

Fighting Terrorism: Bringing Democratic Regime to Nondemocratic Countries— The Legal Implications

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I. INTRODUCTION

The terrorist attacks of September 11, 2001, have generated a sharp shift in the response of Western countries in general, and the U.S. government in particular, to the threat of modern terrorism. Many Western countries, like the United States, Britain, and Canada, initiated statutory reforms that would grant wider counterterrorism measures to the Executive in order to respond effectively to the threat.¹ In addition, a comprehensive military campaign was launched against Afghanistan's Taliban regime, which was known to actively support Al-Qaeda. But the most significant response to the attacks was the initiative led by the United States to instill the values of liberal democracy in countries that traditionally have been governed by tyrannical regimes.²

The premise behind this initiative was that exporting the Western democratic paradigm to nondemocratic regimes would ultimately outroot, or at least weaken, the development of terrorist elements in those countries.³ Promoting democracy in traditionally nondemocratic regimes, it is argued, can heal the grievances made by tyrannical regimes. This can substantially reduce the power of radical fanatics who take advantage of the suffering of the oppressed population by promoting terrorist ideals as solutions to the government's wrongdoings.

1. In the United States, see: Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004); Military Comm'n Order No. 1 (Mar. 21, 2002) (Dep't of Def.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

In Britain, see: Anti-terrorism, Crime and Security Act 2001, c. 24; Prevention of Terrorism Act 2005, c. 2; Terrorism Act 2006, c. 11.

In Canada, see: An Act To Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, Bill C-36, 1st Sess., 37th Parl. 2001.

2. See, e.g., President George W. Bush, Speech at the National Defense University, Remarks on the War on Terror (Mar. 8, 2005), in 41 WEEKLY COMP. PRES. DOCS. 384, 386 (Mar. 14, 2005).

By now it should be clear that decades of excusing and accommodating tyranny in the pursuit of stability have only led to injustice and instability and tragedy. It should be clear that the advance of democracy leads to peace, because governments that respect the rights of their people also respect the rights of their neighbors. It should be clear that the best antidote to radicalism and terror is the tolerance and hope kindled in free societies. And our duty is now clear: For the sake of our long-term security, all free nations must stand with the forces of democracy and justice that have begun to transform the Middle East. Encouraging democracy in that region is a generational commitment.

3. F. Gregory Gause III, *Can Democracy Stop Terrorism*, 84 FOREIGN AFF. 62, 62 (2005).

This Article seeks to examine the legal aspects of this regime-change initiative. Specifically, it examines whether exporting democracy to nondemocratic regimes should indeed be considered an integral part of the war against terrorism, and if so, what legal mechanisms should be used in order to ensure that the new democracy will indeed realize its calling. Part II examines whether an international right to democracy exists and whether it can be enforced. Additionally, it examines the fundamental legal elements that distinguish democratic states from tyrannical regimes and hence turn the latter into hothouses for terrorists and terrorist organizations. Part III examines the dangers that lurk in new democracies due to the improper use of democratic values to legitimize the rise of governments that oppress human rights or governments that harbor and support terrorism.

This Article suggests that while terrorism is linked to lack of democracy, changing the character of nondemocratic regimes is only a first step. Instilling democracy is a long and complicated process that cannot be done in one isolated phase. Otherwise, when the latter is attempted, new democracies may be exploited by extremists and become tools to legitimize the rise of terrorist regimes or regimes that harbor and support terrorism.

II. TERRORISM AND THE DEMOCRATIC PARADIGM

It is a commonly accepted fact that democracy limits the human rights of the individual less than any other form of regime. The democratic state, unlike autocratic regimes, exists because of and for its citizens. It is designed to supply its citizens with a variety of freedoms and rights that enable them to shape their lives as autonomous beings.⁴ Tyrannical regimes, unlike democracies, do not place the individual at the center. The individual citizen is obligated to serve his country, and it

4. ELAZAR WEINRYB, *RELIGION AND STATE: PHILOSOPHICAL ASPECTS* 155-72 (2000) (in Hebrew); Michael Saward, *Democratic Theory and Indices of Democratization*, in *DEFINING AND MEASURING DEMOCRACY* 6, 16-17 (David Beetham ed., 1994); Jiwei Ci, *Taking the Reasons for Human Rights Seriously*, 33 *POL. THEORY* 243, 248-49 (2005) (“A human right is clearly not an end in itself, and it is not usually a sufficient condition for the set of ends it is designed to help achieve. Its importance lies rather in its being thought a necessary condition for a set of ends, including the most abstract ‘end’ of living one’s life in a way that is worthy of a human being.”).

The philosophical foundations of the democratic paradigm lie in the writings of the philosophers of ancient Greece (Aristotle was first to promote the idea of political participation of the citizenry) as well as the writings of the social contract theorists, such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. See generally JONATHAN BARNES, *ARISTOTLE* (1982); RICHARD TUCK, *HOBBS* (1989); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988) (1960); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968) (1761).

is not his country that serves him. Subordination of the individual to the state is a supreme virtue of the autocracy.⁵

In his important work *The End of History?*, published towards the end of the twentieth century, Francis Fukuyama argued that the end of the ideological struggle between the democratic paradigm and its opponents had arrived, and the former had won an unquestionable victory.⁶ In his opinion, as Western liberalism had survived humankind's moral blemishes of the twentieth century, exemplified by Germany's brutal Nazi dictatorship, the world recognized that the liberal democracy would be the dominant type of regime in the future.⁷

The continually increasing power of modern terrorism, and especially the terrorist attacks of September 11, 2001, in the United States, have caused the Western world to acknowledge that this conceptual dispute is still far from resolved. The struggle of the democratic states against radical fundamentalist and nationalist terrorists is not only a struggle to ensure public peace and security but is also a struggle of the liberal-democratic ideology for its continued conceptual supremacy.⁸

Following the terrorist attacks of September 11, the government of the United States, accompanied by several other Western countries, embraced the notion of instilling the paradigm of liberal democracy in countries that traditionally have been governed by tyrannical regimes. The policy to promote democracy, according to its supporters, ought to be perceived as an integral part of the war against terrorism for two reasons.⁹ First, lack of democracy helps breed extremist organizations who take advantage of the suffering of the oppressed population by

5. W.J. Adams, *The Democracy of Today and the Democracy of Tomorrow*, 52 AM. L. REV. 641, 644 (1918); JOHN L. SAFFORD, DEMOCRACY IS DANGEROUS—RESISTING THE TYRANNY OF THE MAJORITY 6 (2002).

6. Francis Fukuyama, *The End of History?*, in CONFLICT AFTER THE COLD WAR: ARGUMENTS ON CAUSES OF WAR AND PEACE 5, 5-6 (Richard K. Betts ed., 1994).

7. For elaboration regarding the obligation of a democratic state to prevent the possibility of its transformation to a dictatorship, see *infra* Part III.B.

8. EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM AND ISRAEL 254 (2006).

9. Remarks on the War on Terror, *supra* note 2, at 388 (“Three-and-a-half years ago, the United States mourned our dead, gathered our resolve, and accepted a mission. We made a decision to stop threats to the American people before they arrive on our shores, and we have acted on that decision. We’re also determined to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world. This objective will not be achieved easily or all at once or primarily by force of arms. We know that freedom, by definition, must be chosen and that the democratic institutions of other nations will not look like our own. Yet we also know that our security increasingly depends on the hope and progress of other nations now simmering in despair and resentment. And that hope and progress is found only in the advance of freedom.”).

offering radical religious and nationalist ideas as a refuge from the grievances against the tyrannical government. Therefore, eliminating those regimes would eventually halt the development of terrorist elements in those countries, or at least weaken them significantly. Second, exporting democracy to traditionally nondemocratic countries would not only benefit the citizens of these countries, but it would also bring to an end the long-lasting battle between democracy and autocracy. Because the phenomenon of modern terrorism endangers the conceptual supremacy of liberal democracy, exporting the democratic paradigm to nondemocratic countries would bring a clear-cut victory to the ideological struggle between democracy and autocracy. In the Part below, I shall examine the legal aspects of these arguments.

A democratic state is responsible for the preservation of the civilian infrastructure and the conditions that enable civilians to enjoy their basic rights.¹⁰ It must treat all its citizens equally, without regard to their religion, gender, or race.¹¹ The rule of law applies not only to the individual citizen, but to all state authorities. The authorities are not placed above the law but rather represent the public interest and thus must act within the boundaries of the law. In contrast, tyranny, by its nature, oppresses the human rights of its citizens.¹² State authorities enjoy wide and unlimited powers, there is no real equality before the law, and the citizens do not enjoy the possibility of realizing fundamental civil liberties. They cannot freely speak their minds, practice their religious beliefs, or assemble and demonstrate against the wrongdoings of their government.¹³

Terrorist organizations exploit the distress and poverty of the oppressed population to their benefit. Many of the organizations develop strong social and economic infrastructures which allow them to operate charity, educational, and religious institutions, which provide citizens with the services their governments should have, such as food, medical treatment, education, welfare services, and employment.¹⁴ Through those

10. ASA KASHER, *MILITARY ETHICS* 38-39 (3d ed. 1998) (in Hebrew).

11. Sammy Smooha, *Is Israel Western?*, in *COMPARING MODERNITIES: PLURALISM VERSUS HOMOGENEITY: ESSAYS IN HOMAGE TO SHMUEL N. EISENSTADT* 413, 432-33 (Eliezer Ben-Rafael & Yitzhak Sternberg eds., 2005).

12. SAFFORD, *supra* note 5, at 6.

13. Melvin Richter, *A Family of Political Concepts Tyranny, Despotism, Bonapartism, Caesarism, Dictatorship, 1750-1917*, 4 *EUR. J. OF POL. THEORY* 221, 224 (2005); ROGER BOESCHE, *THEORIES OF TYRANNY FROM PLATO TO ARENDT* (1996).

14. Editorial, *Living with Hamas*, *CHI. TRIB.* Jan. 26, 2006, § 1, at 18.

services, the terrorist organizations also attempt to promote their extremist religious and nationalist ideologies among the population.¹⁵

The supporters of the regime change initiative assert that replacing tyrannical regimes with democracies would weaken the base of support of these organizations.¹⁶ In a democracy, terrorist organizations would no longer be able to exploit the grievances made by the government in order to recruit activists or enjoy the ideological support of the oppressed local population.¹⁷ In a democracy, the government provides its citizens with vital civil services and socioeconomic infrastructures, and hence, the terrorists lose what they have to offer and have no means with which to deliver their radical ideologies to the population. Many of the incentives to join or support terrorism in a dictatorship—extreme poverty, inequality, high unemployment rates, and lack of public investments in health, welfare, and educational services—usually do not exist in a

15. John Ward Anderson & Molly Moore, *Hamas Won Power in West Bank Vote; Local Elections May Prove to Be Harbinger*, WASH. POST, Jan. 6, 2005, at A15.

This is the case, for example, of the Hizbullah movement in Lebanon and of the Hamas movement in the Palestinian Authority. The Hizbullah movement has built, over the years, a financial empire in Lebanon, which provides a variety of essential civil services including hospitals, schools, and an enormous construction company that installs water and power lines in the villages of South Lebanon and provides loans to farmers. Zvi Bar'el, *Nassrallah's Diamonds*, HA'ARETZ, Aug. 2, 2006 (in Hebrew).

Hamas, the Islamic Resistance Movement, which now governs the Palestinian Authority, began by spreading its Islamic extremist ideas by combining religious teachings and directives with a range of activities in the spheres of culture, society, welfare, sport, and health. YA'ACOV HAVAKOOK & SHAKIB SALEH, *ISLAMIC TERRORISM* 49-56 (1999) (in Hebrew).

Hamas activists offered economic aid to the impoverished; established clinics that provided medical treatment and medicines to the needy at symbolic prices; and built kindergartens, educational institutions, sports clubs, mosques, and libraries for Islamic studies. Also, students were given assistance in arranging their studies at universities in the Arab countries and alternative mechanisms were put in place to settle disputes and make redundant the citizens' need to turn to the courts. *Id.*

The vast social and economic infrastructures which the Hizbullah and Hamas organizations created over the years earned them the support of many of the citizens of Lebanon and the Palestinian Authority. Undoubtedly, these organizations could not have gained similar support from the citizens of democratic countries. The roots of these organizations lie in the poverty and socioeconomic deficiencies of Lebanon and the Palestinian Authority. Both organizations described above, like many other terrorist organizations, presented their radical religious ideologies as a tool to remedy the grievances made by the government, saying that those who do not share their beliefs are heretics or traitors to their country. Within this framework, the liberal values of Western countries contradict these extremist beliefs and are therefore considered as a threat by these organizations. MASKIT BURGIN & DAVID TAL, *ISLAMIC TERRORISM AND ISRAEL: HIZBULLAH, PALESTINIAN ISLAMIC JIHAD AND HAMAS* 121-22 (Anat Kurz ed., 1994) (in Hebrew).

16. Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 392 (2004).

17. Brian Burgoon, *On Welfare and Terror: Social Welfare Policies and Political-Economic Roots of Terrorism*, 50 J. CONFLICT RES. 176, 176-77 (2006).

democracy. Hence, democracy is a political system which diminishes preferences for terrorism.

A. *The Right to Democracy in International Law*

Despite the vast differences between democracy and authoritarianism, international law does not recognize an explicit right to democratic governance. The U.N. Charter, for example, does not use the word “democracy,” and nondemocratic Member States do not breach their obligations under the U.N. Charter merely because of the nondemocratic nature of their governance.¹⁸

In recent years, however, a significant number of scholars have identified an implied recognition of the right to democratic governance.¹⁹ According to this view, among all possible forms of regimes, democracy is most preferable because it grants its citizens the widest freedoms and rights and provides the most effective blocks against governmental misuse of these freedoms and rights.²⁰ Thus, if we examine the content of the existing international rights, it is apparent that these rights are aimed at ensuring the political institutions of a state function in a democratic manner.²¹ In other words, although international law does not explicitly recognize the right to democratic governance, the accumulation of the rights that are already recognized in international law, in effect, promotes and secures the right to democratic governance.

Throughout the twentieth century, international law has undergone significant changes. From a set of norms whose primary purpose was to allow states to implement their sovereignty over their territories and prevent external intervention by foreign states, international law has increasingly become involved in issues concerning the way in which governments ought to be structured.²² The First and Second World Wars,

18. Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMP. L.Q. 225, 227 (2002).

19. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90 (1992); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOKLYN J. INT'L L. 495, 507 (1997); Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 48 (Gregory H. Fox & Brad R. Roth eds., 2000).

20. Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19 WIS. INT'L L.J. 295, 304 (2001).

21. *Id.* at 318-19.

22. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 19, at 239, 249 (“International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or

the Cold War, and other occurrences that involved severe humanitarian crises and human rights violations made it clear to the international community that modern international law has to encompass more than before—i.e., that it has to deal not only with asserting the state's sovereignty over its territory but also with domestic issues concerning the state's governance.²³ Further, the international community has recognized that many of the contemporary troubling issues that states are required to confront, such as the threat of modern terrorism, can only be resolved by a collective response.²⁴ And since democracies are more likely to act in cooperation in order to promote global collective goals, instilling democracy in traditionally nondemocratic countries has become an international interest.²⁵ Hence, the 1948 Universal Declaration of Human Rights,²⁶ the 1948 American Declaration of the Rights and Duties of Man,²⁷ the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁸ the 1966 International Covenant on Civil and Political Rights,²⁹ the 1969 American Convention on Human

through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.”).

23. Fox, *supra* note 20, at 297-98, 318; Vasuki Nesiiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 77-78 (2004).

24. Fox, *supra* note 20, at 319 (“[T]he most serious global issues require collective action among strong and efficient national institutions. . .”).

25. Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 19, at 1, 8.

26. Universal Declaration of Human Rights, G.A. Res. 217A, art. 21, ¶ 3, U.N. Doc. A/810 (Dec. 10, 1948) (“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”).

27. Org. of Am. States (AOS), American Declaration of the Rights and Duties of Man, art. XX (1948) (“Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”).

28. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, 213 U.N.T.S. 262 (1952), art. 3 (“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”).

29. G.A. Res. 2200 A (XXI), art. 25, Mar. 23, 1976.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

Rights,³⁰ and similar twentieth-century international treaties have all posited various standards for the proper conduct of governmental institutions at the domestic level.³¹

B. Democracy as a Countermeasure Against Terrorism and Pro-Democratic Intervention in International Law

Even if we accept the notion that an international right to democratic governance does exist, it is not self-evident that democracy reduces terrorism. Due to the relatively large scope of civil liberties democracies confer to their citizens, it can be argued that democracies do not reduce, but rather encourage, terrorism.³² Democracies confer much wider freedoms of speech, of assembly and demonstration, of movement, of religion, and of a variety of other civil liberties that are unrecognized by dictatorships.³³ Thus, terrorist organizations that operate in democracies gain easy access to media through which they can disseminate their extreme ideologies, garner support, and recruit new members. They can easily locate potential targets for future violent attacks, and they can take advantage of society's religious tolerance to promote their fanatical agenda.

Indeed, the democratic paradigm cannot overcome all motives or goals of terrorism. This is the case, for example, in violent struggles on ethnic and religious grounds, such as the struggle of the Irish Republican Army (IRA) paramilitaries in Northern Ireland and the Basque Euskadi Ta Askatasuna (ETA) in Spain, and in violent anarchistic movements, such as Italy's Red Brigades and West Germany's Red Army Faction.

c. To have access, on general terms of equality, to public service in his country.

30. Org. of Am. States (AOS), American Convention on Human Rights, art. 23, ¶ 1, Nov. 22, 1969.

Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.

31. Fox, *supra* note 20, at 298; Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance To Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 332 (1995).

32. William Lee Eubank & Leonard Weinberg, *Does Democracy Encourage Terrorism?*, 6 TERRORISM & POL. VIOLENCE 417, 417-18 (1994).

33. Arunabha Bhoomik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J. INT'L L. & POL'Y 285, 291 (2005).

There is no dispute as to whether terrorist organizations can evolve in democratic societies. However, an important argument is that, whereas radical Islamic and nationalist Arab terrorist organizations originating in the dictatorships of the Arab world, such as Al-Qaeda, have systematically become stronger during recent decades, ethnic, religious, and anarchistic groups originating in democracies, such as those mentioned above,³⁴ have systematically declined during this time period.³⁵

Various explanations can be offered for the decline of Western terrorist organizations in contrast to the rise of Arab terrorist groups. For instance, it can be argued that as the state invests in social welfare policies, the incentives to initiate or support terrorist activities among citizens correlatively decreases.³⁶ Because democratic countries tend to have more generous welfare regulations than autocracies, fewer of their citizens perpetrate or condone terrorist activities. Another, more compelling explanation is that in democracies, in contrast to autocracies, implementation of violent tactics in lieu of legitimate means of protest is ultimately less useful than promoting the ideological cause within the lawful democratic process.³⁷

Dictatorships are characterized by a lack of opportunities for political participation, which may increase the motivation to adopt violent methods to induce the desired change. In contrast, democracies enable different groups to participate in the political process and promote their interests through peaceful means, thus reducing the need and motivation to resort to violence or condone those who commit terrorist acts. Democracy provides the ability to influence and promote desired goals through lawful means, which reduces motivation to use terrorist tactics.³⁸

The struggle of democracy against fundamentalist Islamic terrorist organizations is much more profound and difficult than the struggle

34. With the exception of the Basque ETA that began as a dictatorship and later became a democracy.

35. The Red Brigades and the Red Army Faction no longer exist, and the IRA and ETA do not currently commit acts of terror. Matthew E. Dunham, *Eliminating the Domestic Terrorist Threat in the United States: A Case Study on the Eradication of the Red Brigades*, 107 DICK. L. REV. 151, 152, 163-64 (2002); *Who Were the Baader Meinhof Gang?*, BBC NEWS, Feb. 12, 2007, <http://news.bbc.co.uk/2/hi/europe/6314559.stm>; Editorial, *An I.R.A. Peace Declaration*, N.Y. TIMES, Aug. 1, 2005, at 14; *Spain and ETA: Talking Peace*, ECONOMIST, July 8, 2006, at 45.

36. See Burgoon, *supra* note 17, at 178.

37. Quan Li, *Does Democracy Promote or Reduce Transnational Terrorist Incidents?*, 49 J. CONFLICT RES. 278, 280-81 (2005); Franck, *supra* note 19, at 88 (“[A] society that makes its decisions democratically and openly will be reluctant to engage its members’ lives and treasure in causes espoused by leaders deluded by fantasies of grievance or grandeur.”).

38. Li, *supra* note 37, at 280-81.

against Western terrorist groups that were born and developed in democracies. The latter, groups such as the IRA, the Basque ETA, the Red Brigades, and the Red Army Faction, aspired to promote a new political agenda (ethnic-nationalist, Maoist) through violent methods but gradually lost support. The reason for this was that these organizations offered the public, their potential future members and supporters, a mode of action that contradicted the democratic values to which the public was accustomed to traditionally. When there is an attempt to promote or employ nondemocratic ideologies through terror, democracy ultimately overpowers such an attempt because people are more satisfied with the democratic values than with other possible values.³⁹

However, the case of religious fundamentalist Islamic terrorism is different. Islamic terrorist groups do not only seek to promote a new political agenda which is contradictory to democracy but also seek to impose a worldwide Islamic Moslem nation. Al-Qaeda, for example, aspires to bring down infidel governments and replace them with religious Islamic regimes by carrying out violent attacks against military and government targets and against civilians.⁴⁰ Similarly, the Hamas movement is one of the branches of the Moslem Brotherhood—a Sunni organization set on bringing about a worldwide Islamic Moslem nation through the liberation of all Islamic nations from foreign rule. According to the organization's ideological platform, the achievement of this goal first requires the spiritual ills of the Moslem community to be cured through an intensive and prolonged educational program aimed at bringing the masses back to Islam. Only after internal unity is achieved can the ideological ground be ready for launching a religious war, i.e., armed struggle, against the foreign infidel regimes.⁴¹

In nondemocratic regimes, the lack of opportunity for political participation induces grievances and frustrations among the oppressed citizens and thus increases their motivation to commit or condone terrorist activity.⁴² Severe human rights violations, poverty, religious intolerance, and neglected civilian infrastructures leave terrorism, backed

39. *Id.* ("Since democracy lowers the cost of achieving political goals through legal means, groups find costly illegal terrorist activities less attractive.")

40. SHAUL SHAY & YORAM SCHWEITZER, *THE TERROR OF THE 'GRADUATES OF AFGHANISTAN'—ISLAM AGAINST THE REST OF THE WORLD* (2000).

41. See HAVAKOOK & SALEH, *supra* note 15, at 21-27; Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 616, 621 (2004).

42. Li, *supra* note 37, at 281 ("To the extent that democratic participation increases political efficacy of citizens, terrorist groups will be less successful recruiting new members in democracy than in autocracy.")

up by false religious justifications provided by extremists, as an appealing method of accomplishing unity, dignity, and freedom.⁴³ Therefore, the greatest challenge of democracy in its war against modern terrorism is presenting the nondemocratic regimes with a democratic option for promoting their interests and making them realize that it is a mistake to try to secure the fundamental civil liberties to which they are entitled to as persons through radical, false interpretations of religion.⁴⁴ The democratic paradigm can successfully withstand this challenge and can promise its conceptual supremacy for generations to come only by succeeding in cutting off the source of terrorism—i.e., by exporting democracy to nondemocratic countries, ultimately preventing religious fanatics from recruiting believers.⁴⁵

As explained above, democracy may reduce terrorism in the long run. However, even if a *right* to democracy does exist,⁴⁶ it is yet another question whether an *obligation* exists for states to possess a democratic form of government and hence whether forcible international intervention to promote or restore democracy can be legally justified. Only if these questions are answered in the affirmative should exporting democracy to nondemocratic regimes be considered an integral part of the war against modern terrorism.

If a state violated the right to democratic governance, either by systematically denying its people the right to democracy or by falling victim to a governmental revolution held by a nondemocratic faction,

43. *Id.* at 294 (“[D]emocratic participation . . . increases satisfaction and political efficacy of citizens, reduces their grievances, thwarts terrorist recruitment, and raises public tolerance of counterterrorist policies.”).

44. John Shattuck, *Religion, Rights, and Terrorism*, 16 HARV. HUM. RTS. J. 183, 188 (2003) (“From a human rights perspective, the terrorism of September 11 was caused in large part by the hijacking of a religion and the suppression of human rights in the Islamic world. Islam was not a cause of the terrorism, it was a victim, and it is now in danger of becoming a scapegoat as well. In addition to the military campaign against terrorism, we need to do something much more difficult and long-term. We must systematically engage with moderate Islamic voices. Those moderate voices are in many places; they exist in Jordan, Tunisia, Morocco, Iran, and throughout the Islamic world.”).

45. W. Robert Pearson, *Democracy as the Cure for Terrorism: Turkey’s Example*, 45 VA. J. INT’L L. 1017, 1024 (2005) (“Turkey’s democratic reforms—along with an impressive economic reform program that has reduced inflation and produced strong growth—have helped to undermine the PKK’s support to some extent. In particular, new legislation allowing teaching and broadcasting in Kurdish, as well as allowing Kurds who had left the region to return to their villages in some cases, have been important steps. . . . [T]he organization has launched a new series of attacks and remains a threat, but many view it as having less support than in the past. To the extent that Turkey continues to democratize domestically, to loosen restrictions on Kurdish culture and language, and to allow full participation of its Kurdish population in its democratic revival, we can expect support for the PKK to weaken further.”).

46. See discussion *supra* notes 18-31 and accompanying text.

would the international community be legally authorized to intervene in order to promote or restore democracy? Specifically in the context of terrorism, if there were evidence that the existence of a nondemocratic government contributes to the growth and development of terrorism, would the international community be authorized to violate the sovereignty of the target state and forcibly impose upon it a regime change? The answer to this question lies in the rules regularizing forcible intervention and the applicability of those rules to the unique situation of a terrorist threat attributable to the nature and characteristics of nondemocratic regimes.

In contemporary times, both treaty and customary international law prohibit the use of force in interstate relations. Article 2(4) of the U.N. Charter prohibits all member states from threatening or using force “against the territorial integrity or political independence of any state.” In effect, the U.N. Charter entrenches and adds to the basic principles that developed as a matter of customary international law subsequent to the Hague Conventions.⁴⁷ The prohibition on the use of force is widely regarded as an inviolable imperative rule (*jus cogens*) of general international law.⁴⁸ However, this prohibition is subject to two exceptions: the exception of self-defense set out in article 51 of the Charter and the exception set out in article 42 which empowers the Security Council to take military enforcement measures in conformity with chapter VII of the U.N. Charter. We shall now examine whether pro-democratic intervention, i.e., an intervention aimed at promoting or restoring democracy, can be allowed within these two exceptions⁴⁹ in

47. See GROSS, *supra* note 8, at 29.

48. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; *Nicar. v. U.S.*, 1986 I.C.J. 14, 100-101, 153, 199 (June 27).

49. There are two additional normative exceptions to the principle of nonintervention. These exceptions are not directly relevant to the issue of intervention due to a terrorist threat and, therefore, shall not be discussed here in detail. The first exception is pro-democratic intervention by invitation. The doctrine of forcible intervention by invitation authorizes states to use force in the territory of another state provided that they are operating with the voluntary consent or acquiescence of the target-state. It can be argued that pro-democratic intervention is permitted in circumstances where a nondemocratic group has forcibly deposed a democratic government in violation of domestic constitutional law. Usually, the consent of the target-state must be given by an entity which possesses the legal authority to express the will of the state. However, if a democratic government has been unlawfully deposed and thus cannot exercise effective control over the state's territory, it is possible that such a government nonetheless retains the authority to consent to intervention whose aim is to restore democracy on behalf of the state. See David Wippman, *Pro-Democratic Intervention by Invitation*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 19, at 293-94.

The second exception is pro-democratic humanitarian intervention. Although the possibility of humanitarian intervention without the authorization of the Security Council has not yet been determined, some scholars assert that a right to humanitarian assistance exists either within or

circumstances of a terrorist threat attributable to the nature and characteristics of a nondemocratic regime.

1. Pro-Democratic Intervention Within the Right to Self-Defense in Order To Eliminate a Terrorist Threat Attributable to the Nature and Characteristics of the Nondemocratic Regime

Self-defense in customary international law is based on the “*Caroline Doctrine*.” This doctrine established the right of a state to use force in order to defend itself against real and imminent threats which require immediate response in circumstances where all peaceful means of resolving the dispute have been exhausted, and the response is essential and proportional to the threat. Self-defense in international treaty law is entrenched in article 51 of the U.N. Charter; the article does not create a new right to self-defense but refers to the preexisting “inherent” customary right.⁵⁰ Nonetheless, the right entrenched in the U.N. Charter is not identical to the customary law right.⁵¹ This can be seen *inter alia* from the fact that customary law permits self-defense in every case of *aggression*, whereas treaty law permits self-defense only in cases of *armed attack*.⁵² Thus, terrorist attacks by nongovernmental groups can be qualified as acts of aggression, but there is a difficulty in classifying them as armed attacks because terrorist attacks are not armed attacks in the classic sense. They are not directed against government and military targets, but at civilian targets; the attacks are not prolonged, but are intermittent; and there are no defined battle zones. However, in my view, even though terrorist attacks are not “armed attacks” in the traditional sense, they nonetheless contain the core characteristics of the traditional armed conflict, because in most cases the attacks are not spontaneous but are meticulously planned, sometimes after intelligence has been gathered, because they have great impact and can cause serious

independent of chapter VII. Pro-democratic humanitarian intervention may include various measures—either forcible (in the case of a humanitarian crisis involving severe human rights violations) or nonforcible (using means such as condemnation, withdrawal of aid, suspension of diplomatic relations, economic sanctions, etc.). Fielding, *supra* note 31, at 329-30; A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL’Y 725, 725-27 (2004). In light of this doctrine, it is possible to argue that if an authoritarian regime severely violates the freedoms and rights of the local population, the international community has a legal and moral obligation to intervene.

50. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”).

51. Nicar, 1986 I.C.J. 14 at 94

52. GROSS, *supra* note 8, at 31.

physical harm and property damage, and because the terrorist group possesses an organized armed force and a hierarchical structure with a political branch that directs the activities of the operational branch. Upon the existence of these circumstances, in my view, it may legitimately be argued that terrorist attacks amount to armed attacks and vest the attacked state with the right to defend itself.⁵³

A second difference that is relevant concerning the customary and treaty right to self-defense is the possibility of applying preemptive activities directed at preventing anticipated attacks.⁵⁴ Customary law, which recognizes the right of the state to defend itself in every case of aggression, provides that the right to self-defense embraces the right to adopt the tactic of a defensive self-defense in the face of an anticipated act of aggression.⁵⁵ The question whether the right to anticipatory self-defense also exists under treaty law has not yet been determined. On one hand, there are those who argue that the language of article 51, “*the inherent right of individual or collective self-defense if an armed attack occurs,*” is unambiguous; a state is prohibited from employing armed force as an anticipatory measure, and it must wait for an actual armed attack.⁵⁶ Opposing these commentators are those who contend that the language of the U.N. Charter is not so unequivocal, as it does not purport to create a new right to self-defense but rather refers to the inherent right of states to defend themselves, and, as mentioned, the customary law referenced by the U.N. Charter recognizes the right of states to anticipatory self-defense. A further argument is that because military capabilities have significantly changed in recent years, article 51 of the U.N. Charter should be interpreted to comply with the new world reality. Thus, for example, it would be absurd to assert that international law requires a state to absorb a severe nuclear attack before it is permitted to defend itself. In view of the modern means of warfare available to terrorist organizations, article 51 must be interpreted in the light of its contents and purpose, so as to enable self-defense in the face of future terrorist attacks.⁵⁷

53. See Emanuel Gross, *Combating Terrorism: Does Self-Defense Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT’L L.J. 569, 575 (2005). Following the terrorist attacks of September 11, 2001, the Security Council decided to reconfirm the right to self-defense recognized in the U.N. Charter. This impliedly confirms the thesis that terrorist attacks may be regarded as armed attacks which vest the right to self-defense. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

54. See GROSS, *supra* note 8, at 225; Gross, *supra* note 53, at 576.

55. YORAM DINSTEIN, *THE LAW OF WAR* 68-70 (1983) (in Hebrew).

56. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 166 (3d ed. 2001).

57. It would seem that this is also the understanding of the U.N. General Assembly. In a resolution concerning the definition of acts of aggression, the Assembly decided that the first use

However, even when states are authorized to defend themselves against a terrorist threat in accordance with the conditions of self-defense, a subsequent question is whether the right to self-defense also authorizes the threatened state to impose a regime-change upon the state from which the terrorist threat ensued. For example, the terrorists who committed the attacks of September 11, 2001, in the United States were members of Al-Qaeda, a terrorist organization that has been situated in Afghanistan and has enjoyed freedom of action by the Taliban tyrant regime.⁵⁸ The U.S. government launched a military offensive in Afghanistan, the aim of which was not only to eradicate Al-Qaeda but also to bring down the Taliban and establish a democratic government in the state. Eradicating Al-Qaeda, so it was argued, was a necessary but insufficient step in removing the threat posed to the United States and its allies, since the roots of the threat lie in the Taliban tyrant regime. If this regime were not overthrown, then sooner or later the threat would resume by similar terrorist groups that would come into being due to the authoritarian nature of the government. Therefore, a regime change was necessary.⁵⁹

Can it be argued that the right to self-defense authorizes the imposition of a regime change upon the target state? The answer to this question should be in the affirmative. As noted, since military capabilities have dramatically changed in recent years, article 51 of the U.N. Charter should be interpreted in a purposive, rather than a literal, manner. It is not prudent to assert that international law requires a threatened state to absorb a severe attack before it is lawfully permitted to defend itself. Also, it is not prudent to assert that the state is only allowed to deal with the symptoms of the illness (the isolated terrorist organization) but not with the illness itself (the authoritarian regime which made the creation, growth, and development of the organization possible). In circumstances where the state is legally authorized to act in self-defense, and there is credible evidence that the terrorist threat is attributable to the nature and characteristics of the nondemocratic regime, the state may act in self-defense, not only to eliminate the

of force in breach of the U.N. Charter would comprise prima facie evidence of aggression, but that the Security Council is entitled to decide whether in light of the circumstances surrounding the commission of the act, it should not be perceived to be an act of aggression. In effect, this amounts to indirect recognition of the legality of the use force as anticipatory self-defense. See G.A. Res. 3314 (XXIX), art. 2, U.N. Doc. A/2319 (Dec. 14, 1974).

58. See 9-11 Comm'n, Overview Of The Enemy, Staff Statement No. 15, available at <http://www.9-11commission.gov/staffstatements/staffstatement15.pdf> (last visited Sept. 30, 2007).

59. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOCS. 1347, 1348 (Sept. 20, 2001).

isolated terrorist group, but also to overthrow the authoritarian regime that enables the creation and growth of terrorist elements in the country.⁶⁰

2. Pro-Democratic Intervention Under Chapter VII of the U.N. Charter in Order To Eliminate a Terrorist Threat Attributable to the Nature and Characteristics of the Nondemocratic Regime

Article 2(7) of the U.N. Charter entrenches the traditional prohibition on international intervention “in matters which are essentially within the domestic jurisdiction of any state.” Although the principle of nonintervention allows the state to realize its sovereignty in internal matters,⁶¹ it is not absolute. Article 2(7) further states that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” Chapter VII allows intervention in the event of threats to international peace and security; article 39 enables the Security Council to exercise collective security in every case of a threat to peace, breach of the peace, or act of aggression. Whereas article 51 enables a state to respond to an armed attack only, article 39 enables the Security Council to respond, within the framework of collective security, to an attack which does not amount to an armed attack. Thus, it seems, the Security Council is entitled to decide on the implementation of preemptive measures in response to a threat to the peace and security. Article 40 enables the Security Council to engage in provisional measures, prior to making the final decisions in accordance with article 39, in order to prevent aggravation of the situation. According to article 42, if the Council considers that the measures referred to above would be inadequate or have proved to be inadequate, it may take a forcible action by air, sea, or land forces as may be necessary, to maintain or restore international peace and security.

The above proposition raises the question: how should the right to democracy be balanced against the principle of state sovereignty? The answer, in my opinion, is that even if chapter VII prohibits interventions for the purpose of promoting or restoring democracy per se,⁶² it

60. See also Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516, 519-22 (1990) (arguing that although there is no principle of international law that permits intervention to impose a democratic form of government in another state, international human rights law demands intervention against tyranny).

61. Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE H.R. & DEV. L.J. 45, 60 (2003).

62. The question of whether chapter VII prohibits pro-democratic interventions per se has not yet been determined. Some argue that lack of democracy or the unlawful overthrow of a democratic government should be perceived as a threat to international peace and security and, therefore, creates a justification for pro-democratic intervention, while others argue that

nonetheless ought to be understood as authorizing interventions in light of terrorist threats that can be attributed to the existence of authoritarian regimes. If credible evidence indicates that a terrorist threat results from the nature of the authoritarian regime, then it ought to be perceived as a threat to international peace and security.

The applicability of chapter VII to terrorist threats which can be attributed to the existence of authoritarian regimes has not received proper discussion thus far. Its applicability in this context should be concluded by way of analogy from the fact that chapter VII was used in the past to legitimize pro-democratic interventions in cases of totalitarian regimes that breached human rights, such as the 1994 intervention in Haiti.⁶³ As explained above, the nature and characteristics of authoritarian regimes increase the danger of the growth and development of terrorist elements. When credible evidence indicates that this danger actually becomes a reality, i.e., that terrorist groups grow and develop in the country (as in the case of Al-Qaeda in Afghanistan), this situation should be considered a threat to international peace and security.

An effective response to modern terrorism requires a fight on numerous fronts. In addition to the necessary military actions against the terrorists, stringent diplomatic, economic, and military sanctions must be imposed on states sponsoring and harboring terrorism, and effective mechanisms of extradition and enforcement of the criminal law must be established. This can be done only through exceptional interstate cooperation.⁶⁴ Only by a comprehensive global response that includes all necessary measures can the international community overcome global terrorism. The U.N. Charter grants the Security Council the authority to initiate such a response—and to do so before an armed attack occurs—provided that a threat to the international peace and security exists. Unfortunately, global terrorism has indeed proved itself such a threat. The recent murderous attacks in the United States, Britain, and Spain are only a few examples. A purposive interpretation of the U.N. Charter, in light of modern developments, should lead to the inescapable conclusion that a threat to international peace and security exists in these circumstances.

intervention for the purpose of promoting or restoring democracy is prohibited under chapter VII. See generally Michael Byers & Simon Chesterman, "You, the People": *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 19, at 259, 281-83.

63. See S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

64. M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, 1937-2001, at 53 (2001).

However, even in cases where forcible international intervention to promote or restore democracy is allowed, either within the right to self-defense or under chapter VII, it should be emphasized that democracy should not be regarded as a miracle countermeasure or as a sole universal cure for terrorism. When we examine the roots of modern terrorism in light of the theoretical frameworks of the political regimes that are present today, we ought to reach the conclusion that, relatively, the democratic regime is the most preferable paradigm for eradicating modern terrorist organizations. However, although the characteristics of democracy help reduce the danger of growth and development of terrorist elements in democracies, changing a political regime from autocracy to democracy is only the first step. Installing democracies in traditionally nondemocratic countries is a long and complicated process that cannot be done in one isolated phase. Otherwise, there is a danger that the new democracies may be exploited by extremists as a tool to legitimize the rise of terrorist regimes or regimes that harbor and support terrorism.

In the following Part, I shall examine the legal mechanisms that should be used in order to ensure that a new democracy will realize its calling to eradicate the roots of modern terrorism.

III. THE PROCESS OF ESTABLISHING NEW DEMOCRACIES: THE APPROPRIATE LEGAL MECHANISMS TO OBSTRUCT DANGERS THAT LURK IN NEW DEMOCRACIES

A. *Establishing Institutions in Emerging Democracies*

Changing a political regime from autocracy to democracy is a long and complicated process. The transition to democracy is an especially vulnerable time for a state.⁶⁵ During this period, the state should form governmental institutions and other public facilities to reflect the fundamental elements of democracy. Thus, the transition to democracy, in itself, does not reduce the danger of the growth and development of terrorist elements. Rather, states in transition from dictatorial regimes to democracies are facing the challenge of successfully developing appropriate democratic institutions that possess the proper mechanisms

65. JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* 288 (2003) (“Transition to democracy has been found to be an especially vulnerable period for states across the board.”).

for ensuring the existence of the fundamental principles of the democratic paradigm.⁶⁶

Developing proper democratic institutions in emerging democracies is not an easy task. These states do not have established traditions of democracy and respect for civil and human rights. They usually have a prior history of human rights abuses; large parts of the population do not have confidence in the political process or in governmental institutions, and the state must gain their trust.⁶⁷

These issues cannot be resolved immediately. Educational efforts, for example, play a significant role in penetrating democratic values into society and encouraging public awareness and participation in the political process. For this reason, in the last several years, the United States has invested large sums of money in building schools, training teachers, and running educational programs that promote tolerance in a number of Islamic countries; the United States contends that improving the quality of education can promote tolerance and counteract extreme Islamic views.⁶⁸

Legal efforts also play a crucial role in spreading democratic values and establishing adequate democratic institutions. In emerging democracies, it is necessary to establish a stable legal framework, one that corrects past grievances and possesses efficient mechanisms for ensuring the existence of the fundamental principles of democracy, especially respect for basic human rights, obedience of all governmental authorities to the rule of law, and a lack of governmental corruption. If emerging democracies produce institutions that do not reflect the

66. Margulies, *supra* note 16, at 401-02 (“A repertoire of institutions, including courts, administrative agencies, and nongovernmental organizations, is necessary. A varied institutional repertoire of both state and nongovernmental organizations refines deliberation about public issues. It gives participants in the polity a menu of opportunities for nonviolent engagement, and a multitude of perspectives for fostering reflection. The ‘horizontal accountability’ yielded by institutional repertoire also nurtures commitments to both formal and informal separation of powers, thus reducing the risk that any single institution will impose an oppressive homogeneity.” (footnotes omitted)).

67. Conference, *From Autocracy to Democracy: The Effort To Establish Market Democracies in Iraq and Afghanistan: Panel 1: Establishing the Rule of Law*, 33 GA. J. INT’L & COMP. L. 119, 123 (2004) [hereinafter Conference, *From Autocracy to Democracy*] (quoting Scott Carlson, a Supreme Court Fellow: “You have a population that you hope to see proceed towards democracy and respect for human rights. The first thing you need to demonstrate to this population is that they have a stake in the legal system. I think one of the best ways to educate and to generate ownership in the rule of law is to encourage some form of public participation in the lawmaking process.”).

68. Jane Perlez, *Livening Up Today’s Lesson, Courtesy of Uncle Sam*, N.Y. TIMES, Aug. 7, 2006, at A4.

essential principles of democracy, then these countries may eventually create regimes that are as flawed as the former dictatorial regimes.⁶⁹

Democratizing a country is a complex process. In addition to establishing the democratic institutions of the nation, it is also necessary to establish public awareness of and confidence in the effectiveness and fairness of these institutions.⁷⁰ Lack of public awareness of or confidence in the governmental institutions might ultimately result in their collapse. The rule of law, the separation of powers, the independence of the judiciary, and the various mechanisms of democratic accountability are only a few examples of the institutions that emerging democracies must establish. These elements will be discussed below.⁷¹

1. The Rule of Law

Establishing the rule of law in new democracies is one of the central challenges of the democratization process and a necessary precondition for the proper functioning of public institutions in a democratic society.⁷² The concept of the rule of law has no precise accepted definition that clearly describes its scope.⁷³ Nevertheless, it is commonly accepted that the rule of law comprises both formal and substantive aspects.⁷⁴ The rule of law, in its formal aspect, requires that all entities in the state, including governmental authorities, act according to the law and that the law applies equally to everyone. The law is the source of the power of all state authorities, and it determines the boundaries of their power. This is the formal aspect which does not deal with the contents of the law but rather with the need to impose it.⁷⁵ The substantive aspect of the rule of

69. Christopher S. Crago, *Rebuilding the Foundations of Iraq: Comparisons to the Revival of Democracy in Central Europe*, 18 REGENT U.L. REV. 157, 158-59 (2005).

70. See *infra* text accompanying notes 65-68.

71. For a survey of the characteristics of a democratic regime, see, for example, Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387, 428 n.219 (2003); Universal Declaration on Democracy, Inter-Parliamentary Council, 161st Sess. (Sept. 16, 1997), available at <http://www.ipu.org/Cnl-e/161-dem.htm>.

72. See Conference, *From Autocracy to Democracy*, *supra* note 67, at 119 (remarks by Daniel Bodansky); Anne Sa'adah, *Regime Change: Lessons from Germany on Justice, Institution Building, and Democracy*, 50 J. CONFLICT RES. 303, 305 (2006) ("The rule of law is a prerequisite of democratic government: it organizes and limits political competition (making it safe), and it curtails the opportunities for arbitrary power.").

73. See GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 12-13 (1996); MENACHEM HOFNUNG, ISRAEL—SECURITY NEEDS VS. THE RULE OF LAW 11-20 (1991) (in Hebrew).

74. Jeffrey Jowell, *The Rule of Law Today*, in THE CHANGING CONSTITUTION 5, 5 (Jeffrey Jowell & Dawn Oliver eds., 2004).

75. 1 AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF ISRAEL 265 (2005) (in Hebrew); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 14-15 (1997) ("According to a formalist conception of the Rule

law concerns the content and value of the law. Here, we aspire to the formulation of the appropriate norms which reflect fundamental requirements: the requirement for coherence and universality of the norm, for the norm to be anchored in a provision of a public law and be defined clearly and specifically, for an appropriate balance to be struck between the needs of the public and the rights and freedoms of the individual, and for a prohibition on the retroactive application of the norm.⁷⁶

The process of constructing the rule of law in new democracies is a complex enterprise. It requires not only revising comprehensively the existing legal codes but also contending with the grievances made by the prior tyrannical regime. Further, it should be emphasized that the success or failure of this process is highly dependent on public understanding and acceptance of the process.⁷⁷ Besides establishing appropriate legal institutions which realize the elements of the rule of law, it is no less important to gain the confidence of the local people in the process and convey the message that the mechanisms of the rule of law are better alternatives to violence and extremism.⁷⁸ If the local citizens do not understand the essence of the new codes and institutions, if they do not believe in their worth and fairness, and if they do not believe that these mechanisms are going to be impartially and effectively enforced, then they will not feel committed to either using or abiding by

of Law, the ideal if not necessary form of 'law' is that of a 'rule,' conceived as a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes. Underlying the formalist ideal type is a picture of human beings as rational planners and maximizers, who reasonably demand to know in advance the legal consequences of alternative courses of action. On this view, rules provide maximally effective guides to behavior and ensure that judges, as much as other officials, are bound by law." (footnotes omitted)).

76. RUBINSTEIN & MEDINA, *supra* note 75, at 264-65; Fallon, *supra* note 75, at 21 ("[N]ot merely any 'rule,' not merely any 'posit' of a lawgiver, and not merely any product of a reasoned deliberative process can satisfy the Rule of Law. According to this conception, the Rule of Law implies the intelligibility of law as a morally authoritative guide to human conduct. In this view, the forms of law—which may encompass rules, conventions of legal reasoning, and processes of legal deliberation—are unintelligible as *legal* forms in the absence of rationally cognizable purposes that possess reasonable claims to moral allegiance." (footnotes omitted)).

77. Brian Gill, *Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study*, 29 FLETCHER F. WORLD AFF. 133, 146 (2005); Andrew Erdmann, *After Withdrawal, Engagement*, N.Y. TIMES, Dec. 27, 2005, at A23.

78. See Conference, *From Autocracy to Democracy*, *supra* note 67, at 131 (remarks by Rosa Ehrenreich Brooks); Christopher S. Crago, *supra* note 69, at 167 ("The new democratic authority must regain control of the population not only through political and economic reform, but through the individualized trust of a people scarred from years of lacking faith not only in the government, but in each other.").

them.⁷⁹ Thus, these new institutions, irrespective of how appropriate they are, will eventually collapse. In order to prevent that from happening, the state must not only focus on establishing proper institutions of the rule of law, but, at the same time, it must act to establish respect for the rule of law among the local citizens and gain public trust in the process. This can be done, *inter alia*, by providing the public with full information about the importance of the upcoming changes and by ensuring that the process will be transparent.⁸⁰

2. Separation of Powers

Countries with a history of tyrannical regimes and human rights abuses must adopt a strong constitutional mechanism of separation of powers which will guarantee effective protection of the rights and freedoms of the individual from unjustified limitations by governmental entities. The doctrine of separation of powers provides that there ought to be a distribution of governmental powers between the three branches of the state, the executive, the legislative, and the judiciary, so that no sole authority controls the entire government.⁸¹ The division of powers, if done in a way that each branch is given some power over the other two, creates a supervision mechanism with “checks and balances.” Neither of the three branches has absolute autonomy or ascendancy over the others, but rather each branch is given the ability to oversee the exercise of powers of the others.⁸² As a result, each branch restrains the execution of powers of the other two branches and diminishes the risk for arbitrary or abusive actions.⁸³

3. Independence of the Judiciary

An independent judiciary is a fundamental constitutional principle in a democracy and an essential precondition for the protection of the

79. Franck, *supra* note 19, at 50, 62 (“When rules are impartially applied, whether by judges, administrators or experts, the determinacy of those rules increases and so, also, their legitimacy.”).

80. William B. Wood, *Post-Conflict Intervention Revisited: Relief, Reconstruction, Rehabilitation, and Reform*, 29 FLETCHER F. WORLD AFF. 119, 129 (2005).

81. Thomas O. Sargentich, *Foundations of Separation of Powers*, 87 JUDICATURE 209, 209 (2004).

82. N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 57, 60 (2001).

83. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

rule of law.⁸⁴ Judicial independence means that the judges and the judiciary are subject to nothing other than the law and that the executive and the legislature cannot apply any pressure, whether political, economic, or personal, to influence judicial decisions.⁸⁵ The judiciary can effectively protect the individual against governmental misconduct, assure objective and impartial justice, and gain public confidence only by enjoying full institutional and personal independence.⁸⁶ In emerging democracies, an independent judiciary is a key element for the credibility of the government and for the strength of the rule of law.⁸⁷ Autocracies are usually characterized by judicial systems which are weak relative to the executive and which are unable to defend the individual against executive oppression.⁸⁸ Thus, states in transition from autocracy to democracy must strengthen the power of the judiciary in relation to the other branches of government and by that also gain public confidence in the neutrality and fairness of judicial rulings. The public will not recognize the legitimacy of judicial decisions unless judges are given the power to decide solely within the framework of the law and are not exposed to external pressures.

4. Mechanisms of Democratic Accountability

A democratic system must have institutional arrangements that enable citizens to hold governmental officials accountable.⁸⁹ Mechanisms which enhance accountability force government officials to face the consequences of their actions and hence provide positive incentives for good governance and for preservation of civil and human

84. Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change*, 45 U.N.B.L.J. 3, 7-8 (1996).

85. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 567-74 (1996); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 54-61 (2002) ("Independence of the judiciary means, first and foremost, that in judging, the judge is subject to nothing other than the law. The law is the sole master of the judge. From the moment that a person is appointed judge, he or she must act independently of everything else. . . . [T]he other branches of the state must be incapable of influencing judicial decisions. . . . [B]ut the independence of the individual judge, while of central importance, is itself insufficient. Personal independence must be accompanied—as it is in the United States—by institutional independence. The judiciary, not merely the individual judge, must be independent." (footnotes omitted)).

86. Cox, *supra* note 85, at 567-74; Barak, *supra* note 85, at 54.

87. Cox, *supra* note 85, at 575-76; Josephine T. Andrews & Gabriella R. Montinola, *Veto Players and the Rule of Law in Emerging Democracies*, 37 COMP. POL. STUDS. 55, 60 (2004).

88. Symposium, *Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability: Panel 2: Protection of Civil Liberties During Times of Transition*, 36 TEX. INT'L L.J. 319, 341 (2001) (remarks by Professor Sarah Cleveland); Cox, *supra* note 85, at 567.

89. Beutz, *supra* note 71, at 401-02.

rights.⁹⁰ Accountability mechanisms demand that citizens will be given the ability freely to speak their minds, will receive access to information regarding the actions taken by their government so that they will be able to rationally form opinions and preferences, and will be given equal suffrage.⁹¹ In new democratic systems with a history of totalitarian regimes, it is especially important to encourage the citizens' awareness of the importance of participation in the political process and of exercising their rights, either individually or in organized groups. However, in order for the accountability mechanisms to be effective and allow people to find sufficient redress for governmental grievances within the democratic system instead of resorting to violence and extremism, it is necessary to establish a minimum level of internal public order.⁹² If the new democratic regime is too weak to fulfill its elementary obligation to safeguard the civilian infrastructure and thwart the dangers posed to the security of its citizens, it is likely that the government will not be accountable to its citizens.

B. Transition from Authoritarianism to Democracy and the Struggle Against Terrorism

As explained, although a democratic regime may reduce the danger of the growth and development of terrorist elements, the transition to democracy, in itself, cannot accomplish this goal. A transition to democracy necessitates the construction of democratic institutions. Their stability and strength as well as the extent of acceptance by the public are the factors that ultimately determine whether the transition may indeed contribute to the eradication of terrorism.

If new democratic institutions are established without proper mechanisms that ensure the existence of the fundamental characteristics of democracy, then the new democratic regime might be as defective as the former autocratic regime. One of the main dangers of such a regime is its exploitation by terrorist organizations who might try to legitimize their activities under the guise of the democratic political process.⁹³

90. *Id.* at 402.

91. *Id.* at 417, 428.

92. *Id.* at 419.

93. An example for the realization of this danger is the participation of the Hizbullah movement in the parliamentary elections held in Lebanon in June 2005. Hizbullah and its ally, Amal, won all seats in South Lebanon and claimed they had won a democratic victory that should be recognized and respected by the international community. Hussein Dakroub, *A Day After Hezbollah's Election Victory, Israeli Warplanes Fly over Large Parts of Lebanon*, ASSOCIATED PRESS WORLDSTREAM, June 7, 2005 (quoting Sheik Hassan Ezzeddine, Hizbullah's senior political officer in southern Lebanon: "The U.S. administration, which claims it wants to promote

Within this context, the question is whether the will of the public, expressed either through periodic elections, referendums, or lawfully elected representatives, in a government that endorses terrorism, should be honored because it was manifested democratically. The answer to this question ought to be found within the concept of “defensive democracy.”

A free competition between a variety of political agendas is an essential component of the democratic paradigm. Nevertheless, not only the competition itself must be democratic, but also the substance of the notions that are being promoted through it.⁹⁴ To borrow the words of Professor Aharon Barak, the President of the Supreme Court of Israel:

democracy in the Middle East, must accept the results of this democratic vote and respect the Lebanese people’s will and choice.”). Hizbullah’s increasing political power, combined with the massive military and financial support it received from Iran and Syria, allowed it to assert legitimacy as a political party on one hand, while operating as an armed militia to launch armed attacks against Israel from territories under Lebanon’s sovereignty on the other hand. Boaz Ganor, Int’l Pol’y Inst. for Counter Terrorism, *Changing the Rules in the Lebanese Arena*, <http://ict.org.il/articles/articledet.cfm?articleid=572> (last visited Sept. 30, 2007).

Another recent example of the realization of this danger is the landslide victory of the Hamas organization in the Palestinian parliamentary elections in January 2006. The Hamas organization won 76 of the 132 parliamentary seats. Fatah, the Palestinian National Liberation Movement, which has formed the core of the Palestinian Liberation Organization (PLO) since the end of the 1960s, won only 43 seats. See Scott Wilson, *Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast*, WASH. POST, Jan. 27, 2006, at A1.

The participation of Hamas, as well as other recognized terrorist groups, in the parliamentary elections was perceived by the Palestinians as a necessary component for the creation of a real and free democratic competition between all rival political factions. *CBS Evening News: Palestinians Angry that Hamas Candidates Will Not Be Allowed on Ballots in Upcoming Election* (CBS television broadcast Jan. 15, 2006) (quoting Ms. Hanan Ashrawi, a Hamas political opponent: “If we want a healthy democratic system, we have to be inclusive and we have to give Hamas a role in this democracy.”).

Hamas’s decision to take part in the elections and the Palestinian Authority’s decision not to ban its participation reveal the danger of misuse of the democratic political process. The Hamas covenant, which sets out the ideological platform guiding the organization, calls for an armed struggle (Jihad) against the state of Israel and against all infidels of Islam, with the aim of liberating all Islamic states from foreign rule and bringing about a global Islamic Muslim nation. An English translation of the Charter of the Hamas may be found in Raphael Israeli, *The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas)*, in *THE 1988-1989 ANNUAL ON TERRORISM* 108-29 (Yonah Alexander & Abraham H. Foxman eds., 1990) available at <http://fas.org/irp/world/para/docs/880818.htm> (last visited Sept. 30, 2007).

A political platform that calls for the promotion of ideological goals through means of violence contradicts the essence of democracy. Therefore, there is no doubt that the organization should have been banned from running in democratic elections.

94. There are extensive discussions regarding the question of whether democracies may take restrictive measures, such as the exclusion of antidemocratic parties from the political process, in order to ensure the continuation of democratic governance. Most scholars conclude that democracies must exclude subversive elements from the electoral process in order to guarantee the preservation of their democratic character. However, such exclusion must conform to stringent standards in order to reduce the risk of potential abuse of this power. See, e.g., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1 (1995); Wheatley, *supra* note 18, at 242-44.

“Democracy is allowed to protect itself, and it need not commit suicide so as to prove its vitality.”⁹⁵ A democratic regime must defend itself against those who seek to destroy it, and within that framework, it must exclude those who seek to promote antidemocratic notions through democratic political processes. Israel, for example, has a constitutional provision which bans parties that deny its existence as a Jewish and democratic state, incite racism, or support an armed struggle of an enemy country or a terrorist organization against the state of Israel from running in elections.⁹⁶ Germany’s Basic Law bans the participation of “parties which, by reason of their aims or the conduct of their adherents, seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany.”⁹⁷ The United Kingdom excludes associations, including political parties, that endanger public security. The Public Order Act of 1936 prohibits any association of persons “organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object.”⁹⁸ The Terrorism Act of 2000 criminalizes membership in organizations that are involved in terrorism, i.e., organizations that commit acts of terror, prepare for terrorism, promote or encourage terrorism, or are otherwise involved in terrorism.⁹⁹

95. EA 2/84 Neiman v. Chairman of Cent. Elections Comm. of Eleventh Knesset [1985] 39(2) P.D. 225, 315 (in Hebrew). An English translation of the judgment may be seen at http://www.elyon1/court.gov.il/files_eng/84/020/000/201/8400002.htm; *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

96. Art. 7A of Basic Law: The Knesset, 1985, S.H. 1155.

97. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] 1949, art. 21(2) (author’s translation)

98. Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 2, ¶ 1.

99. Terrorism Act, 2000, ch. 11, § 3. On the same principle of advancing democratic governance, the Palestinian Authority should have banned Hamas (as well as all other terrorist groups) from running for parliament until it agrees to disarm and amend its covenant in accordance with democratic principles.

The Palestinian experience clearly illustrates the danger of misuse of the democratic principle of majority rule by governments that have not yet properly internalized the substantive aspect, as opposed to the formal aspect, of democratic governance. Substantive democracy is not satisfied only with formal requirements, such as the majority rule and representative governments, but it also demands the preservation of substantive requirements that are meant to assure its internal morality—i.e., protection of human rights, minority rights, and equality. Barak, *supra* note 85, at 38-39 (“Everyone agrees that a democracy requires the rule of the people, which is often effectuated through representatives in a legislative body. Therefore, frequent elections are

The victory of Western democracy at the end of the Second World War made clear not only the importance of eradicating tyrannies but also the imperative to guarantee the capacity of existing democracies to defend themselves against exploitation by subversive factions. After all, the rise of Nazism in Germany took place in a traditionally democratic country that failed to create effective constitutional mechanisms to prevent its transition from a democracy to a dictatorship through democratic means.¹⁰⁰

The democratic nature of a regime is determined not only by the formal decision-making procedures upon which it is based but also by the substantive values that it upholds. In order to prevent the misuse of democratic values, effective oversight mechanisms, such as the exclusion of subversive factions from the political process, ought to be established. In order to ensure the effectiveness and stability of the democratic institutions, as well as of the oversight mechanisms, they ought to be anchored in a formal constitution which enjoys normative supremacy.¹⁰¹

necessary to keep these representatives accountable to their constituents. However, real or substantive democracy, as opposed to formal democracy, is not satisfied merely by these conditions. Democracy has its own internal morality, based on the dignity and equality of all human beings. Thus, in addition to formal requirements, there are also substantive requirements. These are reflected in the supremacy of such underlying democratic values and principles as human dignity, equality, and tolerance. There is no (real) democracy without recognition of basic values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights—rights so essential that they must be insulated from the power of the majority.” (footnotes omitted)).

A substantive democracy does not grant the majority unlimited power but rather balances its power against the other basic values of democracy. Robert Post, *Democracy and Equality*, 603 ANNALS 24, 25 (2006) (“[D]emocracy is a normative idea that refers to substantive political values. . . . Implicit in the idea of democracy are the values that allow us to determine whether in specific circumstances particular decision-making procedures are actually democratic. Governments, for example, do not become democratic merely because they hold elections in which majorities govern. Such elections are currently held in North Korea. To know whether these elections make North Korea democratic requires an inquiry into whether these elections are implemented in a way that serves democratic values. It is a grave mistake to confuse democracy with particular decision-making procedures and to fail to identify the core values that democracy as a form of government seeks to instantiate.”).

It follows that the political process cannot be used as a tool for the majority to promote antidemocratic values such as the negation of fundamental rights, discrimination against racial, ethnic, or religious minorities; the imposition of nondemocratic institutional change; or the imposition of religious laws.

100. Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1361 (2004).

101. Barak, *supra* note 85, at 39 (“To maintain real democracy—and to ensure a delicate balance between its elements—a formal constitution is preferable. To operate effectively, a constitution should enjoy normative supremacy, should not be as easily amendable as a normal statute, and should give judges the power to review the constitutionality of legislation. Without a formal constitution, there is no legal limitation on legislative supremacy, and the supremacy of

Special importance should be given to the scope of freedom of speech within the constitution. Freedom of speech is a central mechanism of accountability in a democratic society, because it allows free dissemination of ideas. Every individual may voice his opinion, contribute to the public discourse, and protest against injustices if he wishes to do so; thus, the right to free speech enhances governmental responsiveness to the will of the public.¹⁰² However, the right to free speech in a democracy is not unlimited. It has to be balanced against other competing interests, such as national security, religious feelings, and a person's reputation.¹⁰³ Shaping the proper balance between the protection of the individual's right to free expression and the security interest in preventing the misuse of this right by terrorists and other subversive elements is not an easy task. On the one hand, the need to protect fundamental human rights does not justify undermining national security in every situation. On the other hand, national security, too, is not a supreme value; the need to ensure it does not always justify violating the constitutional rights of the individual.¹⁰⁴ The outcome of this balance inherently requires the imposition of certain limitations both on the right to free expression and on the state's security interest.

Finding the proper constitutional balance between these conflicting interests is, therefore, one of the most difficult challenges faced by a democracy, since it forces the democracy to make difficult compromises in order to remain faithful to its democratic character. Indeed, established democracies have not always managed to successfully deal with this challenge,¹⁰⁵ and it is all the more difficult for new democracies

human rights can exist only by the grace of the majority's self-restraint. A constitution, however, imposes legal limitations on the legislature and guarantees that human rights are protected not only by the self-restraint of the majority, but also by constitutional control over the majority. Hence the need for a formal constitution." (footnotes omitted)); Susan S. Gibson, *The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT'L L. 1, 8-9 (1998).

102. H.C.J. 73/53 "Kol Ha'am" Co. v. Minister of the Interior [1953] 7(2) P.D. 871, paras. 1-2 (in Hebrew). English translation available at http://elyon1.court.gov.il/files_eng/53/730/000/z01/53000730.z01.htm (last visited Sept. 30, 2007).

103. *Id.* paras. 3-4.

104. GROSS, *supra* note 8, at 255-56.

105. *Id.* at 249 ("The strategic character of the war against terrorism now being waged by the United States and Great Britain is . . . found in the approach taken by the executive authority—the assumption that when facing such a cruel enemy, which violates every rule and consensus, it is sometimes better to err on the side of excessive use of extraordinary measures than to discover too late that too few measures were employed."). In the context of freedom of speech, for example, the United Kingdom responded to the murderous terrorist attacks in London in July 2005 by adopting new counterterrorism legislation that includes, inter alia, the offense of "encouragement of terrorism," which criminalizes any 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

that have no prior tradition of adherence to the rule of law and respect for basic civil and human rights.

As noted, apart from establishing appropriate governmental institutions and oversight mechanisms, democratization also requires cultural and educational campaigns aimed at enhancing the local population's awareness of the values of democracy. In order to prevent extremist elements from advancing nondemocratic notions under the guise of democracy, it is imperative to create awareness not only of the formal but also of the substantive aspects of democracy.¹⁰⁶

IV. CONCLUSION

Exporting the democratic paradigm to countries that traditionally have been governed by nondemocratic regimes may diminish the capacity for development of terrorist elements in those countries. Democratic governance reduces the incentives to join or support terrorist groups due to its responsive nature and its obligation to the preservation of the civilian infrastructure. Hence, the policy to promote democracy ought to be considered an integral part of the war against modern terrorism. Nevertheless, the transition from autocracy to democracy is a complex process. Legally, it requires not only a formal institutional change but also implementation of the substantive democratic values and effective oversight mechanisms that would guarantee the internal

encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism." Terrorism Act 2006, ch. 11, § 1. It is highly doubtful, in my opinion, whether such a vague and sweeping definition reflects a proportional balance between national security and the individual's right to free speech.

106. The participation of Hizbullah in the Lebanese parliamentary elections and the participation of Hamas and several other terrorist groups in the Palestinian parliamentary elections under the guise of the formal democratic principle of majoritarianism demonstrate the danger of practicing only the formal aspect of democracy while abandoning its substantive aspects.

The Iraqi experience also provides a similar example. Following the military intervention which resulted in the overthrow of the dictatorial regime of Saddam Hussein, Iraq was facing the challenge of redesigning its state's institutions. With considerable guidance from the United States and its Coalition allies, Iraq began to form a new democratic governmental infrastructure. Note, *Democracy in Iraq: Representation Through Ratification*, 119 HARV. L. REV. 1201, 1202-03 (2006).

In less than two years, the first democratic national elections were held. *Id.* at 1204. Despite the progress of the nation-building project, it is doubtful whether Iraqi citizens have experienced the positive consequences of the transition, given the fact that thus far, the new regime has been incapable of fulfilling its basic obligation to safeguard their lives and thwart the constant terrorist threats that endanger them. Edward Wong, *Fearful Iraqis Are Avoid Mosques as Attacks Rise*, N.Y. TIMES, Aug. 19, 2006), at A. It is almost impossible to create public awareness of the substantive values of democracy while the current democratic regime cannot restore order and provide a minimum of personal security.

morality of the regime and prevent its exploitation by radical elements. Culturally, the transition requires comprehensive educational and other societal projects to introduce the local population to the benefits of the transition to democracy and to promote assimilation and acceptance of these new values.

If the transition is not done properly, either legally or culturally, there is a danger the formal democratic process will be used to legitimize the formation of a regime that does not maintain the substantive core values of democracy.