

WHEN THE UN ADDRESSES THE “CONDITIONS CONDUCIVE TO TERRORISM,” WHAT HAPPENS TO HUMAN RIGHTS?

C. Cora True-Frost*

2017 MICH. ST. L. REV. 805

ABSTRACT

As terrorist threats continue, the United Nations grapples with the question of what measures governments should adopt to enhance security. This Article is the first to analyze the UN’s involvement in “countering violent extremism programs” (CVE) from a legal academic perspective. Specifically, this Article illuminates a critical question: What is the effect on international human rights law of international-level engagement with CVE?

Preventing or countering violent extremism programs in the United Kingdom force teachers to report signs that students are “vulnerable to radicalization.” In other countries, prosecutions use broad definitions of incitement, raising concerns about freedom of expression, association, and due process. National CVE programs create unique human rights concerns, including criticisms that: violent extremism is a vague term, leading to incomprehensible criteria; Muslims are targeted, and their beliefs are penalized and stigmatized; free speech is suppressed; and extremist tendencies are not reliably identified. Worse, some argue that when social services gather information, they discourage those in need from seeking benefits. Despite these concerns, the UN Secretary-General embraced CVE policies, adopting a “Plan of Action to Prevent Violent Extremism” in December 2015. Just one month later, the UN

* Associate Professor, Syracuse University College of Law. For excellent research assistance, I thank Anna Pinchuk, Sam Cohen, David Katz, and Michelle Futch. Thanks to the generous support of the Andrew Berlin Family Fund at the Institute of National Security and Counterterrorism for a grant to present this Article in different fora. Thanks to Bill Banks, Lauryn Gouldin, Corri Zoli, Keli Perrin, participants at the Southeastern Association of Law Schools Conference, Duke Law School Women in International Law Conference, William and Mary International Law Workshop, University of Georgia Law School Int’l Law Grrls! Conference, and the faculty workshop at Syracuse University College of Law for useful comments on earlier drafts.

High Commissioner for Human Rights called on nations to avoid sacrificing security for human rights.

Embracing CVE will both open and foreclose opportunities to advance international human rights law at the international level. The UN Charter obliges the UN to uphold and promote human rights, including freedom of expression and association. This obligation still holds when the international organization weighs those rights against international and domestic terrorism. By embracing CVE programs, the UN has both limited and expanded its capacity to promote and develop human rights norms. On the one hand, the UN may have curtailed its ability to leverage social stigma against states that violate human rights norms through their CVE programs. This Article addresses an additional concern: The Secretary-General's call for National CVE Action Plans may generate a drive towards uniformity among States, creating a race to the bottom in human rights standards, as well as redirecting important state resources from social services to security. On the other hand, this Article also analyzes some limited ways that the UN's position on CVE programs may promote human-rights-respecting outcomes. This is because the UN's agenda will now offer multiple opportunities for transnational advocacy networks, and other stakeholders to contest CVE programs not only nationally, but also at the international level and through programs within the UN.

This Article fills a gap in existing international law/international relations approaches to norm development by showing how international organizations can stifle rather than merely promote human rights norms at the international level. Given recent news reports that the U.S. President Donald Trump plans to rename CVE programs "Countering Islamic Extremism," specifically targeting Muslim groups, this Article provides timely insight into some concerns of President Trump's proposed program. If the United States changes its programs to "Combating Islamic Extremism," the existing international model of CVE programs would arguably represent a higher baseline than that program, providing human rights advocates leverage in the United States.

TABLE OF CONTENTS

INTRODUCTION	808
I. EMERGENT CVE: ADDING SOFTER CVE TO "HARD" COUNTERTERRORISM APPROACHES	817

A. States' Militaristic and Law Enforcement Counterterrorism Policies and the Move Toward Preventing "Extremism"	822
B. The Ascendancy of Preventive "CVE" Approaches	825
C. Evaluating CVE Programs	828
II. CVE PROGRAMS THROUGH THE LENS OF INTERNATIONAL HUMAN RIGHTS LAW	831
A. The Legal Framework	833
B. Right to Life	836
C. Criminal Law: Incitement	837
D. CVE as an Alternative to Criminal Punishment or Imprisonment	838
E. Preventive CVE—What Exactly Is Violent Extremism Anyway? Definitions, Vagueness, and Privacy	839
F. What of Freedom of Opinion, Expression, and Association?	843
G. Non-Discrimination and Freedom of Religion Norms....	845
H. What of Socioeconomic Rights?	849
III. DILUTION AND DEFERENCE: THE WORRISOME EFFECTS OF THE UN'S EMBRACE OF CVE	851
A. Dilution: Will the UN's Endorsement of CVE Initiatives Invite States to Race to the Bottom?	853
B. Deference and Foreclosing Contestation: "Bureaucratic" Effects of Secretariat Engagement Requiring States to Create National Action Plans and Devote State Resources to CVE.....	855
IV. INTERNATIONAL CONTESTATION AND DISSENT: HOW THE UN'S EMBRACE OF CVE MAY HELP PROMOTE INTERNATIONAL HUMAN RIGHTS LAW	858
A. Setting an Agenda Within the UN and Inviting Contestation from Its Varied Organs, Programs, and Bodies	859
B. How the International-Level Embrace of CVE May Create Opportunities for Advocates to Contest National Level Practice at the International Level and Offer Comparative Lessons for States.....	860
CONCLUSION	862

INTRODUCTION

This Article is the first to focus on the preliminary effects of the United Nations' (UN's) coordinated embrace of countering violent extremism (CVE) programs on security and human rights at the international level. Since 2014, a relatively new and concerted focus on prevention of "violent extremism" has been central to the UN's anti-terror efforts. International law scholars have described the "regulatory" turn in international law,¹ and engaged many of the normative concerns raised by the impacts of internationally coordinated counterterrorism efforts on human rights law.² This Article fills a gap in this literature by analyzing the international, transnational, and correspondingly national move to employing "softer" programs to "prevent" radicalization.

1. Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 322, 324 n.15 (2011) ("Consequently, "regulation" is not being employed here in connection with, as in global administrative law scholarship, a particular form of international lawmaking." See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS. 15, 17 (2005). "[G]lobal administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties."; see also Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 3 (2006) (describing global administrative law as 'the setting and application of rules by bodies that are not legislative or primarily adjudicative in character'). The general idea of regulation used here may be quite similar to the one applied in the domestic context (if we think of that term, broadly speaking, as governmental control of or influence on individual behavior). Yet, because of the particular structure in which international law operates, many of the institutional implications, manifestations, and dynamics of regulation in the national setting are not perfectly translatable into the transnational sphere. That is not to say, certainly, that the lessons of domestic experience or the methodologies and approaches of domestic law scholars do not apply or are not helpful—they do and they are. Rather, it is that the distinctive international architecture must always be taken into account when doing so. For one helpful attempt, among many, on analyzing the distinctive nature of international architecture, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006). See also Kristen E. Boon, *U.N. Sanctions as Regulation*, 15 CHINESE J. INT'L L. 543, 546 (2016).").

2. See generally PETER ROMANIUK, DOES CVE WORK?: LESSONS LEARNED FROM THE GLOBAL EFFORT TO COUNTER VIOLENT EXTREMISM 1 (2015) [hereinafter DOES CVE WORK]; Clive Walker, *The Impact of Contemporary Security Agendas Against Terrorism on the Substantive Criminal Law, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM* 121 (Aniceto Masferrer ed., 2012).

As the international community once again moves beyond the dichotomy of criminal law and armed conflict by endorsing preventive means of countering extremism,³ its resulting quasi-regulatory frameworks trigger implications for human rights law and security. This analysis finds that the UN's endorsement of CVE programs has both opened and foreclosed opportunities to advance international human rights law and security at the national and international levels.⁴

The term "violent extremism" has been winding through the UN system for some time but has only recently come of age. The media, legislators, and policymakers increasingly use the term "violent extremists," or simply "extremists," as synonyms for terrorists.⁵ In 2014, the UN Security Council called on States to address "violent extremism" as a cause of terrorism in Resolution 2178.⁶ Then, in December 2015, the UN Secretary-General broadly endorsed CVE programs in his "Plan of Action to Prevent Violent Extremism" (the Plan of Action).⁷ This Plan of Action unites aspects of the General Assembly's Global Counter-Terrorism Strategy with the Security Council's earlier endorsement of States' use of criminal law and community engagement to prevent "violent extremism."⁸

While this international-level embrace of CVE is relatively recent, at the national level, many States have already implemented various forms of CVE programs.⁹ For example, under the United Kingdom's PREVENT program, to "prevent or counter violent extremism," teachers must now report signs that particular students are "vulnerable to radicalization."¹⁰ In the United States, the Obama

3. See, e.g., Simon Bronitt & Susan Donkin, *Australian Responses to 9/11: New World Legal Hybrids?*, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 223, 224 (Aniceto Masferrer ed., 2012); Walker, *supra* note 2, at 121, 134.

4. A work in progress by the Author more closely examines the national-level impacts of the international-level embrace of CVE programs.

5. The precise boundaries and relationship between violent extremism and terrorism are unclear, as described further in this Note. See *infra* Section II.D.

6. S.C. Res. 2178, ¶ 18 (Sept. 24, 2014).

7. U.N. Secretary-General, *Plan of Action to Prevent Violent Extremism*, ¶ 5, U.N. Doc. A/70/674 (Dec. 24, 2015) [hereinafter Secretary-General Plan of Action to Prevent Violent Extremism].

8. Compare *id.* ¶¶ 5, 7, with G.A. Res. 60/288, U.N. Global Counter-Terrorism Strategy (Sept. 8, 2006), and S.C. Res. 2178, *supra* note 6, ¶ 1. Violent extremism, here, is defined differently than terrorism. *Id.*

9. See *infra* Part I.

10. *Prevent* aims to stop people from becoming terrorists or supporting terrorism, as one prong of a multi-prong national program called Contest. The other

Administration began work on “building bridges” with communities to fight extremism around 2011.¹¹ In pilot cities in the United States, the Federal Bureau of Investigation, the Department of Homeland Security,¹² and the Department of Justice reached out to civil society¹³—including community stakeholders—for assistance

prongs are *Pursue*, which aims to stop terrorist attacks by detecting, prosecuting, and otherwise disrupting those who plot to carry out attacks against the UK or its interests overseas; *Protect* to strengthen protection against a terrorist attack in the UK or against its interests overseas and so reduce their vulnerability; and *Prepare* to mitigate the impact of a terrorist attack where that attack cannot be stopped. DEP’T FOR EDUC., THE PREVENT DUTY: DEPARTMENTAL ADVICE FOR SCHOOL AND CHILDCARE PROVIDERS, 1, 5 (2015) [hereinafter THE PREVENT DUTY], https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/439598/prevent-duty-departmental-advice-v6.pdf [<https://perma.cc/UU84-49ZC>]. The Organization for Security and Co-operation in Europe (OSCE) has adopted a different acronym, VERLT, to describe and distinguish violent extremism. VERLT is violent extremism and radicalization that leads to terrorism. *Youth Engagement to Counter Violent Extremism and Radicalization That Lead to Terrorism*, ORG. FOR SECURITY & CO-OPERATION EUR. (Oct. 23-24, 2012), <http://www.osce.org/atu/103352?download=true> [<https://perma.cc/CED9-QMNF>]. Some of the difficulties with programs like those in Prevent are discussed *infra*.

11. EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1, 2 (Dec. 2011), https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf [<https://perma.cc/XEM7-8LRM>] (“The [United States] Federal Government is focused on three core areas of activity: (1) enhancing engagement with and support to local communities that may be targeted by violent extremists; (2) building government and law enforcement expertise for preventing violent extremism; and (3) countering violent extremist propaganda while promoting our ideals.”). *See id.* at 6 (“Departments and agencies will be responsible for assessing their specific activities in pursuit of [Strategic Implementation Plan] objectives, in coordination with an Assessment Working Group. We will develop a process for identifying gaps, areas of limited progress, resource needs, and any additional factors resulting from new information on the dynamics of radicalization to violence. Our progress will be evaluated and reported annually to the President.”).

12. Roxy Kennedy, *DHS Turning to Communities to Combat Violent Extremism*, HOMELAND SECURITY DIGITAL LIBR. (Nov. 4, 2016), <https://www.hsdl.org/c/dhs-turning-to-communities-to-combat-violent-extremism/> [<https://perma.cc/J9WX-FWZ9>].

13. For purposes of this Article, I borrow Cohen and Arato’s working definition of civil society. Civil society is “a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication.” JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY ix (1994). Civil society is not composed of political organizations and political societies of parties, as these forms of organizations “are directly involved with state power and economic production, which they seek to [] manage.” *Id.*

identifying those most vulnerable to radicalization in order to help them build so-called “resilience.”¹⁴

Such preventive CVE programs may offer the virtue of avoiding the harsh penalties of criminal law or military enforcement, but also raise concerns relating to freedom of religion, opinion, speech, and expression. Yet these preventive CVE programs are increasingly popular as States interpret their obligations to protect populations from terrorism¹⁵ as permitting state intervention, even at the pre-criminal phase in individuals’ behavior or mere beliefs. The Secretary-General’s Plan of Action arguably invites such interpretations by States. It fails to define violent extremism, characterizing it as a “diverse phenomenon, without clear definition,”¹⁶ and a phenomenon that both springs from and enables

14. OFF. PARTNER ENGAGEMENT, PREVENTING VIOLENT EXTREMISM IN SCHOOLS 1 (Jan. 2016), <https://info.publicintelligence.net/FBI-PreventingExtremismSchools.pdf> [<https://perma.cc/9R37-3YRA>]; *Building Community Resilience Minneapolis-St. Paul Pilot Program a Community-Led Local Framework*, U.S. DEP’T OF JUSTICE 5 (2015) [hereinafter *Building Community Resilience*], <https://www.justice.gov/usao-mn/file/642121/download> [<https://perma.cc/CE46-S47A>]; Laura Yuen, *Muslims Fear Anti-Terror Program Could Spy on Their Communities*, MPR NEWS (Jan. 30, 2015), <http://www.mprnews.org/story/2015/01/30/anti-terror-program> [<https://perma.cc/U5ZQ-LAAE>] (“[I]n 2009, FBI headquarters directed Minneapolis and five additional cities to gather intelligence on Somali-Americans under the guise of community outreach, according to an internal document obtained by the Brennan Center through a Freedom of Information Act request. The memo directed the field offices to co-mingle the FBI’s investigative activities with community outreach.”).

15. See generally *Building Community Resilience Minneapolis-St. Paul Pilot Program a Community-Led Local Framework*, U.S. DEP’T OF JUSTICE 5 (2015), <https://www.justice.gov/usao-mn/file/642121/download> [<https://perma.cc/9SBH-Y2RK>] [hereinafter *Building Community Resilience*]; *Building Resilience Against Terrorism*, GOV’T CAN. (2013), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rslnc-gnst-trrrsm/rslnc-gnst-trrrsm-eng.pdf> [<https://perma.cc/F823-TWCN>]; *Countering Violent Extremism*, LIVING SAFE TOGETHER, <https://www.livingsafetogether.gov.au/aboutus/Documents/CVEStrategyFactSheet.pdf> (last visited Jan. 8, 2018) [<https://perma.cc/HAG3-ETGD>]; *The Los Angeles Framework for Countering Violent Extremism*, DEP’T HOMELAND SEC. (2015), <https://www.dhs.gov/sites/default/files/publications/Los%20Angeles%20Framework%20for%20CVE-Full%20Report.pdf> [<https://perma.cc/NP5A-HZEA>]. The definition of terrorism itself remains widely variable and debated. See, e.g., Marcello Di Filippo, *The Definition(s) of Terrorism in International Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 3 (Ben Saul ed., 2014) (discussing various existing international-level definitions and debates about their meaning).

16. See Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 2 (“Definitions of ‘terrorism’ and ‘violent extremism’ are the prerogative of Member States and must be consistent with their obligations under

“conditions conducive to the spread of terrorism.”¹⁷ In the Plan of Action, the Secretary-General makes over seventy broad recommendations directed toward states, regions, and countries at the international level.

The UN High Commissioner for Human Rights has repeatedly emphasized that the global community faces a challenge to continue promoting human rights in the face of security concerns. Normative tension inevitably arises as the UN seeks to balance its rights-respecting obligations, including the duty to protect life, with many States’ goals of curbing international and domestic terrorism. As Professor Scheppele and others have noted, it is challenging for the UN to coordinate anti-terrorism efforts when governance in many States is neither fair nor transparent.¹⁸ Other scholars have shown that since 9/11, even States with “good governance” have created “hybrid” specialized processes and laws for terrorism that effectively widen the grasp of State power and lower protections for defendants.¹⁹ The international law literature has focused on the impacts of the Security Council’s counterterrorism regimes, including its travel and other restrictions applied to curb the foreign-

international law, in particular international human rights law. Just as the General Assembly has taken a practical approach to counter-terrorism through the adoption by consensus of the United Nations Global Counter-Terrorism Strategy, this Plan of Action pursues a practical approach to preventing violent extremism, without venturing to address questions of definition.”)

17. G.A. Res. 60/288, *supra* note 8; Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 5.

18. See, e.g., Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT’L SEC. L. & POL’Y 437, 451 (2010) (“The problem with the rights-violating aspects of the Security Council framework, then, is not with the intentions of the Security Council, but with the terrible quality of governance in many states in the world — and that is not the Security Council’s fault.”).

19. See, e.g., Bronitt & Donkin, *supra* note 3, at 224; Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); Kent Roach, *Sources and Trends in Post 9-11 Anti-Terrorism Laws*, in SECURITY AND HUMAN RIGHTS 227 (Benjamin J. Goold & Liora Lazarus eds., 2007); Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 153 (2010) (arguing that changes in the United States’, United Kingdom’s, and India’s laws and policies raise concerns about the effects of counterterrorism regimes on human rights). For purposes of this Article, “good governance” can be understood as being: participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and committed to following the rule of law. *Good Governance and Human Rights*, U.N. HUMAN RTS. OFF. HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> [https://perma.cc/H8L7-2YY9] (last visited Jan. 8, 2018).

terrorist-fighter phenomenon. However, the literature has not yet assessed the evolving effects of the UN's embrace of preventive and de-radicalization CVE programs on rule of law, security, and human rights, creating a void in international and domestic legal scholarship.

The UN's endorsement of CVE programs affects international human rights law by both opening and foreclosing opportunities for the UN to advance international human rights law at the international level.²⁰ As explained further below, as is true with many counterterror programs, the UN's embrace of CVE programs arguably enables States to curtail certain human rights and risks driving down international-level understandings of the baseline for rights protections.²¹ Although the UN Secretary-General's policy emphasizes the critical role of human rights law in moderating CVE programs, it does not offer further specifics.²² The UN's embrace of CVE may also offer *prima facie* goals of legitimacy to States' problematic CVE programs. Professor Scheppele noted that relatively widespread State compliance with the Security Council's Resolution 1373 counterterrorism regime offered cover to rights-abusing States. In an analogous fashion, States are likely to regard the UN's endorsement of CVE programs as ratifying their own national codifications of "extremism" crimes despite these regimes' potential conflict with their international human rights obligations. This is all the more concerning because whether preventive CVE de-

20. A work in progress by the Author more closely examines the national-level impacts of the international-level embrace of CVE programs.

21. U.N. Secretary General, Note, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 22, 23, U.N. Doc. A/66/310 (Aug. 18, 2011) (stating that States cite their duty to protect citizens as vindicating their focus on CVE). See Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 8 ("United Nations entities, including the Counter-Terrorism Implementation Task Force and the United Nations Counter-Terrorism Centre, the Counter-Terrorism Committee Executive Directorate, the United Nations Development Programme, the Office of the United Nations High Commissioner for Human Rights, the United Nations Educational, Scientific and Cultural Organization, the United Nations Office on Drugs and Crime, the United Nations Alliance of Civilizations, the Department of Peacekeeping Operations of the Secretariat, the Peacebuilding Support Office and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), and my Envoy on Youth, as well as many other members of the United Nations family, have been working on issues relevant to preventing violent extremism.").

22. See, e.g., Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 5.

radicalization programs in fact promote security is at best uncertain,²³ even though their effects on freedom of opinion, expression, and association can certainly be problematic.²⁴ At the same time, from a human rights and security perspective, many of the CVE programs discussed here may be less problematic than many “hard” counterterror tools such as targeted killing, interrogation, preventive detention, surveillance, or the penalties of criminal law.

Indeed, the news about the UN’s embrace of CVE is not entirely negative for human rights norms or security. Some UN entities are contesting problematic aspects of CVE programs and working to hold both the UN and States accountable for respecting rights. This is particularly true of Special Rapporteurs on human rights and human rights bodies staffed by independent experts.²⁵ This analysis suggests that institutional design and membership may influence the willingness and capacity of various bodies to contest norms. The UN’s endorsement of CVE also provides opportunities to develop norms at the international level that may not otherwise be robustly contested at the national level. National-level courts and legislatures vary widely in their willingness—and ability—to respond when the State exercises power, and they are particularly weak when it comes to security threats or members of groups seen as threats to State power.²⁶ Transnational advocacy groups might leverage alleged violations of human rights norms to international fora to remove them from unyielding national-level authorities, thus increasing scrutiny and promoting accountability of state authorities.

Examining the international endorsement of CVE programs thus has important implications for recent theories about the dynamics and interplay of international rule of law with national rule

23. See *infra* Part III; see also Special Rapporteur, Human Rights Council, *Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 36-37, U.N. Doc. A/HRC/31/65 (Feb. 22, 2016); Special Rapporteur, Human Rights Council, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 15, U.N. Doc. A/70/371 (Sept. 18, 2015).

24. See *infra* Part III; see also Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 37; Special Rapporteur A/70/371, *supra* note 23, ¶ 15.

25. See generally *infra* Part II.

26. Compare, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (upholding a law characterizing training on humanitarian law as material support to terrorist organizations), with *Sec’y State for the Home Dep’t v. MB* [2007] UKHL 46 [44] (Eng.) (striking down control orders for individuals suspected of terrorism).

of law.²⁷ The role of international institutions in thwarting— as opposed to promoting—norm compliance is generally undertheorized.²⁸ In this case, the UN advances States’ non-derogable duty to protect lives, while at the same time possibly undermining, for example, its arguably non-derogable duty to protect and promote freedom of opinion and expression. Further study of developments in international-level CVE policy is recommended. As this Article goes to print, the UN Security Council has endorsed a “comprehensive international framework to counter terrorist narratives.”²⁹

Although the issue of the role of the UN in promoting human rights continues to be debated in the international law literature, this Article assumes that the United Nations has a legal obligation not to interfere with the human rights protected by human rights treaties.³⁰

27. See generally MICHAEL ZÜRN ET AL., *RULE OF LAW DYNAMICS IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 5 (Michael Zürn et al. eds., 2012).

28. See *id.* at 12-17.

29. See S.C. Res. 2354, ¶ 1 (May 24, 2017); S.C. Pres. Statement 2016/6 (May 11, 2016); Proposal for Comprehensive International Framework to Counter Terrorist Narratives, transmitted by Letter dated 26 April 2017 from the Chair of the Security Council Comm. Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, ¶ 1, U.N. Doc. S/2017/375 (Apr. 28, 2017).

30. The UN is, of course, not a party to human rights treaties, but various organs or bodies of the UN have an explicit duty to promote human rights, including, for example, the Office of the High Commissioner on Human Rights. In addition, the Secretary-General of the UN has affirmed the importance of promoting human rights to the mission of the UN. The UN Charter affirms human rights multiple times in the preamble and text: “[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small[.]” U.N. Charter pmbl. “The Purposes of the United Nations are . . . [t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion[.]” *Id.* at art. 1, ¶ 3. “The General Assembly shall initiate studies and make recommendations for the purpose of . . . promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.* at art. 13, ¶ 1(b).

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health,

In circumstances such as these, wherein the UN directs States to take steps to prevent radicalization, it should therefore offer States guidance about how to do so without violating human rights standards. The UN advances rights-respecting norms through many of its organs, agencies, and bodies on the one hand. But its endorsement of CVE policies also has offered legitimacy to preventive programs that have, for example, been perceived as disproportionately targeting Muslim communities. As described here, the UN's general endorsement may reduce pressure on States to comply with international human rights norms.³¹

In Part I, this Article first surveys various emerging CVE programs and discusses the programs' related successes and criticisms. Part II takes a preliminary look at the interaction of CVE programs with the basic legal framework of human rights of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³² Part III argues that the UN's overly broad endorsement of preventive CVE programs dilutes international human rights norms and encourages States' deference to the vague and potentially human rights-compromising standards embraced by the UN. Part IV contends that these issues may serve as a valuable counterweight to States' deference to the UN's endorsement of vague norms, notwithstanding dissent within the UN, particularly from non-state,

and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. at art. 55. "The Economic and Social Council may . . . make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." *Id.* at art. 62, ¶ 1, 2.

31. Notwithstanding issues such as United Nations peacekeepers and sexual assault, the scholarly discussion about the accountability of the UN and other international organizations (IOs) has not yet extended so far as to hold IOs accountable for inadvertently lowering human rights standards. *See generally* Int'l Law Comm'n, Draft Articles on the Responsibility of International Organizations, with Commentaries, U.N. Doc. A/66/10 (2011); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 341 (2016) (arguing that "[w]hile partial immunity is justified under certain circumstances, the categorical assertion of absolute U.N. immunity does not survive an assessment of accountability, distributive justice, or economics").

32. *See generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

relatively independent human rights bodies like the Human Rights Committee and Special Rapporteurs. The UN's acceptance of CVE as a complement to hard counterterrorism measures might also provide an important alternative for States, and the UN can offer a valuable forum for transnational advocates challenging particular State implementation of CVE programs as more specific and rights-respecting standards emerge.

I. EMERGENT CVE: ADDING SOFTER CVE TO "HARD" COUNTERTERRORISM APPROACHES

Notwithstanding massive domestic and multilateral security initiatives and the UN's expansive, Security Council-led, post-9/11 counter-terrorism architecture,³³ terrorism today is more diffusely distributed than ever before according to the UN Security Council.³⁴ The precise incidence of terrorism is difficult to establish, as definitions of terrorism remain elusive.³⁵ Still, terrorist violence has certainly persisted and, by some accounts, has even worsened since 9/11.³⁶ One anecdotal report, for example, states that in recent years, some 25,000 individuals from more than one hundred countries are reported to have volunteered to join ISIL in Syria and Iraq (foreign

33. Examples of the UN's massive initiatives include: the UN Counterterrorism Centre; UN Counterterrorism Committee (CTC); UN Counter-Terrorism Implementation Task Force (UN CTITF); the Terrorism Prevention Branch of the UN Office of Drugs and Crime (UNODC); UN Counterterrorism Center (UNCCT); Counterterrorism Committee Executive Directorate (CTED); Global Counterterrorism Task Forum (GCTF); INTERPOL; and Financial Action Task Force of Group of 7, initially set up in 1989. See *United Nations Action to Counter Terrorism*, UNITED NATIONS, <http://www.un.org/en/counterterrorism> [https://perma.cc/WH8S-3CF8] (last visited Jan. 8, 2018) (demonstrating that the CTITF, UNODC, and the UN Counterterrorism Centre are under the General Assembly's mandate, not the Security Council's).

34. S.C. Res. 2178, *supra* note 6, ¶ 2.

35. See generally WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* (2d ed. 2016) (discussing empirical studies showing terrorist incidents have declined globally although the proportion of incidents resulting in death has increased). Cordesman and Jenkins calculated the total number of people killed worldwide by Islamic extremists in the five years after 9/11 in terrorist incidents outside war zones such as Iraq, Afghanistan, etc., as being 200-300 a year. See BRIAN M. JENKINS, *UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES* 179-84 (2006); ANTHONY H. CORDESMAN, *THE CHALLENGE OF BIOLOGICAL TERRORISM* 29-31 (2005).

36. See sources cited *supra* note 35 and accompanying text.

terrorist fighters).³⁷ However, other scholars, including Professors Enders and Sandler, point to empirical studies showing that terrorist incidents have declined globally although the proportion of incidents resulting in death have increased.³⁸

Yet since 9/11, the UN has conducted unprecedented, coordinated counterterrorism efforts. Indeed, for nearly two decades now, the UN's human rights bodies have been grappling with the effects of UN Security Council-led counterterrorism policies and States' policies, such as terrorist financing regulations, drone strikes, secret detentions and evidence,³⁹ electronic surveillance, and rendition—and now, CVE programs. This Part describes the array of UN approaches used in counter-terrorism with a particular focus on preventive CVE programs.

Faced with the limitations of ineffective, traditional “hard” security tools,⁴⁰ it is unsurprising that international “holistic,” prevention-oriented⁴¹ approaches to security, such as CVE programs, have emerged.⁴² States are increasingly engaging civil society to help

37. Ashley Kirk, *Iraq and Syria: How Many Foreign Fighters Are Fighting for ISIL?*, THE TELEGRAPH (Mar. 24, 2016, 3:45 PM), <http://www.telegraph.co.uk/news/2016/03/29/iraq-and-syria-how-many-foreign-fighters-are-fighting-for-isil/> (last visited Jan. 15, 2018); A foreign terrorist fighter may be considered a violent extremist if intercepted by the State before he succeeds in traveling to the battlefield. See U.S. HOMELAND SEC. FINAL REPORT OF THE TASK FORCE ON COMBATING TERRORISTS AND FOREIGN FIGHTER TRAVEL (2015), <https://homeland.house.gov/wp-content/uploads/2015/09/TaskForceFinalReport.pdf> [<https://perma.cc/KUM4-W9K7>] (last visited at Jan. 15, 2018).

38. See sources cited *supra* note 35 and accompanying text.

39. See, e.g., Kent Roach, *Secret Evidence and Its Alternatives*, in 14 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 179, 179 (Aniceto Masferrer ed., 2012).

40. S.C. Pres. Statement 2010/19, at 2 (Sept. 27, 2010) (“The Security Council *recognizes* that terrorism will not be defeated by military force . . . and *underlines* the need to address the conditions conducive to the spread of terrorism, including, but not limited to, the need to strengthen efforts for the successful prevention and peaceful resolution of prolonged conflicts, and the need to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance and inclusiveness.”). Terrorism continues, despite States’ many arrests, deportations, trials, indefinite detention, heightened security measures, and even the use of torture.

41. Although CVE policies were first conceptualized around 2004, the concept of prevention of harm has a much longer pedigree in law. In a separate work in progress, I am exploring the connections between the human security paradigm and CVE policies.

42. It is beyond the scope of this Article to fully develop the multiple ways that the Realpolitik of the war against terror has failed to stop terrorism. On many accounts, however, the U.S.-led massive mobilization of resources to enhance

identify, engage, and preempt “radical” beliefs and pre-criminal behavior, loosely termed “violent extremism.”⁴³ Before the UN broadly endorsed CVE programs, States implemented CVE programs as a supplement to their traditional programs.⁴⁴ For example, “Prevent” is a part of the United Kingdom’s “Contest” program.⁴⁵ Prevent builds on local partnerships⁴⁶ to “safeguard[] and promot[e] the welfare of children in the[] local area,” which takes place under Local Safeguarding Children Boards (LSCBs).⁴⁷ According to the British government,

There is no single way of identifying an individual who is likely to be susceptible to a terrorist ideology. As with managing other safeguarding risks, staff should be alert to changes in children’s behaviour which could indicate that they may be in need of help or protection. Children at risk of radicalisation may display different signs or seek to hide their views.⁴⁸

All young children are the audience of this component of the Prevent program. Regardless of the lack of specificity in warning signs, “the statutory guidance refers to the importance of Prevent awareness training to equip staff to identify children at risk of being drawn into terrorism and to challenge extremist ideas. The [United Kingdom’s] Home Office developed a core training product for this purpose—Workshop to Raise Awareness of Prevent (WRAP).”⁴⁹

CVE programs such as this one, sometimes also termed “preventing violent extremism” programs, are animated by States’ concerns that ideology is a threat to security. With its vague boundaries of fields of practice,⁵⁰ CVE “has emerged rapidly in

security has exacerbated tensions with many States of the non-aligned movement, and States where development is the primary concern. See Jean-Marie Guehenno, *10 Conflicts to Watch in 2017*, FOREIGN POL’Y (Jan. 5, 2017), <http://foreignpolicy.com/2017/01/05/10-conflicts-to-watch-in-2017/> [https://perma.cc/UDV8-43XG].

43. See Mareike Schomerus & Sherine El Taraboulsi-McCarthy, *Countering Violent Extremism*, GSDRC, <http://www.gsdr.org/wp-content/uploads/2017/03/CVE.pdf> [https://perma.cc/5LEW-YD34] (last visited Jan. 8, 2018).

44. The Duty to Prevent, for example, predates the Secretary-General’s Action Plan on Countering Violent Extremism. Compare THE PREVENT DUTY, *supra* note 10, with Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7.

45. See THE PREVENT DUTY, *supra* note 10, at 3.

46. *Id.* at 7.

47. *Id.*

48. *Id.* at 6.

49. *Id.* at 7.

50. DOES CVE WORK, *supra* note 2, at 33.

recent years and represents the most significant development in counter-terrorism over that time.”⁵¹ Violent extremism has been defined in various ways at the national level,⁵² but all definitions represent concepts broader than the concept of terrorism.⁵³

We might understand CVE programs through their goals. They may target either acts or beliefs: on the one hand, cognitive radicalization is defined as the possession of extremist beliefs or feelings, or on the other, behavioral radicalization is defined as the promotion of violent acts.⁵⁴ Or CVE programs could be analyzed according to the public policy underlying the program. For example, at the national level, CVE prevention programs have targeted online fora, as well as foreign policy and development work.⁵⁵ They might also be integrated into domestic social services, including “funding, research and other support for youth programming and mentoring,” and expanded employment opportunities.⁵⁶ CVE programs might target various combinations of cognitive or behavioral “ills” at the micro-, meso-, and universal-levels.

51. *Id.* at v.

52. Special Rapporteur, *supra* note 23, ¶ 4; *see also* Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment No. 34].

53. The definition of terrorism itself remains widely variable and debated. *See, e.g.*, Di Filippo, *supra* note 15, at 3 (discussing various existing international-level definitions and debates about their meaning).

54. DOES CVE WORK, *supra* note 2, at 8.

55. *Id.* at 33.

56. *See, e.g.*, *Building Community Resilience*, *supra* note 15, at 5 (“There will be two intervention models developed, one working within the school systems and one working within the community. Both will be community-led. The school model will expand a current model within connects youth workers from the community, bridging the gap between youth, their parents and the school system. These workers will spend time in the lunch-room and in non-classroom settings, building relationships and trust at school. They will provide connections and continuity during school and after for both parents and the students. The second intervention model is based on community volunteers, with mothers, community organizations, religious leaders and mental health professionals working directly with families before law enforcement is ever involved.”).

Table 1: A Spectrum of Counter-Terrorism and Countering Violent Extremism Initiatives

"Hard," Approaches to Terrorism	Criminal Law	Rehabilitation	Reintegration	Partnering With Civil Society	Generalized Focus on "Conditions Conducive"
Military, Intelligence sharing, armed conflict, target killings	Detention Punishment	"Reprogramming" Alternative to Incarceration	Mentoring, Redirecting	Community Policing and networks, Security Force Training : Engaging in Community Debate, State- ordained community leaders lead Informal "reprogramming"	Investing in infrastructure and social justice programs to demonstrate state's good will towards "vulnerable communities," without reciprocal information flow

CVE programs overlap many different domains. In various ways, with different levels of intervention, all of these programs seek to disrupt the so-called “radicalization process.” As a basic tool for distinguishing between types of CVE programs, Table 1 shows both the specific foci of CVE programs as well as applications of these programs.⁵⁷ For example, under “rehabilitative” CVE programs are programs offering “reprogramming programs” as an alternative to criminal law detention and punishment in select “violent extremist” cases. In practice, boundaries between CVE programs are not always as clear. As Table 1 indicates, they may incorporate any and all of these foci and applications, select aspects, or just one.

Moving from “rehabilitation” in Table 1 to the right are those CVE programs with a focus on “reintegration,” “prevention,” “partnering with civil society,” and “on conditions conducive to terrorism.” On this move to the right, these programs involve governments’ use of gradually soft(er) power, or non-coercive means, to dissuade often increasingly larger groups of people from using violence. CVE programs generally have three components: engagement, prevention, and intervention.⁵⁸

CVE programs can be analyzed from different perspectives. For example, one analytic approach would focus on the level of society at which the CVE program is directed. Consistent with the prevention terminology of criminological or public health

57. The Author is grateful to Corri Zoli for sharing this table.

58. See *id.* at 4.

approaches, a particular CVE intervention might focus on the “universal” level, or in other words be aimed at the whole population; programs at a “secondary” level would only be directed to at-risk groups; and those at a “tertiary” or “indicative” level would only engage those individuals determined to be high-risk.⁵⁹

A. States’ Militaristic and Law Enforcement Counterterrorism Policies and the Move Toward Preventing “Extremism”

As elaborated in Part II, the programs that are particularly concerning are those “secondary” or “meso-level” preventive CVE programs that target pre-criminal beliefs or behavior.⁶⁰ Yet these “softer” CVE approaches may also be more politically acceptable to a wider array of States because they embrace the General Assembly’s focus on prevention of terrorism in addition to the Security Council’s focus on “hard security” to eradicate terrorism. Over the past decade and a half, Non-aligned Movement States in the General Assembly and various civil society groups have invited this mix of development and security goals.⁶¹

States working in the international, transnational, and national spheres have gradually embraced not only the extensive counterterrorism architecture, but also CVE’s preventive focus, which overlaps with the General Assembly’s Global Counterterrorism Strategy pillar addressing the “conditions conducive to the spread of terrorism.”⁶² The General Assembly’s⁶³ and the UN Security Council’s responses to—and prioritization of—terrorism historically have different points of emphasis.

59. DOES CVE WORK, *supra* note 2, at 9, 27-29. Analogously, some policy experts speak of “macro-, meso- and micro-level” foci for CVE approaches. *Id.*

60. See *infra* Part II.

61. This point is further developed in a work in progress by the Author. See C. Cora True-Frost, *Civil Society, Freedom of Opinion and Expression, and the Conditions Conducive to Terrorism* (Nov. 8, 2017) (unpublished manuscript) (on file with author).

62. See G.A. Res. 60/288, *supra* note 8.

63. Of the sixteen existing international legal conventions/declarations pertaining to terrorism, the General Assembly is responsible for six: International Protected Persons Convention 1973; Hostages Convention 1979; Terrorist Bombing Convention 1997 (entered into force May 2001); Terrorist Financing Convention; Nuclear Terrorism Convention; and Comprehensive Convention on International Terrorism.

Since 2001, the UN has had a central role in coordinating counterterrorism responses.⁶⁴ Over the past decade and a half, the UN Security Council, often supported by the Secretariat,⁶⁵ has led the development of a significant and expansive security architecture within the UN, at the transnational level, and at the national level.⁶⁶ In 2001, just over two weeks after the 9/11 attacks, the Security Council unanimously established the Counter-Terrorism Committee (CTC) through resolution 1373.⁶⁷ The United States pressed the resolution,⁶⁸ which broadened how the Security Council interprets its

64. See Scheppele, *supra* note 18, at 439. See generally G.A. Res. 60/288, *supra* note 8 (calling on member states to adopt international cooperation); James Cockayne, *Challenges in United Nations Counterterrorism Coordination*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 666, 667 (Ben Saul ed., 2014).

65. “The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” U.N. Charter art. 99. “In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization.” *Id.* at art. 100. The Secretary-General of the U.N. is appointed by the General Assembly on the recommendation of the Security Council, and there is no established procedure for removing the Secretary-General. Compare Rome Statute of the International Criminal Court art. 46(2), July 17, 1998, 2187 U.N.T.S. 90, with U.N. Charter art. 97.

66. See *United Nations Office of Counter-Terrorism*, UNITED NATIONS, <http://www.un.org/en/counterterrorism/overview.shtml> [https://perma.cc/3LVM-B7XB] (last visited Jan. 8, 2018). This security architecture includes: the UN Counter-terrorism Centre; UN Counterterrorism Committee (CTC); UN Counter-Terrorism Implementation Task Force (UN CTITF); the Terrorism Prevention Branch of the UN Office of Drugs and Crime (UNODC); UN Counterterrorism Center (UNCCT); Counterterrorism Committee Executive Directorate (CTED); Global Counterterrorism Task Forum (GCTF); INTERPOL; and Financial Action Task Force of Group of 7, initially set up in 1989. *Id.* For examination of the challenges of coordination of these entities, see Cockayne, *supra* note 64, at 666 (describing the difficulties in cooperation within the UN as in part a “normative” struggle over what “counter-terrorism” should mean in international society).

67. S.C. Res. 1373, ¶ 6 (Sept. 28, 2001). The Chapter VII resolution establishes the CTC, a committee of the whole, with all fifteen sitting council members monitoring States’ implementation of the resolution. *Id.* See also C.S.R. Murthy, *The U.N. Counter-Terrorism Committee: An Institutional Analysis*, FRIEDRICH EBERT STIFTUNG (Sept. 2007), <http://library.fes.de/pdf-files/iez/04876.pdf> [https://perma.cc/5JTD-YJ9R].

68. José E. Alvarez, *The Security Council’s War on Terrorism: Problems and Policy Options*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 119, 119; Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175, 187 (2005). For example, the Council created the 1267 list that allowed for freezing of individual assets and travel.

international peace and security mandates in ways previously unimaginable.⁶⁹ Not all General Assembly States supported the precise contours of the now international, Security Council-led “war against terror.”⁷⁰ In particular, Non-aligned Movement States in the General Assembly, in particular, noted other global concerns, including many that were later labeled as “conditions conducive to the spread of terrorism.”⁷¹

In 2004, the Security Council established the Counterterrorism Committee Executive Directorate (CTED) to further assist the work of its CTC and to strengthen States’ capacity to combat terrorism.⁷² In 2005, partly responding to concerns about the Security Council’s actions, the forty-seven-Member-State-strong UN Human Rights Council created a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which issues reports on various state practices, including CVE programs.⁷³ CTED assesses States’ compliance with Resolution 1373.⁷⁴

Despite—or perhaps because of—many States’ resistance to UN Security Council-led counter-terrorism initiatives from 2005 to 2006, the General Assembly⁷⁵ negotiated and adopted the United Nations Global Counter-Terrorism Strategy.⁷⁶ This strategy is composed of four pillars of action: The first, and central to this analysis, is “to address the conditions conducive to the spread of

69. See José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 901-04 (2002).

70. See Cockayne, *supra* note 64, at 669.

71. G.A. Res. 60/288, *supra* note 8, at 2.

72. S.C. Res. 1535, ¶ 2 (Mar. 26, 2004).

73. Other related special procedures include a Special Rapporteur on torture and execution, established on March 13, 1985 by the Commission on Human Rights. G.A. on Status of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment on Its Fortieth Session, U.N. Doc. A/40/128, at 242 (Dec. 13, 1985); G.A. Res. 1985/33, ¶ 1 (Mar. 13, 1985); Special Rapporteur, Human Rights Council, *Rep. on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57, at 3 (Jan. 5, 2016).

74. S.C. Res. 1535, *supra* note 72, ¶ 2.

75. The General Assembly enjoys universal membership and a broad mandate, but lacks the power to bind under the UN Charter. U.N. Charter art. 10. Article 13(1) provides that “[t]he General Assembly shall initiate studies and make recommendations for the purpose of: (a) promoting international co-operation in the political field.” *Id.* at art. 13, ¶ 1. In 1947, the General Assembly established the International Law Commission, ILC, comprised of thirty-four members elected by GA for five-year terms.

76. See *supra* note 61 and accompanying text.

terrorism”; the second is to “prevent and combat terrorism”; the third is to “build States’ capacity to prevent and combat terrorism and to strengthen the role of the UN System in this regard”; and the fourth pillar focuses on “ensur[ing] respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.”⁷⁷

B. The Ascendancy of Preventive “CVE” Approaches

From 2009 to 2013, UN counterterrorism efforts continued, with an increasing focus on prevention.⁷⁸ In 2014, the UN Security Council made CVE a legal obligation for States. Daunted by the continued, scattered terrorist attacks in Europe and the United States, and perhaps encouraged by broad State compliance with its 1373-regime, the Security Council directed states to address “the

77. G.A. Res. 60/288, *supra* note 8, at 4-9. In 2005, the UN Secretary-General established the Counter-Terrorism Implementation Task Force (CTITF), which includes thirty-one UN entities, to coordinate implementation of the General Assembly’s Strategy. U.N. Charter art. 10, 13, ¶ 1. The CTITF’s human rights working group produced two reference guides for Member States: one on stopping and searching persons and one on security infrastructure. See UNITED NATIONS OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS, BASIC HUMAN RIGHTS REFERENCE GUIDE: THE STOPPING AND SEARCHING OF PERSONS 1 (2d ed. 2014). In 2005, the UN Secretary-General created the oft-overlooked, yet salient, UN Alliance of Civilizations to address the roots of polarization between civilizations and recommend action. This high-level group of experts explores the roots of polarization between societies and cultures today and works to recommend a practical program of action to address this issue. There are 145 members to the UN Alliance of Civilizations. *High Representative*, UNITED NATIONS ALLIANCE CIVILIZATIONS, <https://www.unaoc.org/who-we-are/high-representative/> [<https://perma.cc/SF97-SQ9S>] (last visited Jan. 8, 2018); *History*, UNITED NATIONS ALLIANCE CIVILIZATIONS, <https://www.unaoc.org/who-we-are/history/> [<https://perma.cc/6V7E-V23X>] (last visited Jan. 8, 2017); *Who We Are*, UNITED NATIONS ALLIANCE CIVILIZATIONS, <https://www.unaoc.org/who-we-are/> [<https://perma.cc/8LRK-SSDF>] (last visited Jan. 8, 2018). In December 2009, the General Assembly created a CTITF Secretariat. G.A. Res. 64/235 (Jan. 14, 2010). The Office failed to effectively convene the CTITF, and eventually the UN Secretariat established the UN Centre on Counter-Terrorism (UN CCT) with \$10 million from the Saudi Arabian government. See Cockayne, *supra* note 64, at 673. The UN CCT would focus on the “prevention” piece of the General Assembly’s Strategy. *Id.* CTITF, UN Office on Drugs and Crime, UNCCT and CTED all facilitate technical assistance to Member States in implementing the UN Global Counter-Terrorism Strategy. See S.C. Res. 2178, *supra* note 6, at 3.

78. See Cockayne, *supra* note 64, at 667.

conditions conducive to . . . terrorism.”⁷⁹ SC Resolution 2178 invokes Chapter VII and orders States to embark on a societal approach to “countering violent extremism.”⁸⁰ In the same resolution, the Security Council also deems “extremism” to be among these “conditions conducive to terrorism.”⁸¹

The UN Security Council obligates States to promote CVE initiatives, and the network of United Nations organs also actively promotes the Council’s CVE agenda, which is, in turn, closely related to the “Prevent” prong of the General Assembly’s Global Counterterrorism Strategy.⁸² In General Assembly Resolution 68/127 (2014), lamenting the many lives that violent extremism (as contrasted to terrorism) had claimed, the General Assembly joined the call to States to fight violent extremism while respecting human rights.⁸³ As elaborated further in Part III below, other state-based organs and bodies, as well as the agencies of the UN, are mostly following the Security Council and the Secretary-General’s lead,

79. S.C. Res. 2178, *supra* note 6, at 2 (“*Recognizing also that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and underlining the need to address the conditions conducive to the spread of terrorism.*”).

80. *Id.*

81. *Id.* ¶ 16 (“*Encourages Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion.*”) (emphasis added). The Council makes this stipulation although empirical studies are inconclusive about what characterizes the path to extremism. The Council apparently found that although the origins of extremism are unclear, the relationship between an undefined “violent extremis[m]” and terrorism is clear. *See, e.g.*, FAIZA PATEL, RETHINKING RADICALIZATION 8 (Brennan Ctr. for Justice ed., 2011). The Resolution also

Calls upon all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by *preventing the radicalization to terrorism* and recruitment of foreign terrorist fighters . . . and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.

S.C. Res. 2178, *supra* note 6, ¶ 4 (emphasis added); *see also id.* ¶¶ 15-19.

81. CTITF, *Plan of Action to Prevent Violent Extremism*, U.N. PRESS RELEASE, <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism> [<https://perma.cc/LK2E-62GD>] (last visited Jan. 8, 2018).

83. G.A. Res. 68/127, ¶¶ 4, 10 (Feb. 20, 2014).

including the Human Rights Council.⁸⁴ In 2015, the Secretary-General and the High Representative for the Alliance of Civilizations were very active in promoting CVE approaches before the Secretary-General's Action Plan was published.⁸⁵

According to the Secretary-General, "The spread of violent extremism makes preventive efforts all the more relevant."⁸⁶ The Secretary-General's Plan of Action attempts to "reinvigorat[e] the universal core values of the international community, based on the Charter of the United Nations and the Universal Declaration of Human Rights, and to present concrete proposals on how the United Nations system and Member States [can] best approach the challenge of violent extremism leading to terrorism."⁸⁷

While the UN is considered the "primary catalyst" for multilateral action on CVE,⁸⁸ there are many other multilateral and private groups and fora also pursuing these programs. Frustrated by the difficulties of UN negotiations, a number of multi-state entities and private organizations have formed to generate and promote counterterrorism and CVE programs.⁸⁹ To name just one, the Global Counterterrorism Forum⁹⁰ supports and catalyzes implementation of

84. See *infra* Part III; see also Human Rights Council Res. 30/15, U.N. Doc A/HRC/RES/30/15, at 3 (Oct. 12, 2015).

85. For example, it convened a high-level thematic debate with religious leaders to promote mutual understanding. *Member States and Faith Leaders Gather at a High-Level Thematic Debate to Discuss "Promoting Tolerance and Reconciliation, Fostering Peaceful, Inclusive Societies and Countering Violent Extremism" on 21-22 April, 2015*, UNAOC (Apr. 16, 2015), <https://www.unaoc.org/2015/04/member-states-and-faith-leaders-gather-at-a-high-level-thematic-debate-to-discuss-promoting-tolerance-and-reconciliation-fostering-peaceful-inclusive-societies-and-countering-violent-extrem/> [<https://perma.cc/B4VY-Y35N>].

86. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 6.

87. Rep. of the Office of the United Nations High Comm'r, *Panel Discussion on the Effects of Terrorism on the Enjoyment by All Persons of Human Rights and Fundamental Freedoms*, ¶ 18, U.N. Doc. A/HRC/30/64 (Sept. 15, 2015).

88. Naz Modirzadeh, *If It's Broke, Don't Make It Worse: A Critique of the U.N. Secretary-General's Plan of Action to Prevent Violent Extremism*, LAWFARE (Jan. 23, 2015), <https://www.lawfareblog.com/if-its-broke-dont-make-it-worse-critique-un-secretary-generals-plan-action-prevent-violent-extremism> [<https://perma.cc/5VZY-WMKL>].

89. See generally *Background and Mission*, GLOBAL COUNTERTERRORISM F., <https://www.thegctf.org/About-us/Background-and-Mission> [<https://perma.cc/T2J6-JSF5>] (last visited Jan. 8, 2018).

90. The Global Counter-Terrorism Forum was launched on September 22, 2011. See *Background and Mission*, *supra* note 89. The thirty founding members

the General Assembly's Global Counterterrorism Strategy.⁹¹ It also seeks to promote synergy with other multilateral and private coalitions like the Global Community Engagement and Resilience Fund.⁹² In addition, many States have hosted multilateral summits on CVE, including The White House Summit on Countering Violent Extremism and The Leaders' Summit to Counter ISIL and Violent Extremism.⁹³

C. Evaluating CVE Programs

Even as the Secretary-General calls on Member States to develop national action plans to implement comprehensive programs to counter violent extremism,⁹⁴ however, scholars and human rights organizations in various Member States have raised significant

include (but are not limited to) the permanent members of the Security Council as well as Canada, Australia, Germany, Japan, the European Union, and a handful of nations in the Middle East. *Members and Partners*, GLOBAL COUNTERTERRORISM F., <https://www.thegctf.org/About-us/Members-and-partners> [<https://perma.cc/H8EX-AT45>] (last visited Jan. 8, 2018).

91. S.C. Res. 2178 mentions the GCTF and its set of good practices. *See* S.C. Res. 2178, *supra* note 6, at 3. The Global Counter-Terrorism Strategy was reviewed in June 2016. U.N. Secretary-General, *Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy*, U.N. Doc. A/70/826 (Apr. 12, 2016).

92. *Partners and Outreach*, GLOBAL COUNTERTERRORISM F., <https://www.thegctf.org/About-us/Partners-and-Outreach> [<https://perma.cc/VJQ2-HT6S>] (last visited Jan. 8, 2018). Other partners include Hedeyah and the International Institute for Justice and the Rule of Law (IIJ). *See Background and Mission*, *supra* note 89.

93. *See* Human Rights Council on Human Rights and Preventing and Countering Violent Extremism, 30/3, U.N. Doc. A/HRC/30/L.25/Rev.1, at 2 (Oct. 1, 2015) [hereinafter Human Rights and Preventing and Countering Violent Extremism]; *FACT SHEET: Leaders' Summit to Counter ISIL and Violent Extremism* (Sept. 29, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/29/fact-sheet-leaders-summit-counter-isil-and-violent-extremism> [<https://perma.cc/T58J-CND2>]; *FACT SHEET: The White House Summit on Countering Violent Extremism* (Feb. 18, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism> [<https://perma.cc/M9GX-K2SJ>]. Saudi Arabia and the U.S. have been major financial sponsors of CVE at both multilateral and international levels. *See, e.g., Contributions*, U.N. COUNTER-TERRORISM CTR., <https://www.un.org/counterterrorism/ctitf/en/uncct/contributions> [<https://perma.cc/3ALS-7E6X>] (last visited Jan. 8, 2018) (“[T]he Kingdom of Saudi Arabia donated an additional USD 100 million to help finance the work of the UNCT.”).

94. *See infra* Part III.

concerns about CVE approaches.⁹⁵ Policy analysts predict, and other evidence indicates, that these CVE programs will continue to grow in the future, although they are expensive and their effectiveness is still inconclusive.⁹⁶

One empirical and foundational issue with CVE programs is that social scientists and policy analysts still debate what the conditions conducive to terrorism actually are. The impacts of CVE programs on individual rights at the national level have been hotly debated in many States.⁹⁷ The empirical bases for these programs remain elusive. How exactly does “good governance” prevent “radicalization”?⁹⁸ What relative role, if any, do lack of development, Islamist ideology, lack of economic opportunity, or social alienation play in “extremism” is, at best, still unclear.⁹⁹ At the national and international levels, other complaints center around the lack of clarity between and among agencies about what the exact goals of CVE are, as well as which of their programs qualify as CVE.¹⁰⁰

Related, and at a more applied level, some scholars and policy analysts argue that we do not understand what risk factors increase an individual’s likelihood of ascribing to violent extremist ideologies.¹⁰¹ For example, USAID’s 2011 policy on “The Development Response to Violent Extremism,” divided factors into “push” and “pull” factors.¹⁰² Push factors describe those institutional

95. See DOES CVE WORK, *supra* note 2, at 39 (describing inevitable uptick of CVE plans).

96. DIDIER BIGO ET AL., PREVENTING AND COUNTERING YOUTH RADICALISATION IN THE EU, 32 (2014) (“Empirical studies show that broadening the scope of ‘soft’ counter-radicalisation measures to what is considered traditionally community cohesion work . . . is detrimental to both objectives of countering radicalization and fostering community cohesion.”). It is beyond the scope of this Article to provide a detailed analysis of the effectiveness of existing CVE programs. At any rate, the literature is not especially robust. See, e.g., DOES CVE WORK, *supra* note 2; Laurie Goodstein, *F.B.I. Tool to Identify Extremists Is Criticized*, N.Y. TIMES (Nov. 1, 2015), www.nytimes.com/2015/11/02/us/fbi-tool-to-identify-extremists-is-criticized.html?_r=0 [<https://perma.cc/9XKZ-C4R9>].

97. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶¶ 24-29.

98. See Modirzadeh, *supra* note 88.

99. See generally Faiza Patel & Meghan Koushik, *Countering Violent Extremism*, BRENNAN CTR. FOR JUST. (2017), https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf [<https://perma.cc/UA59-LVS8>].

100. See, e.g., DOES CVE WORK, *supra* note 2, at 32 (discussing confusion about what counts as a CVE program during an audit of USAID services).

101. See generally Patel & Koushik, *supra* note 99.

102. See Schomerus & Taraboulsi-McCarthy, *supra* note 43, at 9.

or societal failures—real or perceived—that lead individuals to become vulnerable to violent extremism.¹⁰³ Pull factors are said to explain how violent extremists are able to attract new adherents, but the distinction between these two categories is not particularly clear.¹⁰⁴

More fundamentally, and as elaborated further in Part III below, over the last ten years, CVE programs have sparked concerns about their impact on interactions between governments and civil society¹⁰⁵ and the scale of these programs, as well as the backlash they have created. For example, one concern is that vulnerable minorities will be disincentivized from accessing necessary social services with mandated or even suggested reporting, like those created by some CVE programs like the UK's Prevent.¹⁰⁶

Numerous scholars have remarked on a central concern raised by the UN Security Council's Resolution 1373-inspired counterterrorism initiatives: the absence of a precise definition of terrorism.¹⁰⁷ As elaborated further below, the same concern is present in the case of the UN's endorsement of programs countering violent extremism: Violent extremism is not defined.¹⁰⁸ Regardless of the many criticisms and questionable efficacy of these programs,¹⁰⁹ policy analysts and politicians believe that such programs will

103. *Id.*

104. *Id.*

105. This is the subject of a work in progress by the Author. See C. Cora True-Frost, *Civil Society, Freedom of Opinion and Expression, and the Conditions Conducive to Terrorism* (Nov. 8, 2017) (unpublished manuscript) (on file with author).

106. Letter from ACLU et al., to The Honorable Lisa O. Monaco, Assistant to the President for Homeland Sec. & Deputy Nat'l Sec. Adviser (Dec. 18, 2017), https://www.aclu.org/files/assets/141218_cve_coalition_letter_2.pdf [<https://perma.cc/BS8A-ZFJF>]; *Countering Violent Extremism: Myths and Fact*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf> [<https://perma.cc/K8WL-VGGV>] (last visited Jan. 8, 2018). See, e.g., THE PREVENT DUTY, *supra* note 10.

107. See, e.g., Ben Saul, *Civilizing the Exception: Universally Defining Terrorism*, in *POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM* 85 (Aniceto Masferrer ed., 2012); Walker, *supra* note 2, at 134.

108. See generally Owen Frazer & Christian Nünlist, *The Concept of Countering Violent Extremism*, in 183 CTR. FOR SECURITY STUD. (CSS), ETH ZURICH 1, 2 (Christian Nünlist ed., Dec. 2015).

109. Joint Written Statement by NGOs on Human Rights Concerns of CVE Initiatives to the Dep't of Justice (Feb. 4, 2016) (on file with author).

continue to grow and are on the “uptick” at the local, regional, national, international levels.¹¹⁰

II. CVE PROGRAMS THROUGH THE LENS OF INTERNATIONAL HUMAN RIGHTS LAW

“The founders of the United Nations believed in the power of our shared principles, purposes and values. Member States are obliged to adapt their actions to new realities without reneging on our common commitments.”¹¹¹

Both the Secretary-General’s Plan of Action and Security Council Resolution 2178 generally direct States to undertake CVE programs with respect for fundamental human rights.¹¹² For example, the Plan of Action on CVE, “recognize[s] that the protection of human rights is crucial to achieving the goal of effectively preventing and countering violent extremism.”¹¹³ Taken at face value, it might appear, then, that CVE and human rights are easy companions, perhaps even in a symbiotic relationship with each other. Indeed, the UN views promoting human rights as a preventative mechanism against violent extremism: “While there can be no excuse or justification for violent extremism, abuses and violations of human rights may contribute to creating an environment in which people, especially youth, are vulnerable to radicalization that leads to violent extremism and recruitment by violent extremists and terrorists.”¹¹⁴

But closer inspection belies such an easy inference. Just a month after the launch of the Plan of Action, the High Commissioner for Human Rights said the central challenge for human rights in 2016 was for States to remain committed to advancing human rights, even

110. See, e.g., Dep’t of State & USAID, *Joint Strategy on Countering Violent Extremism*, USAID, 5 (May 2016), http://pdf.usaid.gov/pdf_docs/PBAAE503.pdf [<https://perma.cc/ET3Z-6RJN>] [hereinafter *Joint Strategy on CVE*]; see also Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7.

111. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 11.

112. See *id.* ¶ 57; S.C. Res. 2178, *supra* note 6, ¶ 11.

113. Human Rights and Preventing and Countering Violent Extremism, *supra* note 93, at 2 (“States’ international obligations to promote and protect human rights while preventing and countering violent extremism.”).

114. *Id.*

as they work to promote security.¹¹⁵ By 2017, the global human rights situation had declined so precipitously that the High Commissioner for Human Rights opened the Human Rights Council session in February 2017, lamenting the deeply concerning trend towards disregard by States for human rights.¹¹⁶

As a practical matter, embracing preventive CVE programs, even with many caveats about respecting human rights, empowers States to intervene early and often in individuals' lives, in many fora, and often under rather murky terms. International human rights law, which constrains the use of State power at the domestic level, thus offers a valuable lens through which to view the UN's position on CVE initiatives. Throughout the analysis, however, traditional "hard" counterterrorism programs serve as a foil—are preventive CVE programs better or worse for security and rights than are traditional counterterrorism methods?

This Part examines some positive and negative impacts of CVE prevention efforts on internationally protected human rights. It first outlines the general contours of the specific human rights and raises questions to shape future critical examination of the effects of CVE

115. 'The Moment We Do Not Support the Human Rights Agenda We See It Rolling Back in Many Parts of the World' – Zeid Ra'ad Al Hussein, UN NEWS CTR. (Jan. 18, 2016), <http://www.un.org/apps/news/story.asp?NewsID=53035#.WfoJPHfMxo4> [<https://perma.cc/C4BL-LZ9P>].

116. Zeid Ra'ad Al Hussein, U.N. High Comm'r for Human Rights, Opening ceremony of the 34th session of the Human Rights Council in Geneva, (Feb. 27, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21229&LangID=E> [<https://perma.cc/U2AK-KFR6>]. On March 8, 2017, the High Commissioner said:

This past year has witnessed considerable bloodshed at the hands of extremist and terrorist groups, and I take this opportunity to once again strongly condemn all such violence, in every instance. . . . 2017 may be a pivotal year in many respects. Will the vicious attacks by terrorist groups thrust governments deeper into security-heavy responses, further heightening the likelihood of abuses, at the expense of human rights? And will the populists continue to reap the rewards of stoked-up fear and disillusionment? Together with other authoritarian-minded leaders, will they tip the international system over the edge? Or will there be enough people who realise clearly and deeply what is at stake – who see the entire rights-based system is under attack – and reverse the centrifugal forces which threaten to break apart international and regional institutions?

High Commissioner for Human Rights on the Activities of His Office and Recent Human Rights Developments: Annual Report and Oral Update to the 34th Session of the Human Rights Council, UNITED NATIONS HUM. RTS. (Mar. 8, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21316&LangID=E> [<https://perma.cc/TB8T-SKYD>].

policies.¹¹⁷ CVE prevention programs implicate specific civil and political rights, including: the right to life;¹¹⁸ the right to due process; privacy; freedom of opinion, belief and thought;¹¹⁹ freedom of expression;¹²⁰ freedom of association; the principle of non-discrimination;¹²¹ and even freedom of movement. CVE may also implicate economic and social rights, including the right to education¹²² and the right to medical care, for example.¹²³ This is true although States' interpretation of international-level rights vary widely at the national level.

A. The Legal Framework

During times of national emergency, some international rights are subject to limitation or derogation.¹²⁴ For example, Article 4 of the ICCPR sets forth a two-prong test for derogation of some rights during (1) "time[s] of public emergency" (2) "threaten[ing] the life of the nation."¹²⁵ There is very little international-level case law¹²⁶ on

117. It is beyond the scope of this Article to conduct a comprehensive analysis on the effects of these programs on human rights at the national level, but further study is recommended. Officially, the UN takes the position that "[a]ll human rights are universal, indivisible and interdependent and interrelated." *Vienna Declaration and Programme of Action*, UNITED NATIONS HUM. RTS. (June 25, 1993), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> [<https://perma.cc/H343-5LHJ>].

118. See ICCPR, *supra* note 32, art. 6.

119. See *id.* at art. 18.

120. See *id.* at art. 17-19, 25, 27; General Comment No. 34, *supra* note 52.

121. See U.N. Human Rights Comm., General Comment No. 18, U.N. Doc. HRI/GEN/1/Rev.1, at 26 (1994).

122. ICESCR, *supra* note 32, at art. 13.

123. *Id.* at art. 12. The other right under the ICESCR that may be implicated would be "the widest possible protection" of the family, particularly for "[the family's] establishment and while it is responsible for the care and education of dependent children." *Id.* at art. 10.

124. *Neither Just nor Effective*, HUM. RTS. WATCH (June 24, 2004), <https://www.hrw.org/legacy/backgrounder/eca/uk/anti-terrorism.pdf> [<https://perma.cc/M8NL-CFKY>]. Very few States have officially derogated from their human rights obligations under international treaties after 9/11. *Id.* The United Kingdom, however, derogated from the European Convention on Human Rights and the International Covenant on Civil and Political Rights in late 2001. *Id.*

125. ICCPR, *supra* note 32, at 174.

126. See *Landinelli Silva v. Uruguay*, Communication No. 34/1978, U.N. Doc CCPR/C/OP/1, at 65 (1984). Other influential sources regarding the preconditions for derogation are in accord. See e.g., Richard B. Lillich, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072 (Oct. 1985); Economic and Social Council, annex, Siracusa Principles

the question of how this two-part test can be fulfilled, but the Human Rights Committee of the ICCPR has elaborated on the test by stating that derogations must be “exceptional,” “temporary,” and limited to the extent “strictly required by the exigencies of the situation.”¹²⁷ As Christopher Michaelson notes, given States’ rhetoric about how 9/11 fundamentally altered the world, it is a bit surprising to learn that remarkably few States have formally derogated from their obligations under the ICCPR.¹²⁸

Since 2001, only one European State officially derogated from its obligations under Article 4, and one other State did so internationally, but for reasons other than terrorism.¹²⁹ The UN Human Rights Committee has flagged the negative impacts that the United Kingdom’s derogation may have on ICCPR-guaranteed rights.¹³⁰ Overall, however, even with the continued incidence of terrorism, the human rights obligations of the majority of States under the ICCPR persist, subject to any applicable limitations and reservations.¹³¹

Absent a definition of violent extremism, the UN Secretary General’s Plan of Action claims to pursue a “practical” approach to preventing violent extremism.¹³² Yet, the ICCPR Human Rights Committee has raised concerns relating to various aspects of national CVE programs, and these are effectively the only practical models of preventive CVE programs that exist.¹³³ As described further below in

on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 (1985).

127. General Comment No. 34, *supra* note 52.

128. See Christopher Michaelson, *International Human Rights on Trial - The United Kingdom’s and Australia’s Legal Response to 9/11*, 25 SYDNEY L. REV. 275, 293 (2003).

129. HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 583 (2d ed. 2015).

130. *Neither Just nor Effective*, *supra* note 124. The other State that has officially derogated is Nepal, which derogated in 2005 but revoked their derogation on the same day. ICCPR, Nepal: Notification under Article 4 (3), C.N.271.2005 Treaties-5 (Dec. 16, 1966) [hereinafter Nepal: Notification under Article 4 (3)].

131. Nepal: Notification under Article 4 (3), *supra* note 130.

132. See Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 5.

133. See, e.g., Human Rights Comm., Concluding Observations of the Human Rights Committee: Honduras, ¶ 5, U.N. Doc. CCPR/C/HND/CO/1 (Dec. 13, 2006) [hereinafter Observations of the HRC: Honduras]; Human Rights Comm., Concluding Observations of the Human Rights Committee: Mauritius, ¶¶ 5-6, U.N. Doc. CCPR/CO/83/MUS (Apr. 27, 2005) [hereinafter Observations of the HRC: Mauritius]; Human Rights Comm., Concluding Observations of the Human Rights

Part IV, in late February 2016, Ben Emmerson, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, released a report responding to and criticizing various aspects of preventive CVE programs and the UN's new focus on them.¹³⁴

According to the text of the ICCPR, non-derogable rights include the right to life,¹³⁵ the principle of legality,¹³⁶ and the right to freedom of thought and belief.¹³⁷ According to the authoritative body charged with its interpretation, the Human Rights Committee, the right to freely hold opinions is one from which States may not reserve out of or derogate from.¹³⁸

According to General Comment 3 of the Committee on Economic, Social and Cultural Rights, States are "bound by a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" provided in the ICESCR, including: minimum essential food, which is sufficient, nutritionally adequate, and safe to ensure freedom from hunger; "essential primary health care," including essential drugs under the World Health Organization's Action Programme on Essential Drugs; and essential "basic shelter and housing."¹³⁹ In addition, States must guarantee non-discrimination in the exercise of each of the economic, social, and cultural rights enshrined in the Covenant.¹⁴⁰

Committee: Russian Federation, ¶ 4, U.N. Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009) [hereinafter Observations of the HRC: Russian Federation].

134. Special Rapporteur A/HRC/31/65, *supra* note 23, ¶¶ 54-55.

135. ICCPR, *supra* note 32, at art. 6. Pursuant to Article 4 of the ICCPR, additional non-derogable rights include, for example, Articles 7 (free from torture or cruel punishment), 8 (slavery), 11 (no imprisonment for contractual obligation), and 16 (right to recognition). *Id.* at arts. 7-8, 11, 16. Even in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," these rights are non-derogable. *Id.* at art. 4(2). In addition, the Human Rights Committee has determined in its General Comments that additional rights should be viewed as non-derogable. General Comment No. 34, *supra* note 52, ¶ 5.

136. See ICCPR, *supra* note 32, at art. 15.

137. See *id.* at art. 18.

138. See General Comment No. 34, *supra* note 52.

139. U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12: The Right to Adequate Food, U.N. Doc. E/C.12/1999/5 (May 12, 1999); U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, U.N. Doc. E/1991/23 (Dec. 14, 1990).

140. U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc.

States may also enter reservations about some, but not all, rights.¹⁴¹ For example, the United States' reservation to Article 20 of the ICCPR stipulates that its international obligations cannot violate the U.S. Constitution.¹⁴²

B. Right to Life

Under international human rights law, States have a non-derogable duty to protect human life.¹⁴³ Tunisian activist Amira Yahyaoui describes the duty:

[F]or human rights activists, security is a taboo. Security means you are anti-human rights. But that gives space to those who are not very keen on human rights to take care of this topic. I think that people from a human rights background should be more involved in security issues, and stop thinking that security is a taboo. If we want to defend people's rights, the first thing we need to defend is their right to live and not to die. That's the first step.¹⁴⁴

Consistent with this activist's description, CVE programs emphasize States' duty to ensure a secure society and to protect life, focusing on territorial boundaries.¹⁴⁵ Balancing competing rights against each other is a persistent concern in human rights law.¹⁴⁶ ICCPR Article 5(1) establishes that "nothing in [the present Covenant] may be interpreted as implying [a] right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a

E/C.12/GC/20 (July 2, 2009); U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 16: Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/3 (May 13, 2005).

141. For example, reservations that defeat the object and the purpose of the ICCPR are not permitted. U.N. Human Rights Comm., General Comment No. 24: General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

142. See 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

143. G.A. Res. 217 A (III), Universal Declaration of Human Rights, at art. 3 (Dec. 10, 1948); ICCPR, *supra* note 32, at art. 6; ICESCR, *supra* note 32, pmb1.

144. Ilya Lozovsky, *A Wake-Up Call for NGOs*, FOREIGN POL'Y (June 5, 2015, 5:51 PM), <http://foreignpolicy.com/2015/06/05/a-wake-up-call-for-ngos-tunisia-arab-spring-oslo-freedom-forum/> [<https://perma.cc/Y5LE-5U8X>].

145. See *id.*

146. See Schomerus & Taraboulsi-McCarthy, *supra* note 43, at 4, 7-8.

greater extent than is provided for in the present Covenant.”¹⁴⁷ So, the State may not use a duty created by the Covenant to justify eliminating or destroying other rights.

In CVE programs, the State’s duty to protect life is pitted against the State’s duty to promote individual freedoms, *inter alia*, the right to be free of discrimination and privacy rights.¹⁴⁸ One of the core goals of CVE programs, preventing radicalization, creates opportunities for intervention before individuals’ actions or planning would trigger a criminal process.¹⁴⁹ In these programs, States leverage their duty to protect life to intervene, often with the cooperation of civil society, in individuals’ lives much earlier than in traditional anti-terrorism programs, and concerns arise in this process.¹⁵⁰

C. Criminal Law: Incitement

In Resolution 2178 (2014), when the UN Security Council called upon Member States to take steps to ensure that incitement to commit terrorist acts does not occur,¹⁵¹ it failed to define what constitutes incitement. Not coincidentally, the Special Rapporteur has raised concerns about the breadth and vagueness of States’ prohibitions of incitement.¹⁵² States have an obligation to ensure that freedom of expression is exercised responsibly under the ICCPR.¹⁵³ National, religious, and racial incitement to hatred that constitutes discrimination, hostility, or violence may be, and in some cases must be, limited by the State.¹⁵⁴ In 2011, the Office of the High Commissioner for Human Rights and the High Representative of the

147. ICCPR, *supra* note 32, at art. 5.

148. *See id.*

149. *See* Schomerus & Taraboulsi-McCarthy, *supra* note 43, at 18.

150. *See id.*

151. *See* S.C. Res. 2178, *supra* note 6, ¶¶ 11, 14, 16-17.

152. Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 21.

153. The ICCPR Articles 19 and 20(2) are part of a clear normative framework created by international law for when States must limit or when they may permissibly limit hate speech, and they are helped by Human Rights Committee General Comment No. 34 and the Rabat Plan of Action. *UN HRC: Initiative to Criminalise “Acts of a Racist and Xenophobic Nature” Must Adhere to Freedom of Expression Standards*, ARTICLE 19 (Mar. 21, 2017), <https://www.article19.org/resources.php/resource/38681/en/un-hrc:-initiative-to-criminalise> [<https://perma.cc/34JD-BZXS>].

154. *See* ICCPR, *supra* note 32, at art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

UN Secretary-General for the Alliance of Civilizations convened a series of expert workshops on the issue of incitement, resulting in the Rabat Plan of Action on the prohibition of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.¹⁵⁵ However, the Rabat Plan of Action goes beyond expressing concern that “perpetrators of incidents which reach[ed] the threshold of art. 20 of the ICCPR [were] not prosecuted and punished.”¹⁵⁶ It also found that minorities are “de facto persecuted, with a chilling effect on others” and

the dichotomy of (1) no prosecution of “real” incitement cases and (2) persecution of minorities under the guise of domestic incitement laws [which] seems to be pervasive. Anti-incitement laws in countries [across the world] can be qualified as heterogeneous, at times excessively narrow or vague[;] jurisprudence on incitement to hatred has been scarce and ad hoc[;] and while several States have adopted related policies, most of them too general, not systematically followed up, lacking focus and deprived of proper impact-assessments.¹⁵⁷

D. CVE as an Alternative to Criminal Punishment or Imprisonment

Individuals have fundamental rights to be free from degrading treatment under human rights law.¹⁵⁸ As applied to individuals convicted under the many anti-terrorism laws, CVE programs may offer alternatives to prosecution, harsh sentences, or deportation.¹⁵⁹ Some commentators have noted that CVE programs provide allegedly would-be terrorists with alternatives to arrest and detention.¹⁶⁰ For example, in January 2017, a federal judge in Minneapolis, chagrined by the number of young defendants

155. Rep. of the United Nations High Comm’r for Human Rights, on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, annex, U.N. Doc. A/HRC/22/17/Add.4 (Jan. 11, 2013) [hereinafter Rep. of the United Nations High Comm’r for Human Rights]. The ICCPR Articles 19 and 20(2) set out framework for when States must limit, or where they may permissibly limit, hate speech. See ICCPR, *supra* note 32, at art. 19, 20(2).

156. Rep. of the United Nations High Comm’r for Human Rights, *supra* note 155, ¶ 11.

157. *Id.*

158. ICCPR, *supra* note 32, at art. 7.

159. See generally Brendan I. Koerner, *Can You Turn a Terrorist Back into a Citizen?*, WIREd (Jan. 24, 2017), <https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/> [https://perma.cc/J68M-2CR3] (telling the story of a young man who pleaded guilty to aiding the Islamic State under an anti-terrorism law and was mandated to participate in a rehabilitative de-radicalization program as an alternative to imprisonment).

160. See *id.*

receiving harsh prison sentences for “material support” convictions, investigated counter-radicalization programs.¹⁶¹ He then sentenced some, but not all, “would-be terrorists” to a de-radicalization program instead of incarceration.¹⁶² The criteria for who is eligible for these alternate, more rehabilitative, and expensive forms of punishment are not clear, nor does the UN offer helpful guidance at this level of specificity. CVE de-radicalization programs that offer an alternative to harsh prison sentences are arguably better for the defendant and for society than is incarceration, which offers few rehabilitation opportunities for the beliefs or behavior that may have led to the conviction.

Depending on the particular CVE program in various States, however, these programs may just as easily assist the government in labeling and identifying suspects, thus raising the possibility individuals will be prosecuted or deported.¹⁶³ In addition, to the extent that this alternate sentencing permits or encourages the drafting of terrorist-specific criminal laws to be drafted where existing criminal laws would suffice, we might be concerned about over-criminalization—particularly in the murky middle ground between criminal law and civil law that terrorism offenses often represent.

Preventive CVE programs aimed at identifying people at risk of “radicalization” may very well enable States to bring new parties into the justice system by broadening the scope of behaviors and beliefs that are considered to be legitimately of interest to, or threatening to, the State.

E. Preventive CVE—What Exactly Is Violent Extremism Anyway? Definitions, Vagueness, and Privacy

The broad, vague contours of preventive CVE policies inspire the most prominent human rights concerns. Human rights law

161. *Id.*

162. *Id.* Mr. Koerner describes the vetting that defendants undergo in order to be deemed worthy candidates for a de-radicalization program as an alternative sentence. *Id.*

163. Patel & Koushik, *supra* note 101, at 2-3 (“Channeling law enforcement resources into investigating people based on a potpourri of unproven indicators [is not] likely to snare criminals, but rather to draw scrutiny to individuals whose speech or beliefs are outside the mainstream.”).

requires States to respect the individual's privacy,¹⁶⁴ freedom of opinion,¹⁶⁵ and right to adequate process and to be informed of charges against them.¹⁶⁶ CVE programs prompt many legality- and due process-related questions, including: How will the State notify individuals about what conduct renders them suspect under CVE programs? Is conduct required, or can mere beliefs fall under CVE programs? What beliefs are extremist?¹⁶⁷ How exactly is violent

164. ICCPR, *supra* note 32, at art. 17(1)-(2) ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.")

166. *See id.* at art. 19(1)-(2) ("1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.")

166. *See id.* at art. 14(2)-(3) ("2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.")

167. *See, e.g.*, Observations of the HRC: Russian Federation, *supra* note 133, ¶ 24 ("24. In light of numerous reports that the extremism laws are being used to target organizations and individuals critical of the Government, the Committee regrets that the definition of 'extremist activity' in the Federal Law on Combating Extremist Activity remains vague, allowing for arbitrariness in its application, and that the 2006 amendment to this law has made certain forms of defamation of public officials an act of extremism. The Committee also notes with concern that some provisions of article 1 of the Federal Law on Combating Extremist Activity include acts that are not sanctioned in the Criminal Code and are only punishable under the Code of Administrative Offences, such as mass dissemination of extremist materials, the application of which may not be subject to judicial review. The Committee is also concerned about the loose manner in which the definition of 'social groups' in article 148 of the Criminal Code has been interpreted by the courts and their reliance on various experts in this respect, granting protection for State organs and agents against 'extremism'[] (arts. 9 and 19)."); *see also* Human Rights Comm.,

extremism different from terrorism? What effect does being identified as “vulnerable to violent extremism” have on individuals’ rights? What exactly will the State do with an identified individual? What information about the individual does the State collect? What information does it provide to the individual? What opportunity do individuals have to challenge their classification as being “vulnerable to violent extremism”? What reporters will States credit—teachers, doctors, social workers, friends, or family?¹⁶⁸

Nevertheless, the UN Security Council and the Secretary-General leave core fundamental questions about CVE unanswered even as they endorse CVE programs and policies.¹⁶⁹ Neither the Security Council nor the Secretary-General offer model definitions of violent extremism, for example, instead leaving it to States to define the very phenomenon of violent extremism that the UN directs States to address.¹⁷⁰ The Secretary-General says that “[d]efinitions of ‘terrorism’ and ‘violent extremism’ are the prerogative of Member States and must be consistent with their obligations under international law, in particular international human rights law.”¹⁷¹ Similarly, the Human Rights Council, too, adopted “violent extremism” without definition.¹⁷² And the UN does not offer much guidance about what acts or beliefs count as “violent extremism.”¹⁷³ As a result, conceptual confusion continues to cloud “violent extremism.”¹⁷⁴ Unhelpfully, the Secretary-General stated

Concluding Observations of the Human Rights Committee: Russian Federation, ¶ 20, U.N. Doc. CCPR/CO/79/RUS (Dec. 1, 2003).

168. UNITED NATIONS EDUCATION, SCIENCE, & CULTURAL ORGANIZATION, A TEACHER’S GUIDE ON THE PREVENTION OF VIOLENT EXTREMISM 9 (2016).

170. Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 20-22.

170. In Special Rapporteur Emmerson’s 2016 report, he surveys the many different conceptions of violent extremism in various countries in Europe and Australia alone. *Id.* ¶ 11-12.

171. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 5.

172. *See, e.g.*, H.R.C. Res. 30/15, *supra* 84, at 2 (“*Deeply concerned* at the profound threat posed by acts resulting from violent extremism and terrorism motivated by extremist ideologies or intolerance to the realization and enjoyment of human rights.”).

173. *Id.*

174. Patel & Koushik, *supra* note 101, at 3 (discussing how the UN has pushed CVE through its resolutions despite the lack of a clear definition of violent extremism which has now caused some UN human rights experts to raise concerns about the impact of CVE programs).

that violent extremism is a “wider” category than terrorism without elaboration.¹⁷⁵

Empirical studies show that the behavioral and causal trajectory toward “radicalization” is clouded with confusion.¹⁷⁶ Correspondingly, State’s legal definitions of offenses relating to radicalization, which vary greatly, are often open-ended and vague.¹⁷⁷ According to the Special Rapporteur and Human Rights Committee, many states define “extremism” in an overbroad fashion, failing to give notice of what conduct runs afoul of policies and laws.¹⁷⁸ As described in the next Part, related laws now criminalize internationally protected activities including peaceful protests, critical speech, and freedom of movement and religion.¹⁷⁹

A full cycle of CVE policies has been implemented in some States,¹⁸⁰ as well as in States’ foreign policy and development efforts.¹⁸¹ After the first phase of CVE programs, many governments learned that they require the cooperation of civil society to be

175. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, at 13.

176. See Koerner, *supra* note 159; see also John Horgan & Mary Beth Altier, *The Future of Terrorist De-Radicalization Programs*, 13 GEO. J. INT’L AFF. 83, 85 (2012).

177. Special Rapporteur A/70/371, *supra* note 23, ¶ 14 (“[T]he Special Rapporteur notes that many of the measures taken or envisaged by States violate the principle of legality by containing overly broad and vague definitions of terrorism.”); Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 12 (discussing various European countries’ definitions of violent extremism).

178. See Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 11; Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35 ¶ 22 (Dec. 16, 2014) [hereinafter General Comment No. 35] (vagrancy law); Observations of the HRC: Honduras, *supra* note 133, ¶ 13 (“unlawful association”); Observations of the HRC: Mauritius, *supra* note 133, ¶ 12 (terrorism law); Observations of the HRC: Russian Federation, *supra* note 133, ¶ 24 (“extremist activity”).

179. See Letta Tayler, *Overreach: How New Global Counterterrorism Measures Jeopardize Rights*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2017/country-chapters/global> [<https://perma.cc/6VS3-TXGW>] (last visited Jan. 8, 2018).

180. See, e.g., *Channel Duty Guidance: Protecting Vulnerable People from Being Drawn into Terrorism: Statutory Guidance for Channel Panel Members and Partners of Local Panels*, HM GOV’T (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425189/Channel_Duty_Guidance_April_2015.pdf [<https://perma.cc/YLM4-4FHN>] (stating Prevent Phase I launched in UK in 2007 and Prevent II launched in UK in 2012).

181. See, e.g., *Joint Strategy on CVE*, *supra* note 110, at 2, 4 (presenting the example that in the United States, the State Department and USAID were the lead agencies on CVE programming).

successful.¹⁸² Many States' plans for civil society engagement include requiring civil society "partners" to provide the government information regarding who they perceive to be "risk for radicalization," often in the absence of training or clarity about who these individuals are, as a part of receiving funding from the government.¹⁸³ The United Kingdom reports that there has been over-reporting, and that most individuals have been cleared.¹⁸⁴

F. What of Freedom of Opinion, Expression, and Association?

A prominent human rights-related concern about CVE programs is that they offer governments wide latitude to chill speech, stigmatize opinions, and discourage certain types of association.¹⁸⁵ Human rights law protects freedom of expression, and in General Comment 34, the Human Rights Committee declares that no reservations are permitted to this fundamental right.¹⁸⁶ The right may

182. See *Building Community Resilience*, *supra* note 15 ("The Pilot Program is engaged in identifying partners and sources of funding to implement the action plan. Terror recruiting in Minnesota is a pressing problem and we must act decisively to break the cycle.").

183. Such programs would fall under the penultimate slot to the right on Table 1. See *supra* Table 1.

184. See, e.g., Josh Halliday, *Almost 4,000 People Referred to UK Deradicalisation Scheme Last Year*, *GUARDIAN* (Mar. 20, 2016), <https://www.theguardian.com/uk-news/2016/mar/20/almost-4000-people-were-referred-to-uk-deradicalisation-scheme-channel-last-year> [<https://perma.cc/EA6Y-YX5N>]; Miqdaad Versi, *The Latest Prevent Figures Show Why the Strategy Needs an Independent Review*, *GUARDIAN* (Nov. 10, 2017), <https://www.theguardian.com/commentisfree/2017/nov/10/prevent-strategy-statistics-independent-review-home-office-muslims> [<https://perma.cc/XN69-ZFRE>]; *Referrals over Radicalisation 'Double in a Year'*, *BBCNEWS* (Feb. 22, 2016), <http://www.bbc.com/news/uk-35633673> [<https://perma.cc/NK3L-2FLJ>].

185. See Laurie Goodstein, *F.B.I. Tool to Identify Extremists Is Criticized*, *N.Y. TIMES* (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/us/fbi-tool-to-identify-extremists-is-criticized.html> [<https://perma.cc/NQU8-7BF3>]; Lauren Walker, *How the FBI Helps Americans Become 'Terrorists'*, *DAILY DOT* (June 9, 2016), <http://www.dailydot.com/layer8/fbi-informant-sting-operation-isis-terrorism/> [<https://perma.cc/2MCD-5WNZ>].

186. ICCPR, *supra* note 32, art. 19 ("1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights

be, and sometimes is, limited by the responsibility to protect individuals from hateful speech.¹⁸⁷ States' various free speech protections demonstrate the complexities and cultural differences at play when balancing States' need to protect individuals from hateful speech against freedom of expression.¹⁸⁸ At present, we do not know if CVE programs successfully curb "dangerous speech."¹⁸⁹

Human rights law also protects individuals' rights to hold any opinion whatsoever; any effort to limit, coerce, or criminalize the holding or not holding of an opinion is prohibited.¹⁹⁰ Yet preventive CVE programs are designed to deem "radical beliefs" suspect and deserving of reprogramming. What constitutes a radical belief? What penalty might an individual face for holding radical beliefs? What

or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."); General Comment No. 34, *supra* note 52, ¶¶ 2, 6; Yong-Joo Kang v. Republic of Korea, Communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999, ¶¶ 7.1-2, (July 15, 2003).

187. The ICCPR Articles 19 and 20(2) are part of a clear normative framework created by international law for when States must limit, or where they may permissibly limit, hate speech, and are helped by Human Rights Committee General Comment No.34 and the Rabat Plan of Action. See *UN HRC: Initiative to Criminalise "Acts of a Racist and Xenophobic Nature" Must Adhere to Freedom of Expression Standards*, *supra* note 153. For more work on what constitutes dangerous speech, see Susan Benesch, *Dangerous Speech: A Proposal to Prevent Group Violence*, WORLD POL'Y INST. (Jan. 12, 2012), <http://www.worldpolicy.org/sites/default/files/Dangerous%20Speech%20Guidelines%20Benesch%20January%202012.pdf> [<https://perma.cc/4PT8-7T3U>].

188. See Christopher F. Schuetze, *20 Are Convicted for Sexist and Racist Abuse of Dutch Politician*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/world/europe/sylvana-simons-netherlands-hate-speech.html> [<https://perma.cc/V4K9-USBF>].

189. Indeed, the Global Counterterrorism Forum Ankara Document of 2015 discusses the many ways that these strategies can be counterproductive. See Patel & Koushik, *supra* note 101, at 21 (discussing how the U.K.'s CVE approach explicitly focused on extremist speech and ideology rather than violence, which led to poor results and mistrust in many Muslim communities); *Ankara Memorandum on Good Practices for a Multi-Sectoral Approach to Countering Violent Extremism*, GLOBAL COUNTERTERRORISM F., https://www.thegctf.org/documents/10162/72352/13Sep19_Ankara+Memorandum.pdf [<https://perma.cc/XG2S-QCJZ>] (last visited Jan. 8, 2018).

190. ICCPR, *supra* note 32, at art. 19; *Faurisson v. France*, Communication No. 550/1993, ¶ 6.1, U.N. Doc. No. CCPR/C/58/D/550/1993 (Nov. 8, 1996); Human Rights Comm., General Comment No. 22, ¶¶ 2-3, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993); General Comment No. 34, *supra* note 52, ¶ 9 ("It is incompatible . . . to criminalize the holding of an opinion."); ICCPR, *supra* note 32, art. 20(1)-(2) ("1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

role does personal experience play in mitigating any penalty for possessing a radical belief? The answers to these broad questions remain contested. States' focus on "cognitive radicalization" in CVE programs make finding the answers to these questions critical.¹⁹¹ Correspondingly, CVE policies also raise related concerns about the potential for government censorship.¹⁹²

Neither Resolution 2178's broad "extremism" nor the Human Rights Council's 2015 Resolution require an individual to commit a violent act to be deemed a violent extremist.¹⁹³ Indeed, in daily parlance, extremism has begun to replace the term violent extremism. Like many UN Security Council resolutions, the Secretary-General's Plan of Action also emphasizes the need to empower youths and women in the fight against violent extremism and radicalization,¹⁹⁴ yet what training these youths or women would receive is critical to any possible success of this initiative. According to the Special Rapporteur, States have used Resolution 2178 to crackdown on peaceful protest since it was adopted.¹⁹⁵ The broad public safety rationales States invoke to withhold information about a vulnerable individual's alleged radicalization may also interfere with individuals' right of access to public information about them.¹⁹⁶ Indeed, "whole-of-society" CVE programs could sweep individuals' medical and social service records under States' public safety rationale.¹⁹⁷

G. Non-Discrimination and Freedom of Religion Norms

On March 24, 2011, the Human Rights Council adopted Resolution 16/18 on combating intolerance; negative stereotyping against, negative stigmatization of, discrimination against, and negative stereotyping of religion; and incitement to violence and

191. See General Comment No. 34, *supra* note 52, ¶ 9.

192. See, e.g., Human Rights Comm., General Comment No. 25, ¶ 25, U.N. Doc. CCPR/C/Rev.1/Add.7 (Aug. 27, 1996).

193. UN HRC: Resolution on "Violent Extremism" Undermines Clarity, ARTICLE 19, (Oct. 8, 2015), <https://www.article19.org/resources.php/resource/38133/en/un-hrc:-resolution-on-%E2%80%9Cviolent-extremism%E2%80%9D-undermines-clarity> [<https://perma.cc/D5U6-W9AE>].

194. S.C. Pres. Statement 2014/21 (Oct. 28, 2014).

195. Special Rapporteur A/HRC/31/65, *supra* note 23, ¶ 21.

196. ICCPR, *supra* note 32, at art. 19.

197. See *infra* Section II.G (discussing some of the corresponding issues for socioeconomic rights).

violence against persons based on religion and belief.¹⁹⁸ The Resolution cited a rise in Islamophobia, anti-Semitism, and racism.¹⁹⁹ These problems persist and, by many accounts, have intensified.²⁰⁰ In 2015, the Human Rights Council adopted a resolution on countering violent extremism—without specifying the difference between incitement to violence and violent extremism—after contentious debate.²⁰¹

Religious freedom, one of the core guarantees of the ICCPR,²⁰² is non-derogable²⁰³ but may be subject to some limitations in the name of public safety and the fundamental freedoms of others.²⁰⁴ Non-discrimination²⁰⁵ is a basic principle of human rights, and equal protection of the laws is guaranteed under the ICCPR.²⁰⁶ Some are

198. Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18, at 1, 3 (Apr. 12, 2011).

199. *Id.* at 2.

200. *See, e.g.*, Human Rights Comm., Concluding Observations on the Fifth Periodic Report of France, ¶ 23, U.N. Doc. CCPR/C/FRA/CO/5 (Aug. 17, 2015) [hereinafter HRC Concluding Observations on France].

201. Human Rights and Preventing and Countering Violent Extremism, *supra* note 93, ¶ 4.

202. ICCPR, *supra* note 32, at art. 18(1)-(2) (“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”).

203. *See id.*

204. *See id.* at art. 18(3) (“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

205. *See id.* at art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). Article 26 is the equal protection provision, while Articles 2 and 4 emphasize that states may not discriminate based on religion. *See id.* at art. 2, 4, 26.

206. *See id.* at art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *Id.* at art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right,

concerned that the government is effectively endorsing an anti-Islamic position through the substance of its counterterrorism programs; “prevention” CVE programs might also fall victim to the same critique.²⁰⁷

The Security Council encouraged Member States to cooperate with “relevant local communities” to “counter the violent extremist narrative that can incite terrorist acts” and “address the conditions conducive to the spread of violent extremism,” but Resolution 2178 does not specify what communities are “relevant” to violent extremism.²⁰⁸ The Secretary General’s Plan of Action similarly calls for the United Nations to “foster [a] global dialogue, uniting countries, people and communities on the basis of universally shared values and principles as enshrined in international law,” and believes “community leaders are critical in mentoring vulnerable followers so as to enable them to reject violent ideologies.”²⁰⁹

CVE programs are prominently critiqued as proxy justifications for States to target Muslim communities.²¹⁰ Augmenting these concerns, the United States’ new President, Donald Trump, refers narrowly to Islamic terrorism or Islamic extremism, disregarding an attempt to be at least facially neutral in addressing both violent extremism and terrorism.²¹¹ But even a facially neutral approach to

in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”)

207. See generally DOES CVE WORK, *supra* note 2, at 17; Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830 (2014) (expressing the worry that government programs which employ religion are constitutionally troublesome).

208. S.C. Res. 2178, *supra* note 6, ¶ 16.

209. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶¶ 36, 56. The Plan of Action also gives a list of specific recommendations for engaging communities, including civil society engagement strategies, community policing, and locally based mentorship programs. See *id.* ¶ 51.

210. See, e.g., Letter from ACLU et al., to The Honorable Lisa O. Monaco, Assistant to the President for Homeland Sec. & Deputy Nat’l Sec. Adviser, *supra* note 106; see also ‘Radicalization Test’ Ridicule: Anti-terrorism Proposal by French Official Sparks Twitter Barrage, RT NEWS (Aug. 10, 2016, 11:10 AM), <https://www.rt.com/news/355373-test-radicalization-france-schools/> [<https://perma.cc/68UU-4NRZ>].

211. See Julia Edwards Ainsley et al., *Exclusive: Trump to Focus Counter-Extremism Program Solely on Islam-Sources*, REUTERS (Feb. 1, 2017), <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO> [<https://perma.cc/CGR2-KPZ7>]. It is interesting to note that by contrast, Russia’s President Vladimir Putin refers to terrorism only as “international terrorism.” Andrew E. Kramer, *The Phrase Putin Never Uses About Terrorism (and Trump Does)*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/>

violent extremism leads to concerns that States are de facto discriminating by improperly and disproportionately focusing on Muslims as suspect.²¹² For example, States' disproportionate foci on Muslims as potential security threats, whether through legislation restricting religious clothing in some cities in France,²¹³ or through seeking intelligence at mosques (but not churches), continues to interfere with many individuals' free exercise of religion.²¹⁴

Remarkably, the right not to be arbitrarily detained may also be triggered by CVE programs.²¹⁵ Reports of possible radicalism may be ill-founded but nevertheless trigger targeting by authorities.²¹⁶ For example, in 2016 in the United Kingdom, a Middle Eastern woman reading a book about Syria on a flight was reported by a fellow traveler as suspicious as a result of her reading material and was detained for questioning.²¹⁷

Some proponents of the broad use of preventive CVE programs might argue that the very communities that are allegedly being targeted by the government in fact want the help of States to counter the forms of violent extremism they find threatening. For example, the United States Department of Justice reports that the Somali community in Minnesota wants help in stopping the cycle of

world/europe/vladimir-putin-donald-trump-terrorism.html [https://perma.cc/NA2Z-G5QB].

212. See PATEL, *supra* note 81. Despite contrary views put forward by DHS and the NCTC, the FBI and the NYPD have relied heavily on monitoring American Muslim communities based on the contention that radical Islamic views drive violence. See *id.* at 14, 14 n.95. The influence of this theory can be seen in the adoption of it by other local law enforcement agencies. See, e.g., PA. STATE POLICE, RADICAL ISLAM: A LAW ENFORCEMENT PRIMER (Bill Kaiser ed., n.d.); Commonwealth of Va. Dep't State Police, 2009 *Virginia Terrorism Threat Assessment*, 129 (Mar. 2009), <https://www.infowars.com/media/vafusioncenterterrorassessment.pdf> [https://perma.cc/HX8B-5SY3].

213. See, e.g., HRC Concluding Observations on France, *supra* note 200, ¶ 22.

214. See Special Rapporteur, Human Rights Council, *Rep. on Freedom of Religion or Belief*, ¶ 42, U.N. Doc. A/HRC/31/18 (Dec. 23, 2015).

215. See General Comment No. 35, *supra* note 178, ¶¶ 4-5, 39-40 (citing Concluding Observations, Human Rights Comm.: U.K. & N. Ir., ¶ 17, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008); Fongum Gorji-Dinka v. Cameroon, Communication 1134/2002, Human Rights Comm., ¶ 5.1 (2005)).

216. See *id.*

217. See *British Muslim Held by Anti-Terrorism Police for Reading Syrian Art Book*, MIDDLE EAST EYE (Aug. 9, 2016), <http://www.middleeasteye.net/news/anti-terror-police-question-muslim-bride-reading-syrian-art-book-plane-1746856488> [https://perma.cc/MC3Y-D7MD].

recruitment and criminalization.²¹⁸ The desire for help from the State in recognizing a problem does not, however, justify religious targeting or overly criminalized responses, so UN and State efforts would be wise to ensure that “conditions [that might be] conducive to terrorism” are addressed without securitizing or criminalizing social services broadly.²¹⁹ Indeed, Professor James Forman, Jr.’s recent book about how a majority-black jurisdiction participated in the over-incarceration of black youth²²⁰ provides a cautionary tale in this regard. In a separate paper, I address the question of whether preventive CVE programs might work with civil society without overly securitizing the partnership.

H. What of Socioeconomic Rights?

CVE programs’ focus on “the Whole of Society Approach” and the conditions conducive to terrorism seem to fit neatly with the UN’s position that political, economic, and social rights are universal, interdependent, and indivisible.²²¹ Partly responding to civil society organizations, social and cultural services are included in, and even central to, many programs against “violent extremism.”²²² Many human rights advocates and scholars claim that

218. See *Building Community Resilience*, *supra* note 15, at 2 (“Beginning in 2007, al-Shabaab began recruiting Somali Minnesotans to fight overseas on behalf of the terrorist organization. Many young Somali Minnesotans left, including 26-year-old Shirwa Ahmed, a Somali-born American citizen, who on October 29, 2008, became the first documented American suicide bomber. More than 20 young Somalis have been publicly charged in U.S. District Court in Minnesota on terrorism-related charges. Recently, the Islamic State of Iraq and the Levant (ISIL) began capitalizing on the tactics used by al-Shabaab to recruit Somali Minnesotans to travel overseas to fight. ISIL is using more sophisticated technology, social media and personal outreach to target Somali Minnesotans. Since 2013, a large number of Somali Minnesotans have traveled, attempted to travel, or taken steps in preparation to travel to join ISIL. The Somali Minnesotan community wants this cycle of recruitment to stop and have partnered with the U.S. Attorney’s office to buil[d] a plan to stop this cycle.”); see also Letter from Special Rapporteur, United Nations Support for Countering Violent Extremism (CVE) Programs, at 2 (Dec. 24, 2015).

219. Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7, ¶ 7.

220. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (Farrar et al. eds., 2017).

221. Frazer & Nünlist, *supra* note 108, at 3.

222. *Building Community Resilience*, *supra* note 15, at 2; see also H.M. Gov’t, *Protecting Vulnerable People from Being Drawn into Terrorism: A Guide for Local Partnerships*, at 13 (Oct. 2012), <http://www.npcc.police.uk/documents/>

the Secretary-General's Action Plan for CVE marks a welcome shift from focusing on retributive, "hard" security approaches to more rehabilitative, "soft measures," including its "Whole of Society" approach to fight terrorism.²²³ CVE programs like those previously discussed in Part II, designed to "combat violent extremism in a wide variety of states," engage not just the classic "hard" intelligence and law enforcement sectors, but also "soft" sectors previously overlooked in domestic security endeavors—including development, education, medical care, employment, and social services.²²⁴

Some human rights organizations have thus applauded States' attention to CVE programs as being preferable to traditional "hard" security programming.²²⁵ They see CVE programs as a welcome shift that underscores the interdependence of socioeconomic, civil, and political rights because relatively "soft" CVE approaches incorporate spheres traditionally outside security concerns.²²⁶ CVE programs include consideration of the "conditions conducive to terrorism," including socioeconomic concerns.²²⁷ These groups welcome the Action Plan's focus as grounded in the indivisibility of socioeconomic and civil and political rights.²²⁸ For example, the Action Plan readily embraces a gender focus, much more so than have previously gender-blind or gender-biased security programs.²²⁹

TAM/2012/201210TAMChannelGuidance.pdf [<https://perma.cc/RK72-LSK2>]; *The Los Angeles Framework for Countering Violent Extremism*, *supra* note 15, at 1.

223. Frazer & Nünlist, *supra* note 108, at 2-3. Human Rights First (HRF) welcomes the Plan of Action and is urging the U.S. to implement the Secretary-General's recommendations. See Modirzadeh, *supra* note 88. HRF notes "that a narrow military approach to security concerns has contributed to radicalization and expansion of terrorist violence in several countries during recent years." *Id.*

224. See *Building Community Resilience*, *supra* note 15, at 4-5 (discussing community-identified root causes in building community resilience plan in Minneapolis).

225. *Id.* at 2.

226. See generally WOMEN AND PREVENTING VIOLENT EXTREMISM, CTR. FOR HUM. RTS. & GLOBAL JUST. (2012), <http://chrgj.org/wp-content/uploads/2012/10/Women-and-Violent-Extremism-The-US-and-UK-Experiences.pdf> [<https://perma.cc/45VH-HKWE>].

227. PREVENTING TERRORISM AND COUNTERING VIOLENT EXTREMISM AND RADICALIZATION THAT LEAD TO TERRORISM 13 (2014).

228. See generally WOMEN AND PREVENTING VIOLENT EXTREMISM, *supra* note 226.

229. For work on the role of gender in counterterrorism initiatives, see Jayne Huckerby, *Gender, Counterterrorism and International Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 166-69 (Ben Saul ed., 2014); WOMEN AND PREVENTING VIOLENT EXTREMISM, *supra* note 226. "A gender and human rights approach to counter-terrorism queries how, where, and by whom

It also focuses on juveniles and seeks rehabilitative approaches for juveniles.²³⁰ “Whole of Society” approaches might include, for example, seeking to create jobs for the unemployed.²³¹

CVE programs command significant security resources and personnel within the social services sphere, including for example, the United Kingdom’s training and requiring teachers and doctors to report signs of radicalization.²³² When vital resources such as education and medicine are blended with security programs, individuals may avoid accessing critical resources, concerned about being stigmatized for their beliefs.

III. DILUTION AND DEFERENCE: THE WORRISOME EFFECTS OF THE UN’S EMBRACE OF CVE

“The interfaces between national and international law create opportunities for mutual self-reflection.”²³³ Scholars increasingly examine international-level power’s effect on individuals and States, including, for example, work on global administrative law²³⁴ and work on international constitutionalism.²³⁵

When it embraced CVE programs, the UN created new interfaces between the national and international levels, and CVE programs are one of the most recent examples of multi-level power being applied against individuals. As such, the international-level

highly contested terms (such as gender, equality, rights, national security, terrorism, counter-terrorism) are constructed and deployed.” Jayne C. Huckerby & Margaret L. Satterthwaite, *A Gender and Human Rights Approach to Counter-Terrorism*, in *GENDER, NATIONAL SECURITY, AND COUNTER-TERRORISM* 5 (2013).

230. ICCPR, *supra* note 32, at art. 14(4) (“In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”).

231. G.A. Res. 30/15, *supra* note 84, at 3.

232. HM GOV’T, CHANNEL DUTY GUIDANCE: PROTECTING VULNERABLE PEOPLE FROM BEING DRAWN INTO TERRORISM, 1 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425189/Channel_Duty_Guidance_April_2015.pdf [<https://perma.cc/2YP6-ZGW8>].

233. Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: A Framework Paper*, in *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS* 1 (Machiko Kanetake & André Nollkaemper eds., 2016).

234. *See, e.g.*, Kingsbury et al., *supra* note 1 (2005) (exploring the development of global administrative law).

235. *See, e.g.*, JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009); *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

endorsement of CVE programs has implications for cycles of deference and contestation between the global and local levels.²³⁶

Although international law claims supremacy over domestic law, the structure of customary international law allows for debate.²³⁷ Recently, as *Kadi* showed, national-level review of Security Council implementation can even, to some degree, inculcate international-level deference and promote the international-level rule of law.²³⁸ Indeed, the focus of this Article, CVE programs, are not too far removed from the subject matter challenged in *Kadi*, wherein the EU's implementation of targeted sanctions was at issue.²³⁹ There is wide variation at the national and regional levels in understandings of the international treaty-based human rights of freedom of opinion and expression norms, and this variation is apparent in CVE programs.²⁴⁰ However, the UN's international-level endorsement of these CVE programs may induce State practice that is more State-centered and converges at a lower baseline for rights protections for individuals.²⁴¹

The next two Sections critically examine how the UN, by embracing CVE programs at the international level, may affect State practice and, as a result, the content of human rights norms. Given its notoriously limited enforcement capacity, does the UN's endorsement of these programs have any effect separate from what States are already doing at the national level? If so, how does the UN's involvement advance our understanding of how State power may or should be used to achieve security goals while still respecting human rights, if at all? And how, if at all, might the UN resist low national-level legal standards and practices?

236. See generally Machiko Kanetake & André Nollkaemper, *The International Rule of Law in the Cycle of Contestations and Deference*, in THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS 455 (Machiko Kanetake & André Nollkaemper eds., 2016).

237. See *id.*

238. *Kadi v. Council of the Eur. Union*, 2008 E.C.R. I-06351. See generally C. Cora True-Frost, *The Development of Individual Standing in International Security*, 32 CARDOZO L. REV. 1183, 1205-06 (2011) (arguing that the legally unaccountable UN Security Council was gradually compelled by regional- and national-level challenges such as *Kadi* to offer more rights protections at the international-level).

239. See *Kadi*, 2008 E.C.R. I-06351.

240. See *UN Global Counter-Terrorism Strategy*, UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE (2006), <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> [<https://perma.cc/K3E7-25KT>].

241. See *id.*

This Part conducts a preliminary examination of how the UN's CVE positions can give rise to worrisome effects on human rights law, in addition to and independent of national-level CVE programming. It explores the dangers presented by UN-endorsed CVE programs, such as incentivizing States' conformity to a low human rights baseline. In addition, it raises a concern that States may not contest or resist the UN Security Council's binding authority and the Secretary-General's call for States to develop CVE national action plans. If so, then States may very well redirect vital resources toward unproven violent extremism programs, shifting funds away from essential services, including promoting human rights. The UN only recently embraced CVE programming, so we will need to continue its study. The next Part examines the potential for the UN's embrace to positively advance human rights, even if along with security interests. In addition, contest of meaning and authority arise when the UN adopts standards in areas where nations are already regulating; this in turn may help promote security initiatives that do not sacrifice critical human rights.

A. Dilution: Will the UN's Endorsement of CVE Initiatives Invite States to Race to the Bottom?

A rich body of international relations, international law, and human rights law literature discusses setting legal standards and the related concern about races to the bottom. This concern arises here because States may interpret the Secretary-General's Plan of Action on CVE as implicitly endorsing existing national counterterrorism and CVE measures.²⁴² The UN Security Council's call to address violent extremism in Resolution 2178 and the UN Secretary-General's broad, seventy-plus-point Plan of Action, along with other UN CVE-initiatives, may lead States to understand that the UN approves States' efforts to date.²⁴³

This is problematic as States' CVE programming often conflicts with standards of human rights law. For example, the Human Rights Committee, an independent entity, has heavily criticized the Russian Federation, a Permanent UN Security Council Member, for Russia's enforcement of violent extremism laws

242. See generally Secretary-General Plan of Action to Prevent Violent Extremism, *supra* note 7.

243. See S.C. Res. 2178, *supra* note 6, ¶ 1.

broadly to crack down on political action and political opposition.²⁴⁴ The Philippines, too, has been criticized for eagerly embracing vague definitions of “violent extremism.”²⁴⁵ In Indonesia, also criticized by the Human Rights Committee, programming on violent extremism has been reported to be most effective when civil society is involved, but collaboration with civil society has also reportedly devolved into “vigilantism.”²⁴⁶ The Philippines has pursued both alleged communist and Muslim extremists within its borders—and human rights abuses are reported to accompany the pursuit—although public opinion polls show that only four percent of the population believes that terrorism is a national concern.²⁴⁷ In addition, in China, a permanent Security Council Member State, the government targets mostly Uighurs, although it has adopted the general rhetoric about violent extremism.²⁴⁸ The Human Rights Committee has also criticized Kenya’s actions.²⁴⁹ The Kenyan government has aggressively implemented CVE initiatives that have been reported to have targeted Muslim communities and ignited a backlash because of the government’s human rights abuses committed in their implementation.²⁵⁰ Further, the Australian government has committed to countering violent extremism programs in its “Resilience” CVE programs, and controversy about its success or failure persists.²⁵¹ Even in Australia’s more established CVE

244. See, e.g., Observations of the HRC: Russian Federation, *supra* note 133, ¶ 7.

245. See Human Rights Comm., Concluding Observations of the Human Rights Committee: Philippines, ¶ 14, U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003).

246. See generally Human Rights Comm., Concluding Observations on the Initial Report of Indonesia, U.N. Doc. No. CCPR/C/IDN/CO/1 (Aug. 23, 2013).

247. See *The Philippines: Extremism & Counter-Extremism*, COUNTER EXTREMISM PROJECT, 9 (2017), https://www.counterextremism.com/sites/default/files/country_pdf/PH-06272017.pdf [<https://perma.cc/HP22-HMZZ>].

248. See Alice Su, *China Doesn’t Mind Islamic Extremists*, FOREIGN POL’Y (Dec. 16, 2016, 9:30 AM), <http://foreignpolicy.com/2016/12/16/china-doesnt-mind-islamic-extremists/> [<https://perma.cc/9YQU-5MN4>].

249. See Human Rights Comm., Concluding Observations of the Human Rights Committee: Kenya, ¶ 8, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005).

250. See *Countering Violent Extremism: Myths and Fact*, *supra* note 106; *Kenya: Extremism & Counter-Extremism*, COUNTER EXTREMISM PROJECT, 1 (2017), https://www.counterextremism.com/sites/default/files/country_pdf/KE-07122017.pdf [<https://perma.cc/B3VD-BF6R>].

251. See Dan Box, *Programs ‘Don’t Reach Radicals’*, AUSTL. (Nov. 20, 2015), <http://www.theaustralian.com.au/national-affairs/paris-attacks-antiterror-programs-dont-reach-radicals/news-story/d5108f55da2922fa16a36fd7b0a2f811>; Michael Keenan, *Anti-Extremism Programs Are World’s Best Practice*, AUSTL. (Nov. 23, 2015), <http://www.theaustralian.com.au/opinion/australias->

programming, however, broad confusion about the difference between extremism and radicalization is reported.²⁵² A wide gulf separates community members' and government leaders' perceptions of the fairness of existing counterterrorism measures already under way.²⁵³ The question whether these programs offer the state more latitude to play "dirty tricks" with culture remains unanswered.²⁵⁴

As a descriptive matter, if there is a push at the international-level for national conformity to international human rights standards through socialization,²⁵⁵ the concern that UN-endorsed CVE may dilute widely held interpretations of human rights norms to accommodate these CVE programs follows. This concern is heightened when the norms that are the focus of the socialization are norms that broaden States' power, as opposed to limit it, as is arguably the case with CVE programs. Over time, commonly held understandings regarding many rights may change as CVE programming becomes entrenched in States. Furthermore, the UN's endorsement raises a concern about whether the scope of individual liberty protections may be eroded, in part because of the UN's apparent endorsement of CVE programs. If CVE programming faces little opposition, scrutiny, or resistance from critical stakeholders, security priorities may easily erode individual rights norms.

B. Deference and Foreclosing Contestation: "Bureaucratic" Effects of Secretariat Engagement Requiring States to Create National Action Plans and Devote State Resources to CVE

The literature on international organizations describes the bureaucratization of obligations and the corresponding pressure on States to conform to practices and procedures promoted by

antiextremism-programs-are-worlds-best-practice/news-story/0b9ec2093ea99bf0c7ad5b3ad62a3f1f [https://perma.cc/4SCW-RKCJ].

252. See, e.g., *Countering Violent Extremism*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT, <https://www.ag.gov.au/NationalSecurity/Counteringviolentextremism/Pages/default.aspx> [https://perma.cc/7UKZ-LQGD] (last visited Jan. 8, 2018).

253. See *id.*

254. For an example of a state intelligence agency playing dirty tricks with culture, see Laurence Zuckerman, *How the C.I.A. Played Dirty Tricks with Culture*, N.Y. TIMES (Mar. 18, 2000), <http://www.nytimes.com/2000/03/18/books/how-the-cia-played-dirty-tricks-with-culture.html> [https://perma.cc/GR8R-2THT].

255. See, e.g., RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) (arguing that socialization is a significant causal mechanism in creating change at the international level).

international organizations.²⁵⁶ The United Nations has one of the broadest memberships of any international organization²⁵⁷ and through its broad membership can encourage compliance with international norms, although it lacks corresponding enforcement powers. The UN encourages compliance through transparency-enhancing mechanisms, such as reporting on national action plans, as well as through its programming and its agencies and programs. In earlier work, I have traced the palpable, operational effects of what were otherwise non-binding, broad thematic UN Security Council Resolutions.²⁵⁸ I have shown how even nonbinding resolutions contribute to the expansion of UN organs' mandates and may gradually be implemented. A principal method the UN uses to encourage implementation of its directives has been for the Secretary-General to call on all States to adopt National Action Plans to pursue the Council's specific goals.²⁵⁹ These goals may include, for example, incorporating a gender focus in conflict operations, peacebuilding, and peacekeeping.²⁶⁰

Similarly, the Secretary-General's Plan of Action further promotes CVE programs by, *inter alia*, calling on States to create national action plans on CVE, among other things. Although the focus of Resolution 2178 (2014) is primarily foreign terrorist fighters, its broader language includes the concern that "violent extremism . . . can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters."²⁶¹ It calls on "States to enhance efforts to counter this kind of violent extremism,"²⁶² and to "engage relevant local communities and non-governmental actors in developing strategies to counter . . . violent extremism"²⁶³ As described in Part I, Security Council Resolution 2178 (2014) augmented the UN's counterterrorism

256. See, e.g., *id.*; JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006); GALIT A. SARFATY, VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK (2012).

257. The UN has 193 members; the World Health Organization has 194. *Annex 1: List of Member States by WHO Region and Mortality Stratum*, WORLD HEALTH ORG., http://www.who.int/mental_health/neurology/annexes_neuro_disorders_public_h_challenges.pdf [<https://perma.cc/C6EX-R9LK>].

258. See C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT'L L. & POL. 115, 121, 174-75 (2007).

259. *Id.* at 148, 180.

260. See *id.* at 180.

261. S.C. Res. 2178, *supra* note 6, ¶ 1.

262. *Id.* ¶ 15.

263. *Id.* ¶ 16.

architecture;²⁶⁴ as this Article goes to press, the Security Council has approved a “comprehensive international framework” and adopted a Resolution specifically addressing countering the narratives of terrorist groups.²⁶⁵ This framework bears close scrutiny to ascertain how, if at all, it addresses the potential human rights violations detailed above.

For argument’s sake, assume for the moment that States might be motivated to challenge the Council’s use of Chapter VII binding power to call on them to do the above. The UN Security Council has broad authority and discretion to use Chapter VII to create new international legal obligations for States, leaving these dissenting States little recourse. As a practical matter, there are no fora for States or individuals (who have not been indicted by an international ad hoc tribunal) to secure formal and binding (as opposed to advisory) international-level legal review of UN Security Council Chapter VII resolutions²⁶⁶ such as SC Resolution 2178 (2014). Rather, these States will likely have to rely on noncompliance.

Time will tell, but there is good reason to predict that the UN Secretariat’s endorsement of CVE and corresponding call to develop national action plans is likely to lead to States’ actual implementation of CVE initiatives.²⁶⁷ Although the Secretary-General seeks to promote human rights in collaboration with CVE programs, the Secretary-General’s past calls for national action plans in other areas have often led to redirection of priorities, and even resources.²⁶⁸ In this case, States that might otherwise have prioritized development or social services may be encouraged to redirect related resources through security funding, conflating foci of the programs. Trust,²⁶⁹ not only legitimacy, in international collaboration is critical.

264. See *supra* Section I.B.

265. See sources cited *supra* note 29.

266. C. Cora True-Frost, *Weapons of the Weak: The Prosecutor of the ICC’s Power to Engage the UN Security Council*, 44 FLA. ST. L. REV. 261, 273 (2017); see also Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 885 (2005).

267. See generally TRUST IN INTERNATIONAL POLICE AND JUSTICE COOPERATION (Saskia Hufnagel & Carole McCartney eds., 2017).

268. See *id.*

269. “[T]rust is ‘a matter of judgement and action, in conditions of less than perfect information.’” *Id.* at 1 (quoting Onora O’Neill, *Autonomy and Trust in Bioethics* (2001)). “[T]rust as ‘[t]he subjective judgment that a trustor makes about the likelihood of the trustee following through with an expected and valued action under conditions of uncertainty.’” *Id.* (quoting Paul C. Bauer, *Conceptualizing and*

As discussed above, CVE programs may diminish civil society's trust in governments. Even as they may broadly identify individuals alleged to be at risk of radicalization, they may also correspondingly disincentivize vulnerable peoples from seeking assistance from governments for fear of being stigmatized.

IV. INTERNATIONAL CONTESTATION AND DISSENT: HOW THE UN'S EMBRACE OF CVE MAY HELP PROMOTE INTERNATIONAL HUMAN RIGHTS LAW

The UN has created an international agenda with its endorsement of CVE programs and CVE national action plans.²⁷⁰ This agenda invites comment and dissent within the UN, as well as from States and transnational advocacy groups.²⁷¹ Within the UN, independent human rights bodies and Special Rapporteurs have already raised concerns and even sought to dissent from aspects of CVE programs as implemented.²⁷² If vigorous, sustained debate about the potentially deleterious effects of CVE programs ensues and continues, the UN may be forced to specifically define or design a fair CVE program. It will need to further justify comingling security and social services.²⁷³

In promoting an international agenda for CVE programs, the UN also opens itself to contestation from transnational advocacy networks and human rights activists concerned about the implementation of such programs in their own States. As the UN embraces CVE programs as a part of its international-level work, it may be required to more carefully consider activists' voices than it might have done if it had not embraced CVE programs. Indeed, its willingness to offer members of civil society an opportunity to express concerns and challenges to its programs will be essential to

Measuring Trust and Trustworthiness, in POLITICAL CONCEPTS: COMMITTEE ON CONCEPTS & METHODS WORKING PAPER SERIES, Working Paper No. 61 (2015)). Trust "concerns expectations and predictions of future behaviour, hence individuals rely on trust in order to take a 'leap of faith' about present and future performance of roles." *Id.*

270. See generally IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007).

271. *Id.*

272. *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, *supra* note 21, ¶ 17.

273. This aspect of CVE programming is of particular interest to me—the overlap between earlier human security ideas and CVE highlights a number of shared conceptual concerns.

its maintaining (or attaining) sociological legitimacy. As time continues, as was true with *Kadi*, there may also be indirect challenges of UN-endorsed programs from national-level courts.

Indeed, the UN's embrace of CVE policies offers an additional legal interface outside national court systems. Transnational advocates may use the international sphere to leverage rule of law and fairness principles in order to challenge national-level implementation of these programs.

A. Setting an Agenda Within the UN and Inviting Contestation from Its Varied Organs, Programs, and Bodies

Even as the global administrative apparatus of the UN may foreclose contestation in many respects, the UN's incorporation of CVE into its international agenda places these programs squarely within the UN's responsibilities. The UN's embrace therefore creates multiple additional interfaces for contestation of the content of CVE programs. The many organs, bodies, and programs of the UN have different membership, mandates, and foci, and as a result have received the Secretary-General's endorsement of CVE differently.

Indeed, many entities within the UN have raised concerns about the human rights impacts of CVE programs. The UN Human Rights Committee and the Special Rapporteurs have voiced both indirect and direct concerns about the Secretary-General's adoption of a single Plan of Action on CVE. At present, even among various human rights entities such as, on the one hand, the Office of the High Commissioner for Human Rights, or on the other, the Human Rights Council, there have been varied concerns and reactions to the Secretary-General's Action Plan on CVE. For example, as mentioned above, the Human Rights Council enacted a resolution in October 2015 that does not clarify whether violent acts are required under the definition of violent extremism.²⁷⁴ In late February 2016, Ben Emmerson, the Special Rapporteur on the promotion and protection of human rights, while countering terrorism, released a report responding to and criticizing various aspects of the new position embracing CVE programs.²⁷⁵ He raised concerns about the Human Rights Council's failure in its 2015 resolution to specify whether violent extremism requires acts, as well as the Council's failure to mention the many abuses civil society has experienced

274. HRC Res. 30/15, *supra* note 84, at 2.

275. See Special Rapporteur A/HRC/31/65, *supra* note 23.

under CVE programs and initiatives.²⁷⁶ In addition, the ICCPR Human Rights Committee has raised concerns relating to how CVE programs affect freedom of expression, non-discrimination principles, and freedom of movement in their general and state-specific comments.²⁷⁷ Although UNESCO has fulfilled the Secretary-General's directive to produce materials regarding CVE, it has also expressed its discomfort with integrating a security concern into education and teachers' work.

Given that CVE and counterterrorism programs unarguably expand the scope of States' authority and discretion, it is perhaps not surprising that General Assembly States generally support these initiatives.²⁷⁸ As the UN presses its "whole-of-society" approach to countering violent extremism, further study is recommended to investigate whether state-led bodies, including, for example, the Human Rights Council, have been more likely to embrace the Security Council and Secretary-General's CVE initiatives than have been independent human-rights specialized bodies. Internal questioning and contestation within the UN may lead to greater specification of the effectiveness of CVE initiatives in actually countering violent extremism, as well as better understanding of methods that do or do not work to discourage violent extremism.

B. How the International-Level Embrace of CVE May Create

Opportunities for Advocates to Contest National Level Practice at the International Level and Offer Comparative Lessons for States

The UN's endorsement offers international legitimacy to CVE programs.²⁷⁹ When the UN embraces policies that erode, rather than advance, human rights protections on the whole, it is still possible for the UN to exert a counter pressure to State practices and seek higher standards. CVE programs raise many human rights concerns and may not be effective in achieving their rather broadly stated goals—whether and when counter-radicalization programs will succeed is unclear. Nevertheless, there are two ways that the UN's adoption of CVE strategies may help affirm a (marginally) higher baseline for human rights in CVE programs. First, if States' programs are lower than the international standards, their legitimacy as rights-respecting

276. *Id.* ¶¶ 26-28.

277. General Comment No. 34, *supra* note 52, ¶¶ 11-12.

278. G.A. Res. 60/288, *supra* note 8, at 2; S.C. Res. 2178, *supra* note 6 (violent extremism, here, is defined differently than terrorism).

279. HURD, *supra* note 270, at 124.

States will likely be impacted. Second, an international framework for CVE enables those outside the UN, including transnational advocacy groups, to contest the content and authority of national programs. Simply put, UN-endorsed CVE creates an agenda for civil society to engage with.

As for the first, even the UN's broad endorsement of CVE programs articulate limits below which CVE programs would not be acceptable. For example, as framed at the international level, CVE programs are facially neutral. They address violent extremism in all forms and do not explicitly target Muslims. "This is consistent with research on counterterrorism that claims that the counterterrorism approach should be 'agnostic about the "Why?" and focus[] on the "What?"'"²⁸⁰ Indeed, the Human Rights Council has emphasized that "violent extremism, in all its forms and manifestations, cannot and should not be associated with any religion, nationality, civilization or ethnic group."²⁸¹

But, for example, the United States' President Trump reportedly wants to target CVE efforts narrowly at Muslims, and to exclude from investigation, for example, Neo-Nazis and far-right extremists.²⁸² Narrowing CVE programming to Muslims at the national level is not permitted by UN standards.²⁸³ The United States would certainly face international disapproval if it proceeds with this narrow focus. Some may object that the US would face international criticism for launching a religiously targeted program regardless of the UN's position. The US program would violate existing international human rights law. While it is true that the US would face criticism from the treaty bodies, and likely from the Office of the High Commissioner for Human Rights, it is less certain that the US's policy would attract the attention of other programs and bodies of the United Nations. But endorsing CVE creates multiple interfaces for contesting national plans—including, for example, in the Secretariat, by the General Assembly, by UNESCO, and by the UN Development Programme. They might argue that the UN's

280. Peter Bergen, *Why Do Terrorists Commit Terrorism?*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/opinion/why-do-terrorists-commit-terrorism.html> [<https://perma.cc/BQ2F-JBHK>].

281. HRC Res. 30/15, *supra* note 84, at 2.

282. Ainsley et al., *supra* note 211; Nadim Houry, *Trump's CVE Program: Going from Bad to Worse*, JUST SECURITY (Feb. 22, 2017), <https://www.justsecurity.org/37866/good-vs-bad-extremists> [<https://perma.cc/QLN9-YJVU>].

283. See PATEL, *supra* note 81, at 8.

endorsement only serves to mainstream these otherwise concerning programs; to some extent, the UN's endorsement normalizes CVE programs.

However, if CVE programs were implemented at the national level only, there would also arguably be fewer opportunities outside their nation-state for transnational advocacy networks to actively engage the issues they raise. A central challenge for transnational advocacy networks is in shaping the international agenda and finding places where it is easy for them to intervene. As it stands, civil society can leverage the international attention the UN has given CVE programs in any one of the many interfaces created by the UN's endorsement. In the United States, various civil society organizations have recently refused significant grants from the US government out of concern that their cooperation would be abused.

CONCLUSION

Whether the international-level embrace of CVE programs will in fact curb "violent extremism" and enhance individuals' lives is a question this Article cannot answer, but the success of preventative CVE programs targeting "vulnerable individuals" will turn on civil society's perceptions of government action. Many preventative CVE programs embody the intuition that addressing the "conditions conducive to terrorism," through, for example, outreach, development programs, and social services, is critical to discouraging terrorism.

As this Article has argued, quite apart from the continuing scholarly debate, the UN's embrace of CVE programs offers credibility and legitimacy both to this intuition and to the many varied national-level programs that purport to be doing CVE. Over time, the content of some international human rights norms, particularly those related to freedom of religion, association, and speech, may be diluted by a rush to conformity with national action plans that do not adequately protect and promote these norms. Absent human rights-respecting models of preventive CVE programs, the UN's call for National Action Plans and the UN's embrace of CVE programs, could, in limited ways, help to reframe some States' interventions to promote both security and human rights. After all, the UN's embrace of CVE programming allows contests of meaning and authority between the State and the IO, which in turn may help promote security initiatives that do not sacrifice critical human rights. Still, such programs undeniably have

contributed to an ever-expanding scope of State security actions, and have raised limitations for the development of many international human rights laws in the ways described above.

For the foregoing reasons, the international community's embrace of CVE programs has not only enabled the UN to promote human rights within these programs, it also appears to have constrained it in further expanding and developing human rights law as a preliminary matter. As these programs continue to be implemented, further study of their effects on international human rights law and security is imperative.