abu Hamza Jailed for Seven Years for Inciting Murder*, TIMES (U.K.), Feb. 7, 2006, available at <http://www.timesonline.co.uk/tol/news/uk/article728117.ece>.

74. Joshua Rozenberg, *UK Politics: Talking Politics, Does the UK Have a Constitution*, BBC NEWS, June 3, 1998, (U.K.) available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/88136.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/88136.stm).

75. *Id.*

76. I use the term “anti-terror” instead of “counterterrorism” in the U.K. context because that is the term favored by the British authorities. For the purposes of this Note, the two terms should be considered synonymous.

77. See *infra* Part II.B.

legislation that dealt primarily with the ongoing fighting in Northern Ireland.<sup>78</sup> The act instituted three primary legal innovations. First, the act's proscription provisions made it illegal for certain terrorist groups to operate in the United Kingdom, including certain international terrorist groups like al-Qaeda.<sup>79</sup> Second, the act gave law enforcement officials enhanced police powers, including broader "stop and search" powers and the authority to detain terrorism suspects for up to twenty-eight days after arrest.<sup>80</sup> Finally, the act introduced new criminal offenses, including inciting terrorist acts; seeking or providing training for terrorist purposes at home or overseas; providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons; and the possession of documents "of a kind likely to be useful to a person committing or preparing an act of terrorism."<sup>81</sup> Coupled with the Regulation of Investigatory Powers Act of 2000 (RIPA), which allows law enforcement to use methods of surveillance and information gathering to help the prevention of crime, including terrorism,<sup>82</sup> the United Kingdom has some of the most advanced legal capabilities for combating and prosecuting terrorist use of the Internet.

The July 7, 2005 London bombings led the British government to strengthen its already robust anti-terror legislation.<sup>83</sup> Just days after the bombings, Charles Clarke, the secretary of state for the Home Department, addressed the House of Commons on the question of the home secretary's authority to combat terrorism:

In recent decades, for all home secretaries, the criteria for exercising these powers have generally been grounds of national security, public order or risk to the United Kingdom's good relations with a third country. In going beyond these grounds, we rightly need to tread very carefully indeed in areas that relate to free speech. However, in the circumstances that we now face, I have decided that it is right to broaden the use of these powers to deal with those who foment terrorism, or seek to provoke others to commit terrorist acts. To that end, I intend to draw up a list of unacceptable behaviors that fall within those powers—for example, preaching, running websites or writing articles that are intended to foment or provoke

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78. The Terrorism Act 2000, ch. 11 (Eng.), available at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/>.

79. The Terrorism Act 2000, *supra* note 78.

80. *Id.*

81. *Id.*

82. Home Office: About RIPA, <http://security.homeoffice.gov.uk/ripa/about-ripa/> (last visited Feb. 18, 2009). RIPA gave the United Kingdom some of the most advanced Internet spying capabilities in the world by enabling the government to demand that an Internet service provider secretly provide access to a customer's communications and allow the government to monitor people's Internet activities, among other things. *Id.*

83. See discussion *supra* pp. 13-14.

terrorism. The list will be indicative rather than exhaustive and we will consult on it, because it is important that we work with communities.<sup>84</sup>

The British Chief of Police also called for increased authority to combat terrorist use of the Internet, asking specifically for the "power to attack identified websites."<sup>85</sup>

In response to political and other pressures, Parliament approved the Terrorism Act 2006,<sup>86</sup> purportedly broadening the government's authority to deal with those who foment terrorism or seek to provoke others to commit terrorist acts.<sup>87</sup> Part 1 of the act creates a series of new criminal offenses to assist the police in combating terrorism, including the encouragement of terrorism and dissemination of terrorist publications. The act prohibits "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or [other] offences."<sup>88</sup> A statement that is likely to be understood as constituting encouragement is a statement that

(a) glorifies the commission or preparation (whether in the past, in the future, or generally) of such acts or offenses; (b) and . . . from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.<sup>89</sup>

The prohibition on encouragement, at least in light of this statutory definition, is ostensibly broad.

The United Kingdom has recently come under political pressure for its aggressive approach to combat incitement<sup>90</sup> from groups like Human Rights Watch (HRW), which has criticized the government's criminalization of encouragement as an unnecessary

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84. 436 PARL. DEB., H.C. (6th ser.) (2005) 1255, *available at* <http://www.publications.parliament.UK/pa/cm200506/cmhansrd/vo050720/debtext/50720-04.htm>.

85. Conway, *supra* note 3, at 10.

86. The Terrorism Act 2006, ch. 11, (Eng.), *available at* [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en_1).

87. See Press Release, Home Office, Tackling Terrorism-Behaviours Unacceptable in the UK (Aug. 24, 2005), *available at* [http://press.homeoffice.gov.uk/press-releases/Tackling\\_Terrorism-Behaviours\\_Un?version=1](http://press.homeoffice.gov.uk/press-releases/Tackling_Terrorism-Behaviours_Un?version=1).

88. The Terrorism Act 2006, *supra* note 86, part 1, § 1.

89. *Id.* § (3)(a), (b).

90. Even the government was initially opposed to a new offense that would prohibit "encouraging terrorism". See House of Lords House of Commons Joint Committee on Human Rights, *supra* note 34 ("Such wide drafting goes against the principle of clarity of the law, does not sufficiently define what behaviour is expected of persons subject to the law, and can have significant negative effect on freedom of speech in a democratic society.").



measure that will have an excessively chilling effect on the freedom of expression.<sup>91</sup> First, HRW alleges that the mens rea requirement for commission of the offense is unclear.<sup>92</sup> Under the act, a person commits an offense whether he actually intends to encourage or merely is reckless as to whether his statement will encourage an act of terrorism.<sup>93</sup> Second, HRW argues that the offense lacks legal certainty such that people may not necessarily be able to regulate their conduct to avoid infringement.<sup>94</sup> Because the act criminalizes "glorification," it may be hard for individuals to predict when a statement would constitute encouragement of terrorism as opposed to when it would constitute a legitimate exercise of free expression. Third, HRW criticizes the fact that the act does not require any causal link between the criminal act of encouragement and actual violence perpetrated.<sup>95</sup> For purposes of the act, it is irrelevant "whether any person is in fact encouraged or induced by the statement to commit, prepare, or instigate" a terrorist act or offense.<sup>96</sup>

Human Rights Watch's criticisms brought the United Kingdom's encouragement provisions under the scrutiny of the United Nations Human Rights Committee,<sup>97</sup> the body that assesses compliance with the ICCPR. The United Nations Human Rights Committee criticized the definition of "encouragement of terrorism" in Section 1 of the Terrorism Act 2006 as "broad and vague," particularly because an individual can commit the offence in the absence of any intent, as long as the statements are understood by some members of the public to constitute encouragement to commit acts of terrorism.<sup>98</sup> The United Nations Human Rights Committee suggested that the government amend the statute's language to avoid "disproportionate interference with freedom of expression" guaranteed in Article 19 of the ICCPR.<sup>99</sup> The recent attention HRW has brought upon Section 1 of the Terrorism Act 2006 recalls the limitations set in place in UNSCR 1373 and UNSCR 1624 to comply with international legal

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91. See *infra* text accompanying notes 92-96.

92. Human Rights Watch Briefing on the Terrorism Bill 2005, <http://www.hrw.org/backgrounder/eca/U.K.1105/3.htm> (last visited Mar. 16, 2009).

93. The Terrorism Act 2000, *supra* note 78, at part 1, § (1), (2)(b)(i), (ii).

94. See *supra* text accompanying notes 48-50.

95. *Id.*

96. The Terrorism Act 2000, *supra* note 78, at part 1, § 1(5)(b).

97. See generally Introduction to the Human Rights Committee, <http://www.unhchr.ch/html/menu2/6/a/introhrc.htm> (last visited Mar. 16, 2009).

98. Duncan Campbell, *Labour Warned over Limits to Free Expression*, GUARDIAN, Aug. 15, 2008, available at <http://www.guardian.co.uk/politics/2008/aug/15/labour.idcards>.

99. *Id.*

obligations to combat terrorism, on the one hand, and to protect expression on the other.

### III. COMPARATIVE COMPLIANCE WITH UNSCR 1624

While both the United States and the United Kingdom have come under fire from international and domestic human rights groups for their newly-enacted or fortified counterterrorism legislation, these measures may not pose as much of a threat to individual liberties as these groups feared.<sup>100</sup> The fact remains that even with these laws both the United States and United Kingdom have had enormous difficulty in prosecuting terrorist use of the Internet.<sup>101</sup>

#### A. The United States' Compliance with UNSCR 1624

Despite powerful rhetoric surrounding the War on Terror launched in the wake of September 11th,<sup>102</sup> the U.S. government's efforts to identify and prosecute terrorists may have been less successful than authorities have otherwise suggested.<sup>103</sup> In a recent press release, for example, the Justice Department cited the fact that "there has not been another terrorist attack on American soil in the past seven years" as evidence of its success in prosecuting terrorists.<sup>104</sup> The Justice Department attributed some of this success to its policy of taking action against terror threats at the earliest stage possible or "as soon as the law, evidence, and unique circumstances of each case permit, using any charge available."<sup>105</sup> This approach also explains why the material support statutes have played such a critical role in the government's overall prosecutorial efforts, "allowing prosecutors to target the provision of support, resources and other assistance to terrorists and to intervene during early stages of terrorist planning."<sup>106</sup>

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100. See discussion *infra* Part III.A-B.

101. *Id.*

102. I use "War on Terror" here to refer to the American response to the attacks of September 11, 2001, including subsequent diplomatic, military, financial, investigative, homeland security, and humanitarian actions and efforts. See Glossary, *available at* <http://2008election.procon.org/viewresource.asp?resourceID=1575> (last visited Feb. 18, 2009).

103. See *infra* Part. III.A.

104. Press Release, Dep't of Justice, Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11 (Sept. 11, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/September/08-nsd-807.html>.

105. *Id.*

106. *Id.*

As a consequence of turning to lesser charges when there may be insufficient evidence to prove more serious crimes relating to terrorism,<sup>107</sup> the United States is experiencing difficulty prosecuting incitement and may also be failing to comply with UNSCR 1624.<sup>108</sup> Although federal terrorism investigations have named nearly 400 suspects since September 11th, only 39 of these suspects have been convicted of crimes related to terrorism or national security, and even fewer have been convicted on material support charges.<sup>109</sup> Despite these statistics, the government continues to assert the importance of the material support statutes, describing them as forming "a critical component of the [Justice] Department's overall terrorist prosecutorial efforts."<sup>110</sup> But what has been the effect of these statutes in practice, especially with regard to combating incitement?

### 1. The Prosecution of Sami Omar Al-Hussayen: Constitutionally Protected Speech or Material Support?

Take, for example, the much-publicized case of Sami Omar Al-Hussayen, a thirty-four year old graduate student at the University of Idaho who was charged with three counts of providing and conspiring to provide material support for terrorism in violation of 18 U.S.C. §§ 2339A and 2339B, as well as with several additional non-terrorism-related charges.<sup>111</sup> For some, Al-Hussayen's case represented the government's first attempt to use the material support statutes to prosecute conduct that consisted almost exclusively of operating and maintaining websites.<sup>112</sup> According to one scholar, Al-Hussayen's case "attracted national attention and triggered a heated debate focused mainly on one key question: were Al-Hussayen's Internet activities constitutionally protected 'free speech' or did they cross the line into criminal and material support to terrorism?"<sup>113</sup>

107. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A01.

108. S.C. Res. 1624, *supra* note 15, at preamble.

109. Eggen & Tate, *supra* note 107. Note that this list does not include terrorism suspects held at Guantanamo Bay. *Id.* The median sentence for those convicted was just eleven months, and the most common convictions were on charges of fraud, making false statements, passport violations, and conspiracy. *Id.*

110. Press Release, Dep't of Justice, Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11, *supra* note 104.

111. United States v. Al-Hussayen, Case No: CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793, at \*\*1-3 (D. Idaho Apr. 6, 2004).

112. Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What's Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 365, 366 (2008).

113. *Id.*

In its indictment, the Justice Department alleged that Al-Hussayen “unlawfully provided to terrorists and terrorist organizations, directly and indirectly, expert advice and assistance, [as well as] communications equipment . . . [by] creating and maintaining Internet websites and other Internet media designed to recruit mujahideen<sup>114</sup> and raise funds for violent jihad in Israel, Chechnya, and other places.”<sup>115</sup> The indictment alleged that because Al-Hussayen “exercised significant control over the operation and content of those websites and other Internet media” he both knew and intended that “the websites and other Internet media he helped create, operate, and maintain through his expert advice or assistance would be and were used to support and justify violent jihad.”<sup>116</sup>

Al-Hussayen moved to dismiss the terrorism-related charges on three grounds.<sup>117</sup> First, he argued that the indictment failed to allege that he provided anything prohibited by the material support statutes and sought to impose criminal liability for merely “using his personal knowledge to create and maintain websites which were merely used to publish speech.”<sup>118</sup> Second, he argued that “simply creating or maintaining or using websites in the ‘virtual space’ of the Internet did not constitute providing ‘communications equipment’” within the meaning of 18 U.S.C. § 2339.<sup>119</sup> Finally, he argued that “the advocating of one’s beliefs is not criminal nor is such advocacy in the hope of encouraging others to donate money a violation of the applicable statutes.”<sup>120</sup> In denying Al-Hussayen’s motion to dismiss, the district court held that “[t]he indictment allege[d] more than that the defendant was simply a passive party who created and used certain websites; instead, the indictment charge[d] that his involvement included providing support and resources . . . with the knowledge and intent to support terrorism.”<sup>121</sup>

Before his trial began, Al-Hussayen’s defense counsel filed motions arguing that the First Amendment foreclosed prosecution of Al-Hussayen’s Internet activities because such prosecution would

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114. “Mujahideen” refers to Muslim guerilla warriors engaged in “jihad” or holy war. <http://wordnetweb.princeton.edu/perl/webwn?s=mujahideen> (last visited March 9, 2009).

115. Second Superseding Indictment ¶ 1, *Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/usalhussyn304sind2.pdf>.

116. *Id.* ¶ 11.

117. See *Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, at \*\*1-2.

118. *Id.* at \*3.

119. *Id.* at \*5.

120. *Id.* at \*8.

121. *Id.* at \*9.

violate his rights to freedom of association and freedom of speech.<sup>122</sup> The defense team conceded the underlying facts set forth by the government but argued that his acts were protected by the First Amendment.<sup>123</sup> A federal jury later acquitted Al-Hussayen of all three terrorism charges<sup>124</sup> due to their feeling that the government had failed to make a connection between the websites at issue and any wrongdoing by Al-Hussayen.<sup>125</sup> Although Al-Hussayen ultimately agreed to deportation in exchange for the prosecution dropping the remaining visa and false statement charges,<sup>126</sup> some members of the media viewed his acquittal as a defeat of the Patriot Act's enhanced material support provisions, including the "expert advice or assistance" provision.<sup>127</sup> Others believed that Al-Hussayen's case demonstrated the unsuitability of the material support statutes for the prosecution of incitement to terrorism because such prosecutions raise substantial constitutional questions.<sup>128</sup> For example, the material support statutes may not give "adequate notice that website creation and maintenance might expose one to criminal liability."<sup>129</sup> Furthermore, around the time of Al-Hussayen's prosecution, the material support statutes were coming under additional scrutiny for their constitutionally questionable vagueness.<sup>130</sup>

## 2. Humanitarian Law Project & the Erosion of Enhanced Material Support Provisions of the Patriot Act

Just months before Al-Hussayen was charged with providing material support to terrorists in the form of "expert advice or

122. Williams, *supra* note 112, at 377.

123. *Id.*

124. United States v. Al-Hussayen, No. CR03-048-C-EJL (D. Idaho June 10, 2004).

125. Richard B. Schmitt, *Acquittal in Internet Terrorism Case is a Defeat for Patriot Act*, L.A. TIMES, June 11, 2004, at A-20. One juror was quoted as saying, "The evidence was not exact . . . [and] a lot was left up in the air." *Id.*; see also Williams, *supra* note 112, at 378 (noting that a member of the jury stated, "There was no clear cut evidence that said he was a terrorist, so it was all on inference.").

126. Betsy Z. Russell, *Sami Al-Hussayen on his way Home*, SPOKESMAN REV., July 22, 2004.

127. Dan Collins, *Court Test for Patriot Act: Saudi Student Accused of Using Computer to Aid Terror Groups*, CBS.COM, Apr. 14, 2004, available at [http://www.cbsnews.com/stories/2004/04/17/national/main612418.shtml?source=search\\_story](http://www.cbsnews.com/stories/2004/04/17/national/main612418.shtml?source=search_story); see also Todd Wilkinson, *Boise Terror Case Tests Patriot Act's Reach*, CHRISTIAN SCI. MONITOR, Apr. 22, 2004, available at <http://www.csmonitor.com/2004/0422/p03s01-usju.html>.

128. See Williams, *supra* note 112, at 366.

129. See *id.* at 380 (citing United States v. Sattar, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2004)).

130. See discussion *infra* Part III.A.2.

assistance,” the U.S. District Court for the Central District of California ruled that the term “expert advice or assistance” in the material support statute was impermissibly vague and thus void under the Constitution.<sup>131</sup> Though the decision of the California court was not binding in Idaho, where Al-Hussayen was tried, the ruling was nevertheless persuasive authority that drew a lot of attention to Al-Hussayen’s case.<sup>132</sup> The suit was brought by the Humanitarian Law Project (HLP),<sup>133</sup> which has been waging a nearly decade-long battle against the federal government over the constitutionality of various counterterrorism measures and statutes.<sup>134</sup> It has filed numerous suits seeking declaratory judgments that provisions of the Patriot Act are vague and overbroad, in violation of constitutional free speech, free association, and due process protections.<sup>135</sup> Through litigation, HLP has been slowly chipping away at one of the government’s only powerful tools for prosecuting incitement: the material support statutes.<sup>136</sup>

Even before the Patriot Act broadened the reach of these statutes, HLP challenged the constitutionality of criminal prohibitions on the supply of “material support and resources” to alleged terrorists and terrorist groups.<sup>137</sup> In *Humanitarian Law Project v. Reno*, HLP challenged the constitutionality of certain types of support prohibited by the material support statutes, including “training” and “personnel.”<sup>138</sup> The U.S. District Court for the Central District of California ruled in favor of HLP, holding that the terms “training” and “personnel” were impermissibly vague because they appeared to prohibit activities protected by the First Amendment, such as

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131. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1187 (C.D. Cal. 2004).

132. Since the court struck down the “expert advice or assistance” provision with which Al-Hussayen was being charged, some characterized the law as “shaky at best,” and looked to Al-Hussayen’s case as another test of the validity of certain Patriot Act provisions. Collins, *supra* note 127.

133. HLP is a non-profit organization with consultative status at the United Nations that describes itself as “dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law.” Humanitarian Law Project, <http://hlp.home.igc.org/> (last visited Mar. 16, 2009).

134. Andrew C. McCarthy, *Federal Judge Intrudes Upon Executive Authority to Designate Terrorist Organizations*, FOUND. FOR DEF. DEMOCRACIES, May 15, 2007, [http://www.defenddemocracy.org/index.php?option=com\\_content&task=view&id=11782079&Itemid=102](http://www.defenddemocracy.org/index.php?option=com_content&task=view&id=11782079&Itemid=102).

135. *Id.*

136. 18 U.S.C. § 2339(A), (B) (2000).

137. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1184 (C.D. Cal. 1998).

138. *Id.* at 1204.

"distributing literature and information and training others to engage in advocacy."<sup>139</sup>

After its success in *Reno*, HLP filed another suit in the same district challenging the prohibition on providing "expert advice or assistance" in the material support statutes as both unconstitutionally vague and overbroad.<sup>140</sup> The plaintiffs, represented by HLP, sought to provide various kinds of support to two groups, the Kurdistan Workers' Party and the Liberation Tigers of Tamil Eelam, both of which had been designated as foreign terrorist organizations by the secretary of state.<sup>141</sup> The plaintiffs sought to provide training and written publications on how to engage in political advocacy, medical advice and assistance, and expertise in information technology and software development.<sup>142</sup> The district court held that the term "expert advice or assistance" was impermissibly vague because it "could be construed to include unequivocally pure speech and advocacy protected by the First Amendment' or to 'encompass First Amendment protected activities.'"<sup>143</sup>

After HLP litigation began chipping away at the material support statutes, Congress responded by amending and clarifying these statutes.<sup>144</sup> In December 2004 Congress enacted the Intelligence Reform and Terrorism Prevention Act (IRTPA), amending the definition of "material support or resources" and attempting to clarify some of the terms invalidated through previous HLP litigation.<sup>145</sup> In the IRTPA, Congress defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."<sup>146</sup> It defined "personnel" to include individuals who "work under [a] terrorist organization's direction or control" or "organize, manage, supervise, or otherwise direct the operation of [the] organization."<sup>147</sup> It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical, or other specialized knowledge."<sup>148</sup> These revisions were enough for the U.S.

139. *Id.*

140. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1187 (C.D. Cal. 2004).

141. *Id.* at 1188.

142. *Id.* at 1189-92.

143. *Id.* at 1201 (citing *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 404 (9th Cir. 2003)).

144. *See infra* text accompanying notes 145-48.

145. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b)(2), 118 Stat. 3638 (2004) (amending 18 U.S.C. § 2339A(b) (2000)).

146. *Id.* § 6603(f) (amending 18 U.S.C. § 2339B (2000)).

147. *Id.*

148. 18 U.S.C. 2339A(b)(3) (2000) (reflecting the amendments).

Court of Appeals for the Ninth Circuit to vacate the district court's ruling in *Humanitarian Law Project v. Reno* that the terms "training" and "personnel" were unconstitutionally overbroad.<sup>149</sup> But these definitional changes did not settle other challenges and HLP continued to pursue litigation over the material support statutes, even as amended by the IRTPA.<sup>150</sup>

In *Humanitarian Law Project v. Mukasey*, the Ninth Circuit reevaluated the terms "training," "expert advice or assistance," "service," and "personnel" in light of IRTPA's revisions.<sup>151</sup> The court held that the term "training" was still impermissibly vague because it "could still be read to encompass speech and advocacy protected by the First Amendment . . . and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."<sup>152</sup> The court also determined that the term "expert advice or assistance" remained impermissibly vague because the amended definition included "other specialized knowledge,' which covers every conceivable subject" and continued to cover constitutionally protected advocacy.<sup>153</sup> Finally, the court held that the term "service" was still impermissibly vague because "the statute defines 'service' to include 'training' or 'expert advice or assistance' and because 'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'"<sup>154</sup> The court did, however, accept IRTPA's revision of the term "personnel" as curing any vagueness because it provided "fair notice of prohibited conduct . . . and no longer punishe[d] protected speech."<sup>155</sup>

Post-*Mukasey*, in order to prosecute material support in the Ninth Circuit, the government cannot rely on characterizing such support as the provision of "training," "service," or "expert advice or assistance."<sup>156</sup> Of course, the decision still leaves the government with other laws to combat the terrorist use of the Internet, including those dealing with "communications equipment" or "other physical assets."<sup>157</sup> The main lesson to take away from the HLP and other

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149. 9 F. Supp. 2d 1176, 1204 (C.D. Cal. 1998).

150. See *infra* text accompanying notes 151-55.

151. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1135-37 (9th Cir. 2007).

152. *Id.* at 1134-35.

153. *Id.* at 1135.

154. *Id.* at 1136 (citing *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1152 (C.D. Cal. 2005)).

155. *Mukasey*, 509 F.3d at 1136.

156. See 18 U.S.C. § 2339A(a), A(b) (2000).

157. *Id.*



similar litigation is clear: the material support statutes cannot be used to prosecute actions protected by the First Amendment.<sup>158</sup>

### 3. Where U.S. Anti-Terror Law Stands Today

A resolution in the now-pending case of Babar Ahmad may eventually settle some of the issues surrounding the government's ability to prosecute suspected terrorists under the material support statutes without infringing on First Amendment rights.<sup>159</sup> Babar Ahmad, a resident of the United Kingdom who has never been to the United States, is facing extradition to the United States, having been indicted in 2004 on charges of providing, and conspiring to provide, material support to terrorists in connection with Azzam Publications and its family of websites (collectively, Azzam).<sup>160</sup> Azzam is an entity based in the United Kingdom established and operated to recruit individuals to become mujahedeen and to solicit and raise funds for jihad.<sup>161</sup> The indictment against Babar Ahmad alleged that he "provided, through the creation and use of various Internet websites, email communication, and other means, expert advice and assistance, communications equipment . . . and personnel designed to recruit and assist the Chechen mujahideen and the Taliban, and raise funds for violent jihad in Afghanistan, Chechnya, and other places."<sup>162</sup> The United States claimed it had jurisdiction over the case based on the fact that Ahmad operated Azzam's websites through American-based Internet service providers (ISPs) located in Connecticut, Nevada, and elsewhere.<sup>163</sup>

Given Azzam's clear self-proclaimed purpose on its website to "propagate the call for jihad, among the Muslims who are sitting down, ignorant of this vital duty . . . to 'incite the believers' and also secondly to raise some money for the brothers,"<sup>164</sup> Ahmad's connection to these websites would likely be more successfully prosecuted under the United Kingdom's robust anti-terror legislation than under U.S. law.<sup>165</sup> Thus, Ahmad's case has prompted many people to ask why he

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158. *Broader Law Sought Against 'Material Support' for Terrorism*, FIRST AMENDMENT CENTER, May 6, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=13306>.

159. See Conway, *supra* note 3, at 10.

160. Indictment ¶ 10-11, *United States v. Ahmad* (2004).

161. *Id.*

162. *Id.* ¶ 1.

163. Aff. in Support of Request for Extradition of Babar Ahmad, *United States v. Ahmad*, No. 3:04M240 (WIG) (D. Conn. 2004).

164. *Id.*

165. See, e.g., *The Terrorism Act 2000*, *supra* note 78.

is facing extradition to the United States instead of being prosecuted in the United Kingdom. One member of Parliament has already raised suspicion in this regard, stating, "The allegations are that Babar Ahmad committed these offences whilst in the [United Kingdom], whilst a British citizen, and whilst in London . . . . If that be the case the obvious question is why can't and why shouldn't he be tried in the [United Kingdom]?"<sup>166</sup> Although this question remains to be answered, an analysis of the United Kingdom's track record in terrorist prosecutions may shed some light on the issue.

### *B. The United Kingdom's Compliance with UNSCR 1624*

Although the United Kingdom's enhanced anti-terror laws under the Terrorism Act 2006 have already come under fire from groups like Human Rights Watch for being overly aggressive and having a potentially chilling effect on the freedom of expression, there are no documented effects of the Act to date.<sup>167</sup> Thus, one can only speculate on the impact of the Terrorism Act 2006 based on the relative effectiveness of the Terrorism Act 2000. The Terrorism Act 2000 has not been as effective or threatening as supposed at the time of its enacted. Of the more than 1,200 suspected terrorists arrested in the United Kingdom between September 11, 2001, and March 31, 2007, 1,165 of them were arrested under the Terrorism Act 2000.<sup>168</sup> Of the 1,165 suspects arrested under the Terrorism Act 2000, only 41 have been convicted, and more than half have been released without any charges.<sup>169</sup> Examination of the cases of Younes Tsouli, Samina Malik, and others may provide some insight into the reasons for the United Kingdom's less-than-impressive track record on prosecuting terrorist use of the Internet.

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166. Sam Knight, 'Jihadist' Computer Expert Cleared for Extradition to US, TIMES (U.K.), Nov. 16, 2005, available at <http://www.timesonline.co.uk/tol/news/uk/article590795.ece>.

167. See *1,166 Anti-Terror Arrests Net 40 Convictions*, GUARDIAN, Mar. 5, 2007, available at <http://www.guardian.co.uk/uk/2007/mar/05/politics.terrorism>. The Home Office has yet to provide any figures for terror arrests under the Terrorism Act 2006, which introduced a range of new offenses. *Id.* Moreover, since terrorism prosecutions often take years to complete, accounting for the time it may take the government to collect and gather evidence and to prosecute the case while remaining sensitive to national security concerns, it may be several more years before we know how the Terrorism Act 2006 will effect terrorist prosecutions. *Id.*

168. Terrorism and the Law: Home Office, <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/> (last visited Mar. 16, 2009).

169. *Id.*

## 1. Younes Tsouli: Terrorist 007

In July 2007, more than seven years after the Terrorism Act 2000 criminalized incitement of terrorism, Younes Tsouli, Waseem Mughal, and Tariq Al-Daour became the first men in Britain to plead guilty to inciting murder for terrorist purposes under the Terrorism Act 2000.<sup>170</sup> The prosecution alleged that these men were “concerned in the purchase, construction, and maintenance of a large number of websites and Internet chat forums on which material was published which incited acts of terrorist murder, primarily in Iraq.”<sup>171</sup> The government further alleged that “the material on the websites included assertions that it was the duty of Muslims to fight armed jihad against Jews, crusaders, apostates, and their supporters in all Muslim countries and that it was the duty of every Muslim to fight and kill them wherever they are, civilian or military.”<sup>172</sup>

The judge found that “the websites created by Tsouli were used as a vehicle on which jihadi materials were uploaded, which incited acts of terrorist murder outside the United Kingdom in Iraq” but that “Tsouli’s skill lay in the setting up of the websites,<sup>173</sup> [leaving] others to post or upload the material.”<sup>174</sup> Tsouli was ultimately sentenced to sixteen years in prison.<sup>175</sup> Although Tsouli was convicted of crimes predating the Terrorism Act 2006, the judge found that “some of this material might in future cases properly found a prosecution under those sections of the Terrorism Act 2006 which prohibits conduct which indirectly encourages or glorifies terrorism.”<sup>176</sup> Thus, at least in Tsouli’s case, it is unclear whether the differences between the 2000 and 2006 acts were significant in chilling free expression in the United Kingdom.

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170. Press Release, Crown Prosecution Serv., Three Men Admit Using Internet to Incite Terrorism in First British Case (July 5, 2007), available at [http://www.cps.gov.uk/news/pressreleases/archive/2007/137\\_07.html](http://www.cps.gov.uk/news/pressreleases/archive/2007/137_07.html). Under the Terrorism Act 2000, it is a crime to incite another to commit an act of terrorism, wholly or partly, outside the United Kingdom if the act would constitute certain offenses, including murder, if committed in England or Wales. The Terrorism Act 2000, *supra* note 78 § 59.

171. R v. Tsouli, [2007] EWCA (Crim) 3300, ¶ 5 (Eng.).

172. *Id.*

173. This is something akin to the “expert advice or assistance” prohibited by the material support statutes in the United States. See *supra* text accompanying notes 114-16 and 148.

174. Tsouli, [2007] EWCA ¶ 13, 15.

175. See Gordon Corera, *Al-Qaeda’s 007*, THE TIMES (U.K.), Jan. 16, 2008, available at [http://women.timesonline.co.uk/tol/life\\_and\\_style/women/the\\_way\\_we\\_live/article3191517.ece](http://women.timesonline.co.uk/tol/life_and_style/women/the_way_we_live/article3191517.ece) (last visited March 9, 2009). Although he was originally sentenced to eleven years, the court of appeals increased his sentence to sixteen years after the solicitor general referred his sentence as unduly lenient. *Id.*

176. Tsouli, [2007] EWCA ¶ 24.

## 2. The Lyrical Terrorist and Possession of Internet Documents

Just as the Al-Hussayen case was characterized as a key test of the Patriot Act in the United States, the case of Samina Malik was similarly viewed as a key test of the United Kingdom's terrorism acts.<sup>177</sup> On November 8, 2007, Malik became the first woman to be convicted of a terrorism offense in Britain<sup>178</sup> when she was convicted of "possessing information of a kind likely to be useful to a person committing or preparing an act of terrorism," contrary to Section 58 of the Terrorism Act 2000.<sup>179</sup> Malik was found to be in possession of a number of documents downloaded from the Internet and saved on her hard drive that appeared to support violent jihad, including *The Terrorist's Handbook*, *The Mujahideen Poisons Handbook*, and operators' manuals for various firearms.<sup>180</sup> She was also in possession of a collection of graphic and violent poems authored under the pen name "The Lyrical Terrorist," including poems about killing non-believers, pursuing martyrdom, and raising children to be holy fighters.<sup>181</sup> Malik admitted that she was inspired to write her poetry when, "through her use of the Internet[,] she came under the influence of Abu Hamza al-Masri."<sup>182</sup>

Despite the government's assurances that "Malik was not prosecuted for her poetry . . . [but] for possessing documents that could provide practical assistance to terrorists,"<sup>183</sup> her case sparked immense public outrage.<sup>184</sup> Muhammed Abdul Bari, the secretary general of the Muslim Council of Britain, condemned the criminalization of such activities, stating, "Many young people download objectionable material from the Internet, but it seems if you

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177. See *supra* text accompanying notes 112-13. Both cases were characterized as the furthest encroachment of anti-terror laws on individual liberties. *Id.*

178. Duncan Gardham, 'Lyrical Terrorist' Samina Malik Found Guilty, TELEGRAPH (U.K.), Nov. 9, 2007, available at <http://www.telegraph.co.uk/news/uknews/1568726/Lyrical-Terrorist-Samina-Malik-guilty.html>.

179. Regina v. Malik, [2008] EWCA (Crim) 1450, ¶ 1.

180. Joshua Rozenberg, *Wicked Thoughts are not a Crime-Yet*, TELEGRAPH (U.K.), Sept. 7, 2008, available at <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2153626/Law-Wicked-thoughts-are-not-a-crime-andndash-yet.html>.

181. Gardham, *supra* note 178.

182. Regina, [2008] EWCA ¶ 15.

183. Press Release, Crown Prosecution Serv., CPS Response to Samina Malik Appeal (June 17, 2008), available at [http://www.cps.gov.uk/news/pressreleases/143\\_08.html](http://www.cps.gov.uk/news/pressreleases/143_08.html).

184. See Shirley Dent, *Don't Ban the Lyricist*, TIMES, Dec. 6, 2007, (U.K.), available at [http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article3006791.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article3006791.ece).

are Muslim then this could lead to criminal charges, even if you have absolutely no intention to do harm to anyone else.”<sup>185</sup>

The court of appeal reviewing Malik’s conviction focused on the question of intention in quashing her conviction in light of subsequent judgments of the court.<sup>186</sup> The judge pointed to *Regina v. K*, where the court held that a document only falls within Section 58 of the Terrorism Act 2000 “if it is of a kind that is likely to provide practical assistance to a person committing or preparing an act of terrorism.”<sup>187</sup> In light of *Regina v. K*, the court determined that Malik’s conviction was “unsafe,” from the perspective of justice, because there was “a very real danger that the jury became confused.”<sup>188</sup> To prevent further confusion, the court elucidated a new requirement—that the suspect must have a clear intent to engage in terrorism.<sup>189</sup> Just as U.S. courts have pared down the robust counterterrorism legislation used to combat terrorist use of the Internet, so too have U.K. courts limited the applicability of aggressive anti-terror laws. Thus, it is not clear that the Terrorism Act 2006 has done anything to enhance prosecutions of incitement as compared to the Terrorism Act 2000.

#### IV. HOW THE UNITED STATES AND THE UNITED KINGDOM CAN COMPLY WITH UNSCR 1624

Even if U.S. counterterrorism measures and U.K. anti-terror legislation have not been nearly potent enough to impermissibly infringe on individuals’ civil liberties,<sup>190</sup> they still pose significant problems for each state. For one thing, it seems that legislatures and law enforcement agencies in both states are working hard to prevent terror within domestic legal systems that, in general, do not recognize preemptive action as legitimate.<sup>191</sup> However, if the domestic laws of states parties to UNSCR 1624 are ineffective at preventing incitement to terrorism, then those states are failing to comply with their

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185. Natalie Paris et al., *Female ‘Lyrical Terrorist’ Escapes Jail*, TELEGRAPH, Dec. 7, 2007, (U.K.) available at <http://www.telegraph.co.uk/news/newstopics/politics/labour/1571675/Female-lyrical-terrorist-escapes-jail.html>.

186. See *infra* text accompanying notes 187-89.

187. *Regina v. K*, [2008] EWCA (Crim) 185; *Regina v. K*, [2008] 3 All E.R. 526.

188. *Regina v. Malik*, [2008] EWCA (Crim) 1450, ¶ 43.

189. *Id.*

190. See *supra* Part III.

191. See Joanne Mariner, *Terrorism and Speech*, FINDLAW, Jan. 28, 2008, <http://writ.lp.findlaw.com/mariner/20080128.html>. Mariner argues that “[b]y wasting scarce legal and prosecutorial resources going after speech, rather than action, governments may be doing more harm than good. The defendants in such cases no doubt see them as political and religious persecution, and their families, neighbors, and larger communities may agree.” *Id.*

international legal obligations under the resolution.<sup>192</sup> Noncompliance, in turn, undermines the credibility of the international legal framework specifically designed to combat the problem of terrorist use of the Internet. Several solutions have been proposed to remedy the gaps in the current scheme for combating incitement, including ways to improve both domestic and international efforts to combat terrorist use of the Internet.<sup>193</sup>

### *A. Fixing the Domestic System for Prosecuting Incitement*

#### 1. Better Utilization of Existing Laws

The most obvious potential solution, for the benefit both the United States and the United Kingdom's domestic legal systems, involves more creative prosecutorial maneuvering.<sup>194</sup> That is, the prosecution should shift its reliance on statutes that fail to produce convictions to ones that would more successfully hold terrorists accountable. For example, as discussed at length in this Note, the U.S. government has relied heavily on material support statutes to prosecute terrorist use of the Internet, such as in the case of Al-Hussayen.<sup>195</sup> U.S. prosecutors may have more success if they rely less upon material support statutes and more on other sections of the U.S. code.<sup>196</sup> One such alternative basis for prosecution is the federal criminal solicitation statute,<sup>197</sup> which allows U.S. authorities to prosecute individuals who solicit, command, induce, or otherwise endeavor to persuade others to engage in felonious conduct with the intent that the others engage in such conduct.<sup>198</sup> Although the element of intent required for the free-standing offense of federal criminal solicitation may be a considerable hurdle to overcome, terrorist use of the Internet has unique qualities that would likely provide the evidence for such intent. For example, whether a website is password protected, whether text is accompanied by violent and provocative imagery, and whether the website is affiliated with a registered terrorist organization,<sup>199</sup> are a few factors that the

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192. S.C. Res. 1624, *supra* note 15.

193. See discussion *infra* Part IV.A.1-2.

194. See discussion *infra* Part IV.A.1.

195. See *supra* Part III.A.1.

196. See *infra* text accompanying notes 197-205.

197. 18 U.S.C. § 373 (2000); see *supra* Part II.A.2.

198. See *supra* text accompanying notes 54.

199. By "registered terrorist organization," I am referring to foreign terrorist organizations (FTOs), which are foreign organizations that are designated by the Secretary

prosecution may use to deduce intent to solicit felonious conduct.<sup>200</sup> Of course, there is no guarantee that the federal criminal solicitation statute will escape judicial erosion of a kind applied to the material support statutes.<sup>201</sup> Moreover, the same reasoning might well apply to heightened reliance on the criminal sedition or seditious conspiracy statutes.<sup>202</sup>

Another potential basis for prosecution might be the use of non-terrorism-specific statutes to charge terrorism defendants.<sup>203</sup> These alternative statutes might include immigration violations like visa fraud, providing false statements, credit card fraud, money laundering, and other similar charges.<sup>204</sup> In some instances, the government's failure to lodge these alternative charges against the defendant may have accounted for its failure to convict.<sup>205</sup> In other cases, where such alternative charges have been lodged against terrorist defendants, as in the pending case of Babar Ahmad,<sup>206</sup> the result has been a conviction on the alternative charges and acquittal on the more serious terrorism-related charges.<sup>207</sup> Therefore, at least one major problem with this approach is that, just as the material support statutes have proved insufficiently weak to match the gravity of certain terrorist offenses, so might these alternative statutes produce sentences that are unduly lenient or otherwise ill-suited to the crimes charged.<sup>208</sup>

## 2. The Creation of New Internet-Specific Laws

Another proposal to strengthen the domestic legal systems of the United States and the United Kingdom advocates for the creation of Internet-specific legislation to deal with the unique threat posed by

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of State and identified as threatening the security of U.S. nationals or national security. See Foreign Terrorist Organizations, U.S. Department of State, Fact Sheet (2005), available at <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited March 9, 2009).

200. See generally Williams, *supra* note 112.

201. See *supra* Part III.A.2.

202. *Id.*

203. See *infra* text accompanying notes 204-08.

204. Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST, May 2008, at 6, available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

205. Indictment at ¶¶ 7-14, United States v. Ahsan, No. 06-cr-00194 (D. Conn. 2006). The indictment alleges three counts of terrorism-related charges but fails to charge Ahsan with any alternative crimes. See *id.*

206. Indictment ¶¶ 10-11, United States v. Ahmad (2004). Count four of the indictment charges Ahmad with money laundering. *Id.*

207. See *supra* text accompanying notes 160-62 and 165.

208. See Eggen & Tate, *supra* note 107; see also text accompanying note 109.

terrorist use of the Internet.<sup>209</sup> For example, one scholar proposes the enactment of a statute called “Use of Internet Websites with Specific Intent to Facilitate Terrorism,” which would subject to criminal prosecution anyone who “[e]stablishes and maintains Internet websites or posts detailed information on such websites with the *specific intent* to recruit persons to join terrorist organizations” or “with the specific intent to encourage violent attacks against the United States government or its citizens, [including, but not limited to], violations of those [U.S.] code sections set forth in 18 U.S.C. § 2339A(a).”<sup>210</sup> Since this statute imposes criminal liability on anyone who “establishes and maintains” such sites, the statute criminalizes behavior as opposed to pure speech or advocacy. Moreover, the proposed statute would include a limitation in order to protect non-violent political speech or advocacy—namely, “[a]dvocacy of peaceful change and criticism of United States officials or United States policy is specifically excluded.”<sup>211</sup>

The creation of Internet-specific legislation would have three potential advantages over existing laws. First, creating a separate prosecutorial tool for terrorist use of the Internet would prevent the government from expanding the reach of existing law “beyond the ambit of the activity that they were designed to proscribe.”<sup>212</sup> For example, in the United States, prosecuting terrorist use of the Internet under Internet-specific legislation, as opposed to traditional material support statutes, would create the added benefit of protecting the legitimacy of existing laws from constitutionally impermissible manipulation for the purpose of terrorist prosecutions. Secondly, Internet-specific legislation would “provide notice and specificity to the public,”<sup>213</sup> which would also work to enhance the legitimacy of such laws. Finally, separate Internet-specific laws may shift evidentiary burdens in a way that would enhance the prosecution’s ability to convict.<sup>214</sup> Proponents of the creation of a special federal court to deal specifically with terrorism prosecution often invoke these same arguments—enhanced legitimacy, improved notice, and favorable burden-shifting.<sup>215</sup> Unsurprisingly, the counterarguments to

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209. See Williams, *supra* note 112, at 383.

210. *Id.* at 383-84 (emphasis added).

211. *Id.* at 384.

212. *Id.*

213. Williams, *supra* note 112, at 384.

214. See generally *id.* at 384-85.

215. See *Workable Terrorism Trials*, WASH. POST, July 27, 2008, at B06.



a special court are analogous to the reasons one might oppose Internet-specific legislation.<sup>216</sup>

The most significant problem in creating a new set of laws is that a primary goal of terrorism prosecutions is the prevention of terrorism. The creation of new Internet-specific laws, or any other new system of prosecution, would require the creation of new procedures and precedents to govern the application of such laws.<sup>217</sup> This would impose immense inefficiency on terrorism prosecution, which is inherently of a time-sensitive and urgent nature.<sup>218</sup> Moreover, it would ignore the fact that “federal courts have amassed many years of experience and a reservoir of judicial wisdom as well as a broadly experienced bar” to navigate the inherent complications posed by the prosecution of international terrorism cases.<sup>219</sup> Rather than enhancing the legitimacy of the system, the creation of separate or parallel laws might undermine the integrity of the American legal system, at least initially, if adequate mechanisms are not in place to ensure fairness and due process.<sup>220</sup> It is not clear that the question of notice would be resolved through Internet-specific legislation so long as the First Amendment remains in place to exempt protected speech.<sup>221</sup> Even with proposed limitations in place,<sup>222</sup> including exceptions for “advocacy for peaceful change,” the terms implicated would remain vague—maybe even unconstitutionally vague.<sup>223</sup> Perhaps for these reasons, the creation of increasingly specific legislation has not worked for the United Kingdom.<sup>224</sup>

All in all, the risks in creating an entirely new framework to deal with an urgent matter of national security are too great. Therefore, rather than creating new laws, each state should use its existing laws to increase the efficiency and accuracy of terrorist prosecutions. Not only is the creative utilization of existing laws, as a practical matter, easier than the promulgation of new ones, there is concrete proof that existing laws can be successfully applied to

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216. See *infra* text accompanying notes 217-23.

217. See generally Zabel & Benjamin, *supra* note 204, at 61-128.

218. See *supra* text accompanying notes 105-06.

219. Zabel & Benjamin, *supra* note 204, at 3.

220. *Id.*

221. See *supra* Part II.A.1.

222. See *supra* text accompanying note 211.

223. See *supra* Part III.A.2.

224. See *supra* Part III.B.2. The United Kingdom has already tried a similar approach, with the creation of new offenses including encouragement and the possession of documents, including Internet documents, of a kind likely to be of practical assistance to terrorists. *Id.* This increasingly specific anti-terror legislation has done little to increase convictions from the enactment of the Terrorism Act 2000 to the Terrorism Act 2006. *Id.*

important terrorist prosecutions, as they were in the case of Sheik Rahman.<sup>225</sup> In addition, in order to protect the legitimacy of our domestic legal system, it may be that we want to maintain a hefty burden of proof on the government when it prosecutes individuals for inchoate offenses.<sup>226</sup>

*B. The Need for an Improved International System to  
Combat Incitement*

1. Common but Differentiated Responsibilities

Creative manipulation of existing laws, or even the creation of Internet-specific legislation, will be insufficient to combat terrorist use of the Internet and to bring states into compliance with UNSCR 1624.<sup>227</sup> An international solution is necessary and should take the form of a treaty that better allocates individual states' responsibilities for preventing and prosecuting terrorist use of the Internet for purposes of incitement. To borrow from the discipline of international environmental law, the signatories of UNSCR 1624 should draft a new agreement based on the principle of "common but differentiated responsibilities."<sup>228</sup>

In international environmental law, the principle of common but differentiated responsibilities derives from the recognition that certain complex trans-boundary environmental problems, like climate change, require cooperation on an international level.<sup>229</sup> The principle has two components: (1) the common responsibility of states for the protection of the environment at the national and international level, and (2) the need to take into account each state's contributions and ability to prevent, reduce, and control the problem.<sup>230</sup> Terrorist use of the Internet is also a trans-boundary problem because the domestic regulations of one country, by themselves, can do little to combat incitement to terrorism on the Internet.<sup>231</sup> Thus, a common but differentiated strategy for combating incitement might also have two components: (1) a recognition of the common responsibility of all states to prevent incitement to terrorism on the Internet, and (2) the need to

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225. See *supra* text accompanying notes 65-70.

226. See *supra* text accompanying notes 52-55.

227. See generally, S.C. Res. 1624, *supra* note 15, at preamble.

228. See Paul G. Harris, *Common but Differentiated Responsibility: the Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27, 28-30 (1999).

229. *Id.*

230. *Id.* at 29-30.

231. See *supra* text accompanying notes 10-13.

exploit each state's comparative legal advantages in crafting a solution. Rather than simply calling upon all states to take identical measures, such as suppressing the financing of terrorism<sup>232</sup> or prohibiting incitement by law,<sup>233</sup> a common but differentiated solution would allocate responsibilities according to specific domestic legal considerations of each state.<sup>234</sup>

The starting point for drafting such an agreement will be to identify the comparative legal advantages of each domestic legal system. For example, with respect to the United Kingdom, comparative legal advantages in combating incitement include the lack of a constitution—and therefore constitutionally imposed limits on regulation of private activity—as well as a strategic position within the greater European legal community.<sup>235</sup> With these advantages in mind, a common but differentiated agreement might call upon U.K. authorities to increase monitoring and surveillance activities or to develop filters to remove terrorism-related content from the web or to deny access to terrorist websites through ISP filtering systems.<sup>236</sup> ISPs in the United Kingdom already cooperate with law enforcement to shut down sites with illegal content, including sites containing child pornography.<sup>237</sup> There are signs of political will to replicate this cooperation with respect to terrorist content.<sup>238</sup> In her first high profile speech on combating terrorism, Jacqui Smith, the United Kingdom's new home secretary, stated, "If we are ready and willing to take action to stop the grooming of the vulnerable young on social networking sites, then I believe we should also take action against those who groom vulnerable people for the purposes of violent extremism."<sup>239</sup> Even if the operators of these sites move their

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232. S.C. Res. 1373, *supra* note 16, at preamble.

233. S.C. Res. 1624, *supra* note 15, at preamble.

234. *Id.* ¶ 1(a).

235. The U.K. is party to a number of European-wide legal instruments addressing terrorism. See, e.g., Council of Europe Convention on the Prevention of Terrorism, May 3, 2005, C.E.T.S. 196. The convention's stated purpose is to

enhance the efforts of the Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international cooperation, with due regard to the existing applicable multilateral or bilateral treaties or agreements between the parties.

*Id.* at ¶ 1-2.

236. See Mark Trevelyan, *UK Seeks Ways to Stop Militant Grooming on Web*, REUTERS, Jan. 17, 2008, available at <http://www.reuters.com/article/internetNews/idUSL1770926220080117>.

237. *Id.*

238. *Id.*

239. *Id.*

operations elsewhere, the effect, at least in Britain, may be substantial.

Because of the stringent First Amendment limitations in place in the United States, an international agreement based on common but differentiated responsibilities would obligate to the United States to cooperate in a way that minimizes the importance of government regulation and emphasizes the role of private actors. For example, the government might find a way to incentivize the creators and operators of search engines to adjust search capabilities in such a way as to complicate access to terrorist websites. For example, a search engine might provide "an indication of the status of information according to measureable reputability dynamics" so as to push actual terrorist websites down to the bottom of a user's search results.<sup>240</sup> The same agreement could exploit the United States' high level of technical sophistication relating to private Internet regulation. Ultimately, "the successful use of the Internet for recruitment and other types of political action is based on the assumption that both users and audiences have access to the messages communicated via the Internet."<sup>241</sup>

Another viable option that does not involve government regulation involves what at least one author has dubbed "cultural intelligence"—empowering moderate voices to challenge radicals on the Internet.<sup>242</sup> According to this approach, the best way to counter radicalization on the Internet is to offer counterarguments and to refute the underlying assumptions that promote and incite terrorism.<sup>243</sup> Whereas censorship or filtering would only put a Band-Aid on the problem, the cultural intelligence approach has two effects. First, disseminating more counterterrorism viewpoints on the web will affect the technical operation of web searches, as the same key words used to locate pro-terrorism sites might bring up alternative counterterrorism pages. Second, and more importantly, the cultural intelligence approach has the advantage of addressing some of the underlying ideological roots of radicalism and terrorism.<sup>244</sup> Ultimately, the integration of these state-specific measures as part of

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240. See Conway, *supra* note 3, at 6. This is basically just a technique by which the most reputable sites rise to the top of a user's search results. *Id.*

241. *Id.*

242. Johnny Ryan, *Dossier Security and Defense: EU Must Take its Anti-terrorism Fight to the Internet*, EUROPE'S WORLD, Summer 2007, available at <http://www.europesworld.org/EWSettings/Article/tabid/191/ArticleType/ArticleView/ArticleID/21068/artlang/fr-FR/DOSSIERSECURITYANDDEFENCEEUmusttakeitsantiterrorismfighttotheInternet.aspx>.

243. *Id.*

244. *Id.*

a larger, enforceable global counterterrorism strategy is vital to combating terrorist use of the Internet and to promoting global security.

## V. CONCLUSION

The Internet represents a new and rapidly growing front of the war against international terrorism.<sup>245</sup> Terrorists are increasingly using the Internet to incite others to join terrorist causes and to support or commit acts of terrorism.<sup>246</sup> Because of the cross-border nature of terrorist use of the Internet, governments have realized the need for, and have taken some concrete steps towards international cooperation, including the adoption of UNSCR 1373 and UNSCR 1624.<sup>247</sup> These documents reflect a renewed political will to combat terrorism, in all of its forms, while recognizing the existence of countervailing values, including the freedom of expression.<sup>248</sup> Governments have also responded by revising existing domestic laws and propagating new laws.<sup>249</sup>

The United Kingdom and the United States have come under increasing fire for their seemingly aggressive new legislation, and methods of applying existing legislation to the problem of combating terrorist use of the Internet for purposes of incitement, respectively.<sup>250</sup> Despite taking the lead on responding to this issue, both states have had relatively minimal success in trying to comply with the international legal obligations they helped to create while keeping within the confines of their domestic legal systems.<sup>251</sup> In the United States, the primary constraint on prohibiting incitement by law has been the First Amendment.<sup>252</sup> In the United Kingdom, the problem has manifested itself as a divide between anti-terror legislation that is aggressive in theory but limited in judicial application.<sup>253</sup> The result in both cases has been a relatively unimpressive track record of terrorism-related prosecutions and convictions.<sup>254</sup>

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245. See *supra* text accompanying notes 2-4.

246. See discussion *supra* Introduction.

247. See discussion *supra* Part I.A.

248. See discussion *supra* Part I.B.

249. See discussion *supra* Parts II.A.2, II.B.

250. See discussion *supra* Part III.A.2.

251. See discussion *supra* Part III.

252. See discussion *supra* Part II.A.1.

253. See discussion *supra* Part III.B.

254. See discussion *supra* Part III.

A successful solution to the issue of combating incitement to terrorism on the Internet must have two dimensions—each state must fine tune its domestic legal system, whether by maximizing the utility of existing laws or experimenting with new legislation, and, more importantly, each state must cooperate with others to craft an international solution to the problem based on the principle of common but differentiated responsibilities.<sup>255</sup> Only with such a comprehensive approach will the signatories of UNSCR 1624 achieve compliance with their international legal obligations.

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255. See discussion *supra* Part IV.B.1.

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