

HUMAN RIGHTS: THE MEASURE OF SUCCESS IN NONTRADITIONAL WAR

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The history of the United States shows that in spite of the varying trend of the foreign policy of succeeding administrations, this Government has interposed or intervened in the affairs of other states with remarkable regularity, and it may be anticipated that the same general procedure will be followed in the future.¹

[P]rotecting the rights of even the least individual among us is basically the only excuse the government has for even existing.²

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¹ U.S. MARINE CORPS, SMALL WARS MANUAL 4 (1940) [hereinafter SMALL WARS MANUAL].

² Ronald Reagan, Governor, Speech at "Operation Cablesplinter" Governor's Orientation (Feb. 10, 1969), in GEORGE KATSIAFICAS, THE IMAGINATION OF THE NEW LEFT: A GLOBAL ANALYSIS OF 1968 app. 1, at 260 (1987).

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INTRODUCTION

After the departure of the United States and coalition military forces from Iraq and Afghanistan, politicians, historians, and commentators have assessed, and will continue to assess, the successes and failures of the US-led coalitions. Victories could be claimed or defeats exposed using various standards and perspectives, including

political costs,³ costs to military readiness,⁴ relative successes of the military strategies employed, costs in human life weighed against the benefits to national security,⁵ and economic costs weighed against economic opportunity.⁶ However, in nontraditional warfare waged by a democracy, victory should not be gauged primarily by a triumph of one ideology over another,⁷ by the interests of one state over another,⁸ or even by the survival of one governing body over another, but by progress made in the advancement of human rights. This article argues that the successful resolution of the conflicts in Iraq, Afghanistan, and other nontraditional wars⁹ should be measured primarily from the perspective of the citizenry of the state in which the conflict was fought, using the standards of recognized international human rights. Achieving success through establishing respect for human rights is consistent with a strategy for winning the hearts and minds of the population,¹⁰ and is not at odds with other military, political, or economic goals.

³ See, e.g., BEN CONNABLE & MARTIN C. LIBICKI, HOW INSURGENCIES END 13, 24 (2010) (suggesting political costs and considerations both for the government of the state in which the nontraditional war is fought, as well as for the government of the intervening state).

⁴ See, e.g., Press Release, Congressmen John Murtha and Dave Obey, United States Army Military Readiness (Sept. 13, 2006), available at http://www.globalsecurity.org/military/library/congress/2006_rpt/060913-murtha-obey_army-readiness.htm (describing how the conflicts in Iraq and Afghanistan are eroding military preparedness). See also U.S. GEN. ACCOUNTING OFFICE, GOA-04-112, REPORT TO CONGRESSIONAL REQUESTERS, MILITARY READINESS: DOD NEEDS TO REASSESS PROGRAM STRATEGY, FUNDING PRIORITIES, AND RISKS FOR SELECTED EQUIPMENT (2003).

⁵ See, e.g., MAX BOOT, THE SAVAGE WARS OF PEACE 347–48 (2002) (asserting that U.S. military intervention in foreign conflicts will inevitably result in costs to human life, and that such costs should be expected prior to making the decision to intervene).

⁶ See, e.g., *id.* at 346–52 (describing the costs and benefits of conducting small (nontraditional) wars, including economic costs, costs to human life, and the risks and costs of insufficient or non-intervention).

⁷ MARTIN WALKER, THE COLD WAR 5 (1993) (describing two broad kinds of warfare: war over ideology, “what other men and women are allowed to believe,” and “wars of succession and balance of power”).

⁸ See, e.g., JOHN SWEETMAN, THE CRIMEAN WAR 17–20 (2001) (discussing the reasons for the Crimean war as a conflict fought primarily between Russia and the Turks, French, and British over a variety of concerns, including the spread of Russian power as well as religious and economic interests).

⁹ See *infra* Part II (defining nontraditional war as any armed conflict or military intervention that is not a conventional war between two states, and includes counterinsurgency warfare, small wars, guerrilla warfare, and low intensity conflicts).

¹⁰ See, e.g., General David H. Petraeus, *A Message from the Commander*, COIN COMMON SENSE, July 2010 (instructing servicemembers in Afghanistan to show compassion and to “secure and serve the people of Afghanistan”). See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY, at C-4 (2009) [hereinafter FIELD MANUAL 3-24.2] (“Counterinsurgency is a competition with the insurgent for the right to win the hearts, minds, and acquiescence of the population.”).

Success following nontraditional war requires durable solutions, which in turn require long-term commitments to improving repressive or conflict-ridden societies.¹¹

In particular, long-term solutions require rebuilding (or building from scratch) the rule of law: fostering effective, inclusive, and transparent indigenous governance structures; creating fair and independent judicial systems and responsible security forces; reforming and updating legal codes; and creating a widely shared public commitment to human rights.¹²

Stated another way, lasting victory comes with the creation of conditions that allow for both the provision and the progression of fundamental human rights.¹³ Any end result of a nontraditional conflict that falls short of instituting the conditions that allow for the progress of human rights will ultimately give rise to those forces that led to the nontraditional conflict (and the need for external intervention) in the first place.¹⁴

Although the impetus for engaging in nontraditional war may be to protect US interests abroad, success in nontraditional warfare is not attainable without both the establishment of security and the provision of human rights to the populace.¹⁵ Following a nontraditional war, without the stability that accompanies security and human rights, the state is far more likely to devolve once again into failure and collapse.¹⁶ By way of contrast, outcomes of traditional/conventional warfare are generally more clear-cut, and can be determined simply by the ability of a state to successfully defend its borders and sovereignty, defeat military forces, protect its economic interests, or assert national interests.¹⁷

This article proposes two central questions that must be answered affirmatively to evaluate the success of a nontraditional war. First, has the state emerged from the nontraditional conflict capable of

¹¹ JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 3 (2006).

¹² *Id.*

¹³ See *infra* Part III.B (describing those conditions necessary for establishing human rights, which include the provision of public security, the establishment of an effective democratic system, the ability of a state to defend its borders, and the ability of a state to sustain itself economically).

¹⁴ See *id.*

¹⁵ See, e.g., SMALL WARS MANUAL, *supra* note 1, at 32 (winning nontraditional wars requires permanently establishing peace and security, and protecting life, liberty and property).

¹⁶ See U.S. AGENCY FOR INT'L DEV., FRAGILE STATES STRATEGY 4 (2005), available at http://pdf.usaid.gov/pdf_docs/PDACA999.pdf [hereinafter FRAGILE STATES STRATEGY].

¹⁷ See generally Frank G. Hoffman, *Small Wars Revisited: The United States and Nontraditional Wars*, 28 J. STRATEGIC STUD. 913, 914 (2005).

establishing public security and governing effectively? This discussion focuses on the significance of establishing the rule of law as a means to strengthen state governance. The broader discussion includes key elements such as providing security, instituting a working democracy, and establishing economic stability. Second, to what extent has respect for human rights been afforded to the citizens of a state following the nontraditional war? A state capable of providing security and democracy is only a foundation for success. Whether the state uses its authority to provide and allow for the advancement of human rights is the difference between short-term and enduring success.

Part II defines the nature and characteristics of a nontraditional war. The term nontraditional war is used throughout this paper to refer to a variety of armed conflicts that are not of an international or conventional character, and includes counterinsurgency and peacekeeping operations. While this article will regularly cite to the nontraditional conflicts in Iraq and Afghanistan for illustration and support, other nontraditional wars will be referenced as well. Part III explores the conditions that lead to fragile and failing states and the impact that state failure has on the population and international security. This section also includes a discussion of the four foundational standards necessary for a successful state. Part IV defends the proposition that securing human rights is the measure of success for a democracy engaged in a nontraditional armed conflict. This section supports the proposal that instilling and institutionalizing respect for human rights is necessary to lessen the grievances responsible for the conflict and create a lasting peace.

Part V argues that establishing respect for human rights protects US security interests. Part VI discusses internationally accepted human rights necessary for a successful state, and, by correlation, for the successful conclusion of a nontraditional war. This article concludes with the observation that with human rights as the standard, victory is not won by the government forces involved in the conflict. Military, government, and other non-government forces can only establish those conditions necessary for success. In the end, it will be the citizens of the state that bear the responsibility to instill a lasting democracy, safeguard human rights, and determine their future.

I. NONTRADITIONAL WAR: HISTORY AND CHARACTERISTICS

What is a nontraditional war? What makes a nontraditional warfare fundamentally different from other conventional or inter-state conflicts? It is important to understand both the nature of nontraditional warfare, as well as the conditions that give rise to it, in order to comprehend why the establishment of human rights is critical to a successful outcome.

The terminology for nontraditional war has evolved over time, and includes a range of conflicts referred to by various names.¹⁸ In the broadest sense, a nontraditional war could include any armed conflict that is not a conventional war between two states. In conventional—or traditional—warfare, the conflict focuses on defeating the opposing military through “force-on-force operations,”¹⁹ by pitting the government and military of one state against the government and military of the other.²⁰ In nontraditional warfare, the conflict focuses more on control or influence over a population rather than military control over enemy forces or territory.²¹

The definition of small wars from the *Small Wars Manual*, applies equally well to the concept of nontraditional war.

The term “Small War” is often a vague name for any one of a variety of military operations. As applied to the United States, small wars are operations undertaken under executive authority, wherein military force is combined with diplomatic pressure in the internal or external affairs of another state whose government is unstable, inadequate, or unsatisfactory for the preservation of life and of such interests as are determined by the foreign policy of our Nation.²²

The appellation “small wars” is misleading however, as they are “not limited in their size, in the extent of their theater of operations nor in their cost in property, money, or lives.”²³

Nontraditional war is a broad term encompassing conflicts of various names²⁴ including small wars,²⁵ unconventional war,²⁶ guerrilla

¹⁸ See *infra* text accompanying notes 24–33. See also Hoffman, *supra* note 17, at 914.

¹⁹ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-24: COUNTERINSURGENCY I-2, I-4 (2013) [hereinafter COUNTERINSURGENCY].

²⁰ See *id.* at I-4.

²¹ *Id.* at I-8.

²² SMALL WARS MANUAL, *supra* note 1, at 1.

²³ *Id.*

²⁴ See Hoffman, *supra* note 17, at 914.

²⁵ See SMALL WARS MANUAL, *supra* note 1, at 1.

wars, asymmetric warfare,²⁷ irregular warfare,²⁸ low intensity conflict, insurgency, counterinsurgency,²⁹ Fourth Generation Warfare,³⁰ and Common Article 3 conflicts.³¹ Even peacekeeping operations³² and Stability and Support Operations³³ are included within the realm of nontraditional warfare.³⁴ While a lack of clear terminology for these wars may be problematic in some circumstances,³⁵ “segregation of [nontraditional wars] into fixed classifications” is not only “extremely difficult,”³⁶ but is also unnecessary. For purposes of this article, the term

²⁶ See U.S. DEP’T OF DEF., DIRECTIVE 3000.07, IRREGULAR WARFARE 11–12 (2008) (defining unconventional warfare as involving a broad spectrum of military and paramilitary operations, normally of long duration, and conducted along with indigenous forces. These operations include insurgency, guerrilla warfare, subversion, sabotage, intelligence, and unconventional assisted recovery.) [hereinafter DODD 3000.07].

²⁷ DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 27 (2009). Because of overwhelming U.S. military power, adversaries will attempt to counter this asymmetry by fighting against the U.S. using asymmetrical means. *Id.* at 22.

²⁸ Irregular warfare (IW) is defined as

[a] violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary’s power, influence, and will.

DODD 3000.07, *supra* note 26, at 11.

²⁹ *Id.* Counterinsurgency (COIN) is defined as

a comprehensive civilian and military effort designed to simultaneously defeat and contain insurgency and address its root causes. COIN is primarily a political struggle and incorporates a wide range of activities by the [host nation] government of which security is only one, albeit an important one.

COUNTERINSURGENCY, *supra* note 19, at I-2.

³⁰ William S. Lind et al., *The Changing Face of War: Into the Fourth Generation*, MARINE CORPS GAZETTE, Oct. 1989, at 22.

³¹ Common Article 3 (CA3) conflicts are non-international in character, occurring within the territory of one of the parties to the 1949 Geneva Conventions, as described in Article 3 of each of the four conventions (referred to as the “common article”). See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. For a more detailed explanation of CA3, see INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *THE LAW OF WAR DESKBOOK* 21–22 (2010).

³² See COUNTERINSURGENCY, *supra* note 19, at V-12 (defining peace operations as “crisis response and limited contingency operations . . . to contain conflict, restore the peace, and shape the environment to support reconciliation and rebuilding and to facilitate the transition to legitimate governance. [Peace Operations] include peacekeeping operations, peace enforcement operations (PEO), peace building post-conflict actions, peacemaking processes, and conflict prevention.”).

³³ See *id.* at V-11 (describing Stability Operations as being fundamental to counterinsurgency operations, as they are designed to “address the root causes of insurgency as well as drivers of conflict and are therefore essential to long-term success”).

³⁴ See Hoffman, *supra* note 17, at 916.

³⁵ *Id.*

³⁶ SMALL WARS MANUAL, *supra* note 1, at 1–2.

“nontraditional warfare” will be used to encompass all small wars, including insurgency and counterinsurgency operations.

Nontraditional wars are often described as “campaigns in which at least one side of the conflict does not employ regular forces as its principal force and does not fight conventionally.”³⁷ Although not rising to the scale of conventional warfare, they may yet involve “protracted and extremely lethal conflicts of the most savage and persistent violence.”³⁸ Significantly, nontraditional warfare generally involves non-state actors, is often internal to a particular state, and, like conventional warfare, it often destabilizes governments and results in the defeat of major powers.³⁹

Given the prevalence of recent and ongoing nontraditional wars, developing a method for evaluating the outcomes of these wars is increasingly important. For example, a relatively recent estimate by one author placed the number of ongoing small wars to be between twenty and fifty-five.⁴⁰ For the United States, the ability to conduct candid and accurate assessments of its involvement in nontraditional war is particularly important given the current conflicts in Iraq and Afghanistan and the many conflicts during the past century involving US troops in the Philippines, Cuba, Haiti, Dominican Republic, Nicaragua, Panama, Columbia, and Somalia, to name a few.⁴¹ The prevalence of these conflicts led to the creation of a body of military guidance which serves to prescribe the manner in which nontraditional wars are to be fought.⁴² What has not yet fully emerged is a method to appraise the outcomes of these conflicts.

II. THE SUCCESSFUL RESOLUTION OF A NONTRADITIONAL CONFLICT?

What marks the ending of a nontraditional war? Before evaluating a war’s success, there must first be a determination that the

³⁷ Hoffman, *supra* note 17, at 915.

³⁸ *Id.* at 915. See BOOT, *supra* note 5, at 347–48.

³⁹ See Hoffman, *supra* note 17, at 917.

⁴⁰ *Id.* at 914. See also KILCULLEN, *supra* note 27, at 2 (estimating ninety-five ongoing wars at the beginning of the 21st Century).

⁴¹ See Hoffman, *supra* note 17, at 920.

⁴² Examples include Field Manual 3-24.2, *Tactics in Counterinsurgency* and Joint Publication 3-24, *Counterinsurgency Operations*. See generally FIELD MANUAL 3-24.2, *supra* note 10; JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-24: COUNTERINSURGENCY OPERATIONS (2009) [hereinafter COUNTERINSURGENCY OPERATIONS].

conflict has ended or that hostilities have ceased,⁴³ which “is not as straightforward a task as it might first appear.”⁴⁴ Unfortunately for many countries exiting a nontraditional war, “[p]eace is rarely a permanent condition Failure to address the root causes of insurgencies allow[s] them to hibernate, sometimes undetected, for years before reemerging.”⁴⁵ Due to the longstanding natures and origins of some types of war, certain simmering conflicts seem to be drawn out indefinitely.⁴⁶ While the aspects of indefinite conflict, such as the war on terror, are legally, politically, and socially troubling,⁴⁷ discussion into this subject is beyond the scope of this article.⁴⁸

Evaluating the success of nontraditional war is not black and white; instead, success is measured in a “matter of degrees.”⁴⁹ Assessments of success and defeat arguably can be made at any time, such as evaluations of progress and failure in the midst of a protracted struggle. However, a rush to judgment should be avoided, as the long-term impact of strategies, tactics, and actions taken during a nontraditional war may not be apparent until years after hostilities have ceased.

⁴³ See generally Adam Klein, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865 (2010).

⁴⁴ CONNABLE & LIBICKI, *supra* note 3, at 20.

⁴⁵ *Id.* “An insurgency could effectively be over without either side realizing that it had won or lost for several years. . . . ‘[D]efeated’ insurgencies can splinter into smaller, more-violent terrorist organizations or hibernate with the intent of reigniting hostilities when conditions present themselves.” *Id.* at xiii.

⁴⁶ See *id.* at 200–01 (listing the duration in years of various insurgencies, including the ongoing insurgencies in Chad and Indonesia, for example, that have continued for forty-five years). See also Klein, *supra* note 43, at 1867 (concerning participation by the United States military in the ongoing conflict in Afghanistan. “The length and novelty of the conflict and the open-ended Authorization for the Use of Military Force (AUMF) have led courts and legal scholars to comment on the uncertain prospects for a determinate legal end to the conflict.”).

⁴⁷ See Klein, *supra* note 43, at 1868 (discussing the politically risky judicial practice of “pinpointing the ‘end’ of such a nebulous conflict” as the war on terror). But see BOOT, *supra* note 5, at 346 (arguing by analogy that just as no one expects the city police to win what has been termed as the war on crime, the expectation of completely winning the war on terror by eliminating terrorism is unreasonable. “The police are considered successful if they reduce disorder, keep the criminal element at bay, and allow decent people a chance to live their lives in peace.”).

⁴⁸ For a more in depth analysis, see Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004) (arguing that the war on terror is not a war but a state of emergency).

⁴⁹ ASHRAF GHANI & CLARE LOCKHART, *FIXING FAILED STATES* 5 (2008).

A. THE FRAGILE STATE AND NONTRADITIONAL WAR

Progression towards creating an environment supportive of the protection of human rights begins with assisting in the formation of a successful state, capable of governance.⁵⁰ A failed⁵¹ state does not or cannot exert effective control over its territory and is “unable or unwilling to assure the provision of vital services to significant parts of its territory.”⁵² A fragile state is a country that “suffers from institutional weaknesses serious enough to threaten the stability of its central government. . . . The term ‘fragile states’ describes a broad range of failing, failed, and recovering states.”⁵³

On one hand, some states with seemingly stable and established governments have the ability to provide greater individual freedoms and protection for human rights, but do not do so.⁵⁴ This can “incite destabilizing elements within a state,”⁵⁵ leading to hostilities. Fragile and failing states are also breeding grounds for “the accidental guerrilla.”⁵⁶ These provoked, disenfranchised, or dispossessed “accidental guerrillas” strengthen an insurgent’s base of support—further weakening the state—by aligning with insurgent forces against the state.⁵⁷

⁵⁰ See generally LIANA SUN WYLER, CONG. RESEARCH SERV., RL34253, WEAK AND FAILING STATES: EVOLVING SECURITY THREATS AND U.S. POLICY (updated Aug. 28, 2008).

⁵¹ AHMED RASHID, TALIBAN 194–95 (Yale Univ. Press 2010) (describing a failed state as one that is “not necessarily a dying state, although it can be that too. A failed state is one in which the repeated failure of policies carried out by a bankrupt political elite is never considered sufficient reason to reconsider them.”).

⁵² FRAGILE STATES STRATEGY, *supra* note 16, at 1 (describing these fragile and vulnerable states as ones where the legitimacy of the government is in question).

⁵³ COUNTERINSURGENCY OPERATIONS, *supra* note 42, at I-2 (recognizing that the distinction between a failed, failing, and recovering state is “not always clear in practice, as fragile states rarely travel a predictable path of failure and recovery, and the labels may mask other important factors (e.g., insurgencies, factions). It is more important to understand in which direction a state is moving along the framework and how quickly than it is to categorize a state as failed or not.”). See also, e.g., WYLER, *supra* note 50, at 28–31 (providing lists of fragile/weak/failing states compiled by various organizations, including the World Bank, U.S. Department of State, George Mason University, and the Fund for Peace. Examples of fragile or failing states from these lists include Somalia, Chad, Zimbabwe, Afghanistan, Iraq, Sudan, Congo, Rwanda, Liberia, Burma, Nepal, Haiti, and Sierra Leone, to name a few.).

⁵⁴ See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, 2011 HUMAN RIGHTS REPORT: CHINA (2011), available at <http://www.state.gov/documents/organization/186478.pdf> (finding violations of human rights in China, including restrictions on political and religious expression).

⁵⁵ WYLER, *supra* note 50, at 4.

⁵⁶ See generally KILCULLEN, *supra* note 27.

⁵⁷ See, e.g., *id.* at 40–41, 51, 208–09 (providing two illustrations of otherwise relatively pacified populations taking up arms against government or foreign military forces. This book provides

Conversely, for states without stable and established governments, it is the inabilities and the limits of the state's capacity that are the heart of the problem.⁵⁸ In Afghanistan, for example, the state is not overbearing, nor is the government the main restriction of the personal autonomy of its citizens.⁵⁹ However, this same deficiency of state control fails to prevent other forces—such as cultural conventions—from restricting human rights,⁶⁰ such as those of Afghani women.⁶¹ Furthermore, “the weakness of the state against danger and lawlessness” is an impediment to the establishment of human rights.⁶²

Fragile states are susceptible to nontraditional conflicts resulting from regime changes, rebellion, overthrow, and democratic collapse.⁶³ Corrupt, tyrannical, or otherwise ineffective governance often sets the stage for civil conflicts and war.⁶⁴ Failing states are susceptible to downward spirals of violence and increased infringements of human rights, as “[r]epression, poverty, and injustice can fuel terrorism, instability, civil war, and organized crime, and these in turn can lead to still more repression, poverty, and injustice.”⁶⁵ A failing state cannot guarantee security of populace and cannot provide for basic humanitarian needs.⁶⁶ Consequently, successes in stabilizing fragile states are tenuous and may be short-lived. As described by the US Agency for International

several examples in places from Afghanistan to East Timor, where local inhabitants, otherwise unaffiliated with any insurgent group, took up arms and joined the insurgent group in order to expel foreigners and fight back against government provocation.).

⁵⁸ MATTHEW J. MORGAN, *A DEMOCRACY IS BORN: AN INSIDER'S ACCOUNT OF THE BATTLE AGAINST TERRORISM IN AFGHANISTAN* 154 (2007).

⁵⁹ *Id.*

⁶⁰ Certain forms of weak governance, such as an anocracy, are particularly problematic for fragile states. “Anocracies (pseudodemocracies) do not often succeed against insurgencies and are rarely successful in fully democratizing.” CONNABLE & LIBICKI, *supra* note 3, at xiv. “Anocracy is a particularly weak form of government in that it is good at neither democracy or autocracy: It gains little benefit from reform and must refrain from using effective repressive tactics in order to retain the façade of democracy.” *Id.*

⁶¹ *See id.* *See also* Sameera Ayyubi, *The Role of Women in Rebuilding Afghanistan*, in *THE CHALLENGE OF REBUILDING AFGHANISTAN* 111 (Moonis Ahmar ed., 2005) (revealing the cultural and institutional biases against the progress of women's rights in Afghanistan).

⁶² MORGAN, *supra* note 58, at 154.

⁶³ *FRAGILE STATES STRATEGY*, *supra* note 16, at 4.

⁶⁴ *See* WYLER, *supra* note 50, at 4.

⁶⁵ STROMSETH ET AL., *supra* note 11, at 3.

⁶⁶ *See id.* at 2. *See also* U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: AFGHANISTAN (2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154477.htm> (By way of example, Afghanistan has not yet shown an ability to hold fair elections, free from fraud, coercion or violence, provide for freedom of safe travel within the country, provide for returning refugees, adequately protect women against sexual and domestic violence, or provide freedom of religion and speech.).

Development, “When deterioration in effectiveness and legitimacy combine with violent conflict, protracted state failure is highly likely. Avoiding this scenario is a high priority because these states often become trapped in a deadly cycle of repeated failure and recovery.”⁶⁷

State failures and the resulting humanitarian crises and regional instability prompt major powers to intervene, particularly when national interests are involved.⁶⁸ These interventions have generally been motivated, at least in part, by humanitarian concerns, human rights, and democracy.⁶⁹ Historically, the struggles of undeveloped states combating internal dissent and poor governance had “little impact upon the security of developed nations.”⁷⁰ Following 9/11, however, it has become apparent that prevention of state failure is of particular importance to the United States and to the world, as the consequences of state failure and terrorism “pose potentially catastrophic consequences to international security.”⁷¹ “It is the dysfunctional state that stands between the [citizens of a failing state] and a better life.”⁷² It is this “yearning for civil order and enfranchisement,” among the most basic of human rights, that is “the overwhelming desire of ordinary men and women around the world.”⁷³

B. LAYING THE FOUNDATION FOR A SUCCESSFUL STATE: FOUR STANDARDS

Eliminating the conditions which led to the failed state is logically the first step towards success for the prosecution of a nontraditional war. The foundational standards for measuring success⁷⁴

⁶⁷ FRAGILE STATES STRATEGY, *supra* note 16, at 4 (Examples of states caught in the cycle of attempts at recovery and failure include Nigeria following a democratic collapse in 1983, or Mozambique following a protracted civil war which ended in 1992.).

⁶⁸ *See id.* at 4, 7.

⁶⁹ *See id.* By way of example, in his Address to the Nation on Libya, President Obama expressed the need to protect the Libyan people against violence, the need to encourage the democratic impulses of the region, and the importance of the claim of Libyans to basic human rights. *See* Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

⁷⁰ Hoffman, *supra* note 17, at 922.

⁷¹ *Id.* at 923.

⁷² GHANI & LOCKHART, *supra* note 49, at 3.

⁷³ *Id.*

⁷⁴ Authors with expertise in the field of counterinsurgency have suggested the use of certain metrics to evaluate the progress of counterinsurgency campaigns. *See, e.g.*, DAVID J. KILCULLEN, COUNTERINSURGENCY 51–83 (2010). These metrics include the number the voluntary reports made to counterinsurgent forces, the number of IEDs found, the rate of participation in

are those which are necessary for the strengthening of failed or failing states.⁷⁵ The first standard is the provision of public security.⁷⁶ Second is the establishment of an effective democratic system.⁷⁷ The third measure of success is the ability of the state to defend its territorial borders,⁷⁸ and the fourth is the ability of a state to sustain itself economically.⁷⁹

1. Public Security

The first standard, public security, is referred to as the “central factor” because it allows for the movement of people and commerce.⁸⁰ Achieving a basic level of security is the “prerequisite to further stabilization,” and the key to long term peace.⁸¹ “Strange as it may seem, the military victory is the easiest part of the struggle. After this has been attained, the real challenge begins: the reestablishment of a secure environment opens a new opportunity for nation building.”⁸² In short, “a

government programs, transportation prices, the amount of investment capital entering or exiting the country, and kill ratios, to name just a few. *Id.* While the purpose of these metrics suggested by Kilcullen is to gauge the day-to-day and month-to-month progress of a counterinsurgency campaign, the metrics proposed in this paper are intended to provide an evaluation of the conflict’s end state.

⁷⁵ See generally ROBERT C. ORR, WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION (2004) (providing a comprehensive framework of priorities and options for post-conflict reconstruction).

⁷⁶ See Memorandum from COMISAF/CDR USFOR-A to the Soldiers, Sailors, Airmen, Marines, and Civilians of NATO ISAF and US Forces-Afghanistan, COMISAF’s Counterinsurgency Guidance (Aug. 1, 2010) [hereinafter COMISAF Counterinsurgency Guidance Memo]. The first principle of guidance from General David Petraeus was that the forces conducting counterinsurgency operations “Secure and Serve the Population.” *Id.* General Petraeus further stated that “[t]he decisive terrain is the human terrain. The people are the center of gravity. Only by providing them security . . . can the Afghan government and ISAF prevail.” *Id.* See also Memorandum from the Sec’y of Def. to Sec’ys of the Military Dep’ts et al., Implementing Counterinsurgency (COIN) Training Guidance to Support Execution of the President’s Afghanistan-Pakistan Strategy (May 24, 2010) [hereinafter Implementing COIN Memo] (stating that the keys to success in current counterinsurgency operations included first the “development of an Afghan government capable of maintaining internal security . . .”).

⁷⁷ See generally FRAGILE STATES STRATEGY, *supra* note 16, at 7.

⁷⁸ See WYLER, *supra* note 50, at 4.

⁷⁹ See *id.* at 5.

⁸⁰ See FRAGILE STATES STRATEGY, *supra* note 16, at 9.

⁸¹ See *id.* at 6.

⁸² STROMSETH ET AL., *supra* note 11, at 134 (quoting GEORGE K. TANHAM, WAR WITHOUT GUNS: AMERICAN CIVILIANS IN RURAL VIETNAM 138 (1966)).

secure environment is the ‘*sine qua non*’ of post-conflict reconstruction.”⁸³

Establishing security requires a competent police force—particularly at the community level⁸⁴—as well as the evaluation of the successes achieved in instituting the rule of law.⁸⁵ This includes the legal and judicial training and institutions necessary for successfully resolving disputes.⁸⁶ The challenge of establishing security in failing states—the states in which military intervention is most likely to occur—is complicated by the fact that these states often have populations that have lost faith in law and political institutions.⁸⁷ As seen in Afghanistan, a rule of law culture must be created, a daunting task made even more so in a society where “law and governance structures have been badly discredited.”⁸⁸

In Afghanistan, the turning of the populace to the Taliban to resolve disputes, rather than to the newly-created, but not readily available court system, is a measure that the war has not yet achieved its aims in this regard.⁸⁹ While the Taliban are known to be cruel, they are also perceived as fair, immediate, and transparent, leading local Afghans to turn to the Taliban rather than to government.⁹⁰ So, although the international community is working to train judges and police and to build an Afghan legal system, the government system and officials are too often seen as corrupt.⁹¹

2. *Effective Democratic Political Systems*

The second measure of success is the establishment of an effective democratic political system.⁹² As lack of governmental legitimacy leads to failed states, lasting success following a

⁸³ *Id.* (quoting CTR. FOR STRATEGIC AND INT’L STUDIES, ASS’N OF THE U.S. ARMY, PLAY TO WIN: FINAL REPORT OF THE BI-PARTISAN COMMISSION ON POST-CONFLICT RECONSTRUCTION (2003)).

⁸⁴ *See* FRAGILE STATES STRATEGY, *supra* note 16, at 7.

⁸⁵ *See generally* STROMSETH ET AL., *supra* note 11.

⁸⁶ *See id.* at 14–15.

⁸⁷ *See id.* at 137–38.

⁸⁸ *Id.* at 15.

⁸⁹ Troy Anderson, *Insurgent Justice*, COIN COMMON SENSE, July 2010, at 10 (relating that Afghans turn to the Taliban to settle property, water, tribal, marriage, and criminal disputes because the official government courts are too distant or take too long to resolve their cases).

⁹⁰ *See Id.*

⁹¹ *See* KILCULLEN, *supra* note 27, at 47.

⁹² *See generally* FRAGILE STATES STRATEGY, *supra* note 16, at 7–8.

nontraditional war must measure the effectiveness of the government in place.⁹³ While this includes free elections and an acceptable constitution,⁹⁴ more important is the political will of the leaders to “foster greater effectiveness and legitimacy.”⁹⁵ Corruption and the inadequate provision of basic public services hinders progress.⁹⁶ For this reason, the metrics of success must arguably include an appraisal of the functional national government, its perceived legitimacy, and the political will of its leaders to provide effective and incorrupt governance.

Effective democratic governance includes more than free and fair elections; it requires a series of political processes and governmental forms, individual rights, and effective institutions.⁹⁷ As stated in the United Nation’s 2002 *Human Development Report*:

Democratic governance in this fast-changing environment is about more than people having the right to vote. It must be about strengthening democratic institutions so that they keep pace with the changing distribution of economic and political power. And it must be about promoting democratic politics that make participation and public accountability possible⁹⁸

Democratic governance requires giving citizens a meaningful way to participate in and have a voice in the way they are governed.⁹⁹

3. Territorial Border Control

The stability of a state depends in large measure on its ability to control its borders.¹⁰⁰ The “lack [of] effective control of [a state’s] territory, military, or law enforcement,” provides “space where instability can fester,” such as the Pakistan-Afghanistan border and the Sahel region of Northern Africa.¹⁰¹ These “ungoverned spaces” and “safe

⁹³ See *id.* at 5–10.

⁹⁴ See *id.* at 9.

⁹⁵ See *id.* at 5.

⁹⁶ See *id.*

⁹⁷ See MORGAN, *supra* note 58, at 144.

⁹⁸ UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 61 (2002).

⁹⁹ By way of illustration, following several years of nontraditional warfare, and despite some irregularities and controversy, the newly organized Iraqi government was determined to be free and fairly elected by the nation’s citizens and “reflected a significant achievement in advancing the free exercise of human rights.” See U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: IRAQ (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154462.htm>.

¹⁰⁰ See WYLER, *supra* note 50, at 4.

¹⁰¹ *Id.* at 4–5.

havens” are potential incubators for instability and unrest, and must be controlled to achieve long-term stability.¹⁰² In Afghanistan in particular, the “capacity to eliminate internal violent extremists and their sanctuaries” has been highlighted as one of the keys to immediate and long-term success.¹⁰³

Borders must be controlled to protect against threats to a state’s economic viability as well. Porous borders can lead to breakdowns in regional trade and an increase in smuggling and illicit goods.¹⁰⁴ Increases in arms and drug trafficking and unmanaged flows of refugees and immigrants also threaten a state’s viability.

4. Economic Sustainability

The fourth metric for evaluating the success of a nontraditional war is the ability of the state following the conflict to sustain itself economically. This metric is based on the premise that many weak states are among the poorest in the world,¹⁰⁵ and weak states “often lack the conditions to achieve lasting economic development.”¹⁰⁶ Because security means more than protection from violence or physical danger,¹⁰⁷ the lack of a stable economy will always create a greater potential for threats against the security of people.¹⁰⁸

Success is measured on a sliding scale, and is not absolute. The strength of a state can be evaluated by the strength of its economic, institutional, political, and security foundation;¹⁰⁹ without these, the state is subject to falling back into instability and conflict.¹¹⁰ In evaluating the success of a nontraditional conflict, the question is not so much the successes or failures of the past, but whether *progress* is being made by the government in providing security and human rights. By way of illustration, progress could be measured by increases in the ability of

¹⁰² See *id.*

¹⁰³ Implementing COIN Memo, *supra* note 76, at 1 (identifying the keys to “immediate and long-term success as two-fold: facilitating the development of an Afghan government capable of maintaining internal security and providing effective, responsive governance and enhancing host nation capacity to eliminate internal violent extremists and their sanctuaries”).

¹⁰⁴ WYLER, *supra* note 50, at 8.

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ Azizur Rahman Rifaee, *Afghan Civil Society: An Emerging New Political Culture?*, in THE CHALLENGE OF REBUILDING AFGHANISTAN, *supra* note 61, at 231, 232.

¹⁰⁸ See *id.*

¹⁰⁹ See WYLER, *supra* note 50, at 18.

¹¹⁰ FRAGILE STATES STRATEGY, *supra* note 16, at 4.

people to engage in trade, travel, worship freely, obtain an education, or have access to a court for the redress of grievances—all which can be empirically evaluated—to name just a few examples. In sum, there is no black and white for success or failure, merely degrees.

III. HUMAN RIGHTS AS THE MEASURE OF SUCCESS

The measure of a successful state, at its core, is the ability and willingness of the state to provide basic human rights. As recently and dramatically evidenced in Tunisia and Egypt in January 2011,¹¹¹ as well as in Libya, Yemen, Bahrain,¹¹² and other Middle Eastern states,¹¹³ physical security and economic sustainment are insufficient to guarantee political stability. While establishing a foundation of a strong economy and physical security are critical to success following nontraditional wars, as the recent public uprisings in the Middle East have shown, entire populations are willing to risk both security and the economy in hope of obtaining democratic reforms and human rights.¹¹⁴

A. “WINNING HEARTS AND MINDS” BEGINS AND ENDS WITH EXPANDING HUMAN RIGHTS

In nontraditional warfare, fostering human rights and combating the enemy are not conflicting objectives. The same strategies employed to win nontraditional conflicts must be the same standards by which success is determined. The objectives of a democracy engaged in nontraditional warfare are arguably the same as organizations seeking to develop and protect human rights. The provision of human rights is a natural consequence of “winning hearts and minds” campaign,¹¹⁵ and is necessary to establish the “legitimacy and effectiveness” of the

¹¹¹ See, e.g., Babak Dehghanpisheh et al., *Rage Against the Regime*, NEWSWEEK, Feb. 7, 2011, at 3. See also Fareed Zakaria, *How Democracy Can Work in the Middle East*, TIME (Feb. 3, 2011), <http://content.time.com/time/magazine/article/0,9171,2046038,00.html>.

¹¹² Hadeel Al-Shalchi & Barbara Surk, *Bahrain Protesters Seek to Overthrow Royal Family*, WASHINGTON TIMES (Feb. 21, 2011), <http://www.washingtontimes.com/news/2011/feb/21/bahrain-protesters-seek-overthrow-royal-family/?page=all>.

¹¹³ Christopher Dickey, *When Strongmen Become Straw Men*, NEWSWEEK (Feb. 27, 2011), <http://www.newsweek.com/when-strongmen-become-straw-men-68599>.

¹¹⁴ See *id.*

¹¹⁵ See generally COUNTERINSURGENCY, *supra* note 19, at II-6, VIII-19.

government in the eyes of the people.¹¹⁶ Legitimacy is established when the citizens of a state not only have a secure environment, but when they have a voice in the system and understand that it is in their own best interests to support one side of the conflict over the other.¹¹⁷

For an outcome to be successful it must also be durable. Military guidance for counterinsurgency operations recognizes the need for “enduring security” and “lasting solutions,”¹¹⁸ solutions that will continue in force after the military troops have departed. The strategy for a lasting victory in nontraditional war requires the implementation of diverse, complex objectives. These include governance, economic development, public administration, and the rule of law¹¹⁹—all of which are necessary for creating a strong state and protecting human rights.

While some military guidance regarding the conduct of counterinsurgency operations (*Joint Pub 3-24*, for example) is relatively recent, the principle that victory is gained by achieving human rights is not. The *Small Wars Manual* of 1940 provides that the purpose of the counterinsurgent:

should always be to restore normal government or give the people a better government than they had before, and to establish peace, order, and security on as permanent a basis as practicable. Gradually there must be instilled in the inhabitants' minds the leading ideas of civilization, the security and sanctity of life and property, and individual liberty.¹²⁰

These goals closely align with the description of human rights found in major international human rights declarations, such as the Universal Declaration of Human Rights, which states that “[e]veryone has the right to life, liberty and the security of person.”¹²¹ These rights to life, property, and individual liberty are among the most basic of human rights, and are necessary not only to establish the legitimacy of a government, but also for promoting stability and for winning a lasting peace.¹²²

¹¹⁶ *Id.* at A-17, I-2.

¹¹⁷ *See id.* at A-17, I-2, III-11–III-12.

¹¹⁸ COMISAF Counterinsurgency Guidance Memo, *supra* note 76.

¹¹⁹ *See generally* COUNTERINSURGENCY, *supra* note 19.

¹²⁰ SMALL WARS MANUAL, *supra* note 1, at 32.

¹²¹ *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 3, 17, U.N. Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹²² COUNTERINSURGENCY, *supra* note 19, at III-6, III-11, III-12.

B. SUSTAINABLE SOLUTIONS THROUGH THE PROVISION OF HUMAN RIGHTS

Complete victory in a nontraditional war is famously difficult to achieve, primarily because victory does not come by military means alone.¹²³ In the case of an insurgency, for example, while the government may defeat the military cadre, insurgencies do not end until the root causes are addressed.¹²⁴ This is because the support necessary to create and maintain an insurgency is based on social, economic, and political discontent.¹²⁵

Root causes to an insurgency are also often closely related to the motivations of the revolutionaries, insurgents, or other anti-government forces fighting the non-traditional war. These core grievances may be either real or perceived, and include poor economic opportunities, repression, foreign occupation, government corruption, and/or religious extremism.¹²⁶ These grievances are then used and manipulated by insurgent or other non-government forces to drive support for the insurgency or nontraditional war.¹²⁷ More significantly, these root causes empower the insurgent force with a strong collective will.¹²⁸ The root causes must be addressed, or the nontraditional war becomes a contest of wills, a challenging task for the government of a fragile state.¹²⁹

Winning a nontraditional war is about lasting solutions, which are possible only when grievances are addressed and resolved. This is because, “[w]ith a few exceptions, lasting insurgency endings are shaped not by military action but by social, economic, and political change. At their core, insurgencies are battles for the control of public support.”¹³⁰ With insurgents using violence to create instability and insecurity,¹³¹ the

¹²³ See generally *id.* at I-2.

¹²⁴ See CONNABLE & LIBICKI, *supra* note 3, at 154. See also COUNTERINSURGENCY, *supra* note 19, at III-1.

¹²⁵ See CONNABLE & LIBICKI, *supra* note 3, at 154. See also COUNTERINSURGENCY, *supra* note 19, at III-1.

¹²⁶ See COUNTERINSURGENCY, *supra* note 19, at II-4 to II-5. For example, the Taliban in Pakistan exploits several grievances against the state, including the existing corruption within the government and unequal distribution of wealth and public services, in order to garner support. See also RASHID, *supra* note 51, at 236–37.

¹²⁷ See COUNTERINSURGENCY, *supra* note 19, at II-4 to II-5.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ CONNABLE & LIBICKI, *supra* note 3, at 154.

¹³¹ See *id.*

key to earning the public support essential to winning the conflict is to create sustainable security, livelihoods, governance, and development.¹³²

Sustainable security requires “lasting perceptions of safety and stability.”¹³³ People living in areas of insecurity are most concerned about violence to themselves, their families, or their homes.¹³⁴ This is the key task of human security—protecting ordinary people from violence.¹³⁵ This protection is also about human rights—primarily the “right to life, liberty and security of person,” as well as the right to own property.¹³⁶ Providing sustainable security is about more than merely protecting people, it is accomplished “in support of law and order where law and order is based on human rights.”¹³⁷

Just as providing human security is about civil rights, providing sustainable livelihoods is about social and economic rights.¹³⁸ This includes not only the “right to work” and “protection against unemployment,” but also “the right to a standard of living adequate for the health and well-being” of individuals and their families.¹³⁹ These needs continue to exist, even in the midst of violence.

Closely related to sustainable livelihoods is sustainable development. Sustainable development is tied to what an individual needs to live a dignified life.¹⁴⁰ While development in a failing state may initially require extensive humanitarian aid, this aid is generally not beneficial in the long term because it can harm or displace local production and industry.¹⁴¹ Long-term development strategies, such as

¹³² See SHANNON D. BEEBE & MARY KALDOR, *THE ULTIMATE WEAPON IS NO WEAPON* 90–106 (2010).

¹³³ *Id.* at 90.

¹³⁴ *Id.*

¹³⁵ *Id.* at 91.

¹³⁶ UDHR, *supra* note 121, arts. 3, 17.

¹³⁷ BEEBE & KALDOR, *supra* note 132, at 93.

¹³⁸ *Id.* at 98.

¹³⁹ UDHR, *supra* note 121, arts. 23, 25.

¹⁴⁰ *Id.* art. 1 (“All human beings are born free and equal in dignity and rights.”).

¹⁴¹ BEEBE & KALDOR, *supra* note 132, at 98–99. See also *Food Aid or Hidden Dumping?: Separating Wheat from Chaff*, OXFAM INT’L (Mar. 2005), http://www.oxfam.org/sites/www.oxfam.org/files/bp71_food_aid.pdf.

The greatest concern around food aid is the possibility that it can undermine the livelihoods of poor farmers by creating disincentives for local food producers, by flooding markets and depressing prices. Substantial volumes of food aid provided over a long-term basis could discourage local production, result in increased poverty, and create long-term food insecurity due to increased dependence on food imports. Regenerating agricultural production and local markets is central to any strategy for longer-term recovery and development.

Id.

education and the development of new skills is also important, especially for those who had been affected by conflict such as disabled persons and combatants suffering debilitating injury.¹⁴²

Finally, sustainable governance requires instilling the rule of law, which is:

a principle under which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.¹⁴³

To establish the rule of law is to set the foundation for many of the most fundamental human rights expressed in the Universal Declaration of Human Rights (UDHR), beginning with the right that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”¹⁴⁴

A system based on rule of law is one where the government accepts and protects its citizens’ human rights.¹⁴⁵ The rule of law arguably consists of two primary components, the formal structures and processes (including elections, constitutions, courts, and fair trial guarantees) and substantive commitments (to human rights, for example).¹⁴⁶ Internationally accepted human rights relating to the rule of law include the right to an effective remedy by a competent tribunal,¹⁴⁷ protections against arbitrary arrest or detention,¹⁴⁸ the right to a fair and public hearing by an impartial court,¹⁴⁹ and the right to the presumption of innocence.¹⁵⁰

Crucial to the rule of law is the principle that even government decision-makers be subject to the rules.¹⁵¹ This limits the potential for

¹⁴² BEEBE & KALDOR, *supra* note 132, at 100.

¹⁴³ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 1-40 (2008) [hereinafter FIELD MANUAL 3-07].

¹⁴⁴ UDHR, *supra* note 121, art. 7.

¹⁴⁵ See, e.g., U.S. AGENCY FOR INT’L DEV. ET AL., SECURITY SECTOR REFORM 4 (2009) (stating that the “Rule of Law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law”).

¹⁴⁶ STROMSETH ET AL., *supra* note 11, at 13.

¹⁴⁷ UDHR, *supra* note 121, art. 8.

¹⁴⁸ *Id.* art. 9.

¹⁴⁹ *Id.* art. 10.

¹⁵⁰ *Id.* art. 11.

¹⁵¹ See STROMSETH ET AL., *supra* note 11, at 70.

unfairness and corruption,¹⁵² thereby increasing respect by the public for the established legal system. Furthermore, holding government officials accountable increases the perceived legitimacy of the government, which in turn diminishes core grievances and motivations of non-state actors and insurgents to take actions against the government.¹⁵³

Establishing the rule of law is necessary to guard against human rights abuses, and to protect the existence of other human rights, such as freedom of expression, freedom of worship, and women's rights.¹⁵⁴ In short, "[p]romoting the rule of law thus seems to most human rights advocates like a critical component of protecting fundamental human rights."¹⁵⁵

Rule of law efforts have increased in recent years following a rise in the number of failed states, nontraditional wars, and human rights disasters in countries such as Bosnia (1992–1995), Kosovo (1998–1999), East Timor (1974–1999), and Sierra Leone (1991–1999)—all of which led to efforts to build or rebuild rule of law institutions.¹⁵⁶ One scholar noted that:

the rule of law revival we are experiencing today can be partly traced to the triumph of human rights . . . there has been an increasing demand for law, or, more specifically, for the treatment of human rights as justiciable claims rather than mere aspirations, and for legal institutions that are able to enforce these claims.¹⁵⁷

Due to the increased recognition rule of law implementation has had on successful nation building and post-conflict reconstruction, it has received a great deal of attention and increased funding from policy-makers.¹⁵⁸ Following this increase in recognition, an enormous part of the

¹⁵² See *id.*

¹⁵³ See generally, COUNTERINSURGENCY, *supra* note 19.

¹⁵⁴ See STROMSETH ET AL., *supra* note 11, at 59.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 62.

¹⁵⁷ STROMSETH ET AL., *supra* note 11, at 59 (quoting Owen Fiss, *The Autonomy of Law*, in SELA 2000, SEMINARIO EN LATINOAMERICA DE TEOIA CONSTITUCIONAL Y POLITICA: THE RULE OF LAW, I-26 (Jun. 8–11, 2000)).

¹⁵⁸ See CURT TARNOFF, CONG. RESEARCH SERV., R40699, AFGHANISTAN: U.S. FOREIGN ASSISTANCE 7 (2010) (describing the rule of law programs as extensive and involving multiple agencies, including the State Department, the Department of Justice, USAID, the Drug Enforcement Administration, as well as the Department of Defense); LIANA SUN WYLER & KENNETH KATZMAN, CONG. RESEARCH SERV., R41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 24 (2010) ("Civilian expenditures on [Rule of Law] support in Afghanistan have increased from an estimated \$7 million in FY2002 to an estimated \$411 million in FY2010, totaling \$904 million from FY2002 to FY2010."). See generally Lieutenant

US military efforts in Afghanistan and Iraq today are and were centered around providing for the rule of law and the safeguarding of human rights.¹⁵⁹

Winning durable success in a nontraditional war comes with an important condition. Understanding that lasting solutions must be built from the ground up, it is equally important to note that, “[i]n the end, sustainable security . . . can only be established by people who live there.”¹⁶⁰ Conversely, “[t]he most that outsiders can do is to establish safe spaces, through setting preliminary conditions, in order to lift the pall of fear so that people can freely determine their own futures.”¹⁶¹ Foreign military forces, humanitarian groups, and other non-governmental organizations may provide physical security, training, infrastructure, restore basic services, and supply funding—all with an eye towards expanding human rights—but all this will not be sufficient to win the war without great effort from the population.

IV. PROTECTING AMERICAN SECURITY INTERESTS BY EXTENDING HUMAN RIGHTS

An underpinning of human rights law is found in the doctrine of humanitarian intervention, where the sovereignty of a state can be disregarded in the face of abuse of power.¹⁶² With respect to human rights, the manner in which a state treats individual human beings, including its own citizens, is not solely the state’s own business and exclusively within its domestic jurisdiction—it is a matter of international concern and therefore a proper subject for regulation by international law.¹⁶³ As stated in one commentary: “A state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not, was regarded as having made itself

Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45.

¹⁵⁹ STROMSETH ET AL., *supra* note 11, at 62.

¹⁶⁰ BEEBE & KALDOR, *supra* note 132, at 197.

¹⁶¹ *Id.*

¹⁶² Daniel T. Murphy, *The Restatement (Third)’s Human Rights Provisions: Nothing New, But Very Welcome*, in COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 175, 178 n.12 (Joseph J. Norton et al. eds., 1992).

¹⁶³ See *id.* (concluding that a state’s treatment of its own nationals is not only a matter of its own concern, but is a proper subject of international concern). See also 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 (1987).

liable to action by any state which was prepared to intervene.”¹⁶⁴ Historically, these interventions have been justified based on human rights violations, such as religious persecution, extreme cruelty, governmental oppression, and persecution of minorities.¹⁶⁵ As these interventions are predicated upon human rights violations, the only justifiable result of such an intervention must necessarily include the restoration of such rights.

A. SPREADING DEMOCRACY IS VITAL TO AMERICAN NATIONAL SECURITY

A peaceful world requires stable states with effective governance.¹⁶⁶ American security requires allies, not enemies,¹⁶⁷ as well as the cooperation of governments that will not tolerate terrorism.¹⁶⁸ The 2010 US *National Security Strategy* expressly states that “[d]emocracies that respect the rights of their people remain successful states and America’s most steadfast allies.”¹⁶⁹ Human rights concerns are not at odds with nor subordinate to national security objectives, rather, support for and creation of effective, democratic governance allows for the growth of human rights that supports national security goals.¹⁷⁰

Democratic states are less likely to fight wars with other democratic states,¹⁷¹ and as a result, democratically-elected, constitutionally-based governments are the least likely to pose a threat to American security. Although democracies tend to engage in warfare as frequently as have nondemocratic states, “they almost never fight each other This absence of war between democratic states comes as close

¹⁶⁴ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963).

¹⁶⁵ See *id.* at 338, 340. Unfortunately, the use of humanitarian interventions were also badly abused by certain powers, such as Hitler’s occupation of Bohemia and Moravia in 1939, following his assertion of “assaults on the life and liberty of minorities.” *Id.* at 340.

¹⁶⁶ FRAGILE STATES STRATEGY, *supra* note 16, at 1–2.

¹⁶⁷ BEEBE & KALDOR, *supra* note 132, at 195 (explaining that governments and militaries engaged in nontraditional warfare must avoid taking actions that create more enemies, making the situations worse than before the interventions).

¹⁶⁸ FRAGILE STATES STRATEGY, *supra* note 16, at 1–2.

¹⁶⁹ THE WHITE HOUSE, *NATIONAL SECURITY STRATEGY* 8 (May 2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY].

¹⁷⁰ See William W. Burke-White, *Human Rights and National Security: The Strategic Connection*, 17 HARV. HUM. RTS. J. 249, 249 (2004).

¹⁷¹ See David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24, 24 (1992).

as anything we have to an empirical law in international relations.”¹⁷² Even though liberal, democratic states frequently become involved in wars with nonliberal, autocratic states, evidence indicates that “there exists a significant predisposition against warfare between liberal states.”¹⁷³

Evidenced in the language from the 1998 *National Security Strategy*, the US government recognizes that the spread of democracy plays a valuable role in national security.¹⁷⁴ For instance, “[d]emocratic governments are more likely to cooperate with each other against common threats, encourage free trade, and promote sustainable economic development.”¹⁷⁵ Democratic states are also less likely to wage war or abuse the rights of people, and hence, promoting democracies throughout the world advances American interests.¹⁷⁶

Supporting the creation of capable, democratic governments in fragile states is vital to preventing threats to US national security. For example, the threats associated with weak or failing states include safe havens for terrorists, organized crime, regional instability, and other humanitarian emergencies.¹⁷⁷ As stated in the 2010 *National Security Strategy*, the US “supports the expansion of democracy and human rights abroad because governments that respect these values are more just, peaceful, and legitimate.”¹⁷⁸ In sum, “[p]olitical systems that protect universal rights are ultimately more stable, successful, and secure.”¹⁷⁹

B. ADVANCING HUMAN RIGHTS ABROAD SAFEGUARDS NATIONAL SECURITY

Just as with the importance of the advancement of democracy abroad, “[b]etter protection of human rights around the world would

¹⁷² JACK S. LEVY, *THE CAUSES OF WAR: A REVIEW OF THEORIES AND EVIDENCE* 270 (1989).

¹⁷³ Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 PHIL. & PUB. AFF. 205, 213 (1983). There are exceptions to the maxim that democratic states almost never engage in war one with another, such as the case of Peru and Ecuador in 1941, and the repeated conflicts between Lebanon and Israel. *Id.* at 213 n.7. There are also instances of covert interventions by democratically elected governments directed against other democratically elected governments such as the efforts by the United States to destabilize the Allende government in Chile in the mid-1970s. *Id.* at 215 note.

¹⁷⁴ THE WHITE HOUSE, *A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY* (1998).

¹⁷⁵ *Id.* at 2.

¹⁷⁶ *See id.*

¹⁷⁷ *See generally* WYLER, *supra* note 50.

¹⁷⁸ 2010 NATIONAL SECURITY STRATEGY, *supra* note 169, at 37.

¹⁷⁹ *Id.*

make the United States safer and more secure.”¹⁸⁰ As observed in the national security strategies, democracy and human rights go hand-in-hand.¹⁸¹ It is increasingly evident that “states that systematically abuse their own citizens’ human rights are also those most likely to engage in aggression.”¹⁸² It comes as no surprise that states with the worst human rights records, such as North Korea,¹⁸³ Cuba,¹⁸⁴ and Iran¹⁸⁵ (as well as pre-9/11 Afghanistan¹⁸⁶ and Iraq¹⁸⁷ under Saddam Hussein), are the states that generally pose (or once posed) the most significant threats to US interests and world peace.

A long-standing tension exists between perceptions of national security interests and foreign human rights policy.¹⁸⁸ This tension has manifested itself in the words of US government policymakers who indicate a need to “balance a political concern for human rights against economic and security goals.”¹⁸⁹ The relationship between the foreign policy of human rights advancement and national security has a complex history, leading to criticisms that the US government often reserves its censure of human rights abuses only for those countries to which America is hostile.¹⁹⁰ Following 9/11, the United States faced the urgent—and contradictory—need to both establish closer ties with autocracies in the Middle East while simultaneously confronting the realization that it was the lack of human rights and democracy in these countries that

¹⁸⁰ Burke-White, *supra* note 170, at 249.

¹⁸¹ 2010 NATIONAL SECURITY STRATEGY, *supra* note 169, at 37 (describing democracy, human rights, and development as mutually reinforcing).

¹⁸² Burke-White, *supra* note 170, at 250.

¹⁸³ U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA (2010) (describing North Korea’s human rights abuses as “deplorable”).

¹⁸⁴ U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: CUBA (2010).

¹⁸⁵ U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: IRAN (2010).

¹⁸⁶ U.S. DEP’T OF STATE, AFGHANISTAN (2001) (describing in detail the abysmal human rights situation).

¹⁸⁷ U.S. DEP’T OF STATE, IRAQ (2001) (describing, among other human rights violations, the extrajudicial killings, corrupt election process, torture, and disappearances of Iraqis).

¹⁸⁸ See Burke-White, *supra* note 170, at 252.

¹⁸⁹ AM. ASS’N FOR THE INT’L COMM’N OF JURISTS, HUMAN RIGHTS AND U.S. FOREIGN POLICY: THE FIRST DECADE, 1973-1983, at 21 (1984) (quoting Secretary of State Cyrus Vance).

¹⁹⁰ The tendency of the United States to overlook human rights abuses in friendly nations during the Cold War era were common, such as support for Augusto Pinochet in Chile against the communist Salvador Allende, the Diem regime in Vietnam and the Batista rule in Cuba. Currently, nations with troubling human rights records may still receive significant U.S. aid and assistance in the name of national security, such as Saudi Arabia and Pakistan. See, e.g., PAKISTAN, USAID, <http://www.usaid.gov/pakistan> (last visited June 2, 2014). See also U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: PAKISTAN (2011) (describing Pakistan’s poor human rights record).

fostered violent extremism.¹⁹¹ As a result of this tension, the United States found itself criticized for policies that revealed “a deep reluctance to sacrifice even minor economic interests, let alone security interests, for human rights.”¹⁹²

This relationship between national security and human rights, however, may be more complementary than competing.¹⁹³ First, there is increasing evidence that states which are “founded on such individual rights as equality before the law, free speech and other civil liberties” are more likely to live at peace with their neighbors.¹⁹⁴ As discussed earlier, this line of reasoning parallels the argument that democratic states are unlikely to go to war with each other.¹⁹⁵

Second, the most basic of human rights associated with the rule of law are cited as necessary to combating and preventing terrorism. The lack of the rule of law “can lead to instability and violence and create fertile recruiting grounds for terrorist organizations.”¹⁹⁶ On the other hand, establishing the rule of law plays an important role in removing the conditions and abuses that give rise to aggression and terror.¹⁹⁷

Third, US economic interests need not necessarily be sacrificed in order to establish and protect human rights abroad. In an interconnected world, protection of human rights and the rule of law are of tremendous importance to the international development community and would-be investors.¹⁹⁸ The economic importance of establishing the rule of law is not only championed by human rights advocates, but by banks, businesses, and multinational corporations.¹⁹⁹ Sanctity of private property and enforcements of contracts are critical to modern conceptions of the free market, as the protection of these human rights creates stable, favorable business climate with increased investment and

¹⁹¹ See generally Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFF., Jan./Feb. 2003, at 84.

¹⁹² Burke-White, *supra* note 170, at 249, 253.

¹⁹³ *Id.* at 249–50.

¹⁹⁴ *Id.* at 254 (quoting Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1151 (1986)).

¹⁹⁵ *Id.* See also 2010 NATIONAL SECURITY STRATEGY, *supra* note 169, at 37.

¹⁹⁶ STROMSETH ET AL., *supra* note 11, at 60.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* at 58.

¹⁹⁹ See *id.* at 58–59. See also INT’L RULE OF LAW SYMPOSIUM, THE RULE OF LAW AND ECONOMIC DEVELOPMENT I (Apr. 16, 2007) (emphasizing that the “[a]bsence of the rule of law is a serious impediment to economic and business growth,” and citing the words of Laura Klein, General Counsel of Clorox Corporation, that the existence of the rule of law in a particular country is of paramount importance when businesses decide whether to invest in that country).

market opportunities.²⁰⁰ Evidence shows that basic human rights are a precondition for other types of rights, such as property and civil rights, and thereby enhancing economic efficiency.²⁰¹ Thus, increases in social rights contribute to economic productivity.²⁰² In particular, “economies of nations that protect property rights grow more rapidly than those of nations that do not protect property rights.”²⁰³ Foreign-policy goals of respecting and establishing human rights are therefore consistent with both US economic interests as well as sustainable, long-term economic growth in a weak or fragile state.²⁰⁴

C. HUMAN RIGHTS: THE AMERICAN WAY

America was founded on the premise of human rights, from the definitive expression of human rights in the Declaration of Independence²⁰⁵ to the US Constitution and the Bill of Rights. The US Constitution has either strongly influenced the creation of or has been the model for constitutions in states across the world.²⁰⁶ Examples include the Constitution of the Mexican United States in 1917 following (and during) the Mexican Revolution, the Constitution of India following its independence from Great Britain in 1947, as well as the constitutions of Japan and Germany after World II.²⁰⁷ The protections to democracy and human rights²⁰⁸ incorporated in these instruments serve as foundations for lasting governance and the beginnings of protections for human rights.

²⁰⁰ See Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 KYKLOS 509, 509–10 (2007).

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ David A. Leblang, *Property Rights, Democracy and Economic Growth*, 49 POL. RES. Q. 5, 5 (1996). See also Johan Torstensson, *Property Rights and Economic Growth: An Empirical Study*, 47 KYKLOS 231, 242 (1994) (finding that nations that do not protect property rights and engage in arbitrary seizures of property decelerate economic growth).

²⁰⁴ Andy McKay & Polly Vizard, *Rights and Economic Growth: Inevitable Conflict or ‘Common Ground’?*, OVERSEAS DEV. INST. (Mar. 2005), <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4353.pdf>.

²⁰⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

²⁰⁶ See Albert P. Blaustein, *Our Most Important Export: The Influence of the United States Constitution Abroad*, 3 CONN. J. INT’L L. 15, 15, 25 (1987). The U.S. Constitution has been used as a pattern for federalism (including the separation of powers, separate branches of government, and a system of checks and balances) and the expression of human rights. See *id.* at 25.

²⁰⁷ See *id.* at 22–25.

²⁰⁸ This is not to assert that the human rights asserted in the U.S. Constitution were created or first discovered in the United States. The claims of sovereignty by the people and human liberties

While the ideals within the US Constitution and the Bill of Rights²⁰⁹ existed prior to 1787, the constitutional formalization of human rights was an American innovation.²¹⁰ Not surprisingly, the need for a constitution—and accompanying principles of sovereignty by the people and human liberties—generally came about following a period of conflict. The Bill of Rights and other amendments to the US Constitution embody many of the same protections later prescribed by the UDHR, namely the freedom of religion, the right to peaceably assemble, and the freedom of expression.²¹¹ The Bill of Rights also includes statements of those rights associated with the rule of law, such as the right to equal protection under the law, due process, and the right to a speedy and a fair trial.²¹² The guarantee of human rights is a safeguard for peace, a sign of effective governance, and a protection against lost legitimacy and failed government.²¹³

While the history of American foreign policy reveals that the United States may not have always remained true to its human rights ideals in the face of compelling national security interests, it is the stated policy of the United States to defend human rights principles.²¹⁴ Following 9/11, former President George W. Bush declared that

were articulated centuries earlier by Kant, Goethe, Hume, Locke, Hobbes and Voltaire, to name a few. *See id.* at 25. Both the Magna Carta, first passed in 1215, and the Habeus Corpus Act of 1679 (persons unlawfully detained cannot be ordered to be prosecuted before a court of law) are early examples of codified protections of human liberties.

²⁰⁹ *See generally* U.S. CONST. amends. I–X.

²¹⁰ *See* Blaustein, *supra* note 206, at 15, 28.

²¹¹ *See generally* UDHR, *supra* note 121.

²¹² *See* U.S. CONST. amends. I–X.

²¹³ *See generally* WYLER, *supra* note 50, at 4, 25.

²¹⁴ However, the tension still remains, as seen in the language of Secretary of State Hillary Clinton's address in South Korea in 2009, when in response to the issue of pressing China on human rights, she said, "[S]uccessive administrations and Chinese governments have been poised back and forth on these issues, and we have to continue to press them. But our pressing on those issues can't interfere with the global economic crisis, the global climate change crisis, and the security crisis. We have to have a dialogue that leads to an understanding and cooperation on each of those." Interview with Hillary Rodham Clinton, Sec'y of State, Press Roundtable: Working Toward Change in Perceptions of U.S. Engagement Around the World, in Seoul, S. Kor. (Feb. 20, 2009), *available at* <http://m.state.gov/md119430.htm>. *See also* Hillary Rodham Clinton, Sec'y of State, Inaugural Richard C. Holbrooke Lecture on a Broad Vision of U.S.-China Relations in the 21st Century (Jan. 14, 2011), *available at* <http://m.state.gov/md154653.htm> (referring to human rights as a "matter that remains at the heart of American diplomacy," and saying, "Now, I know that many in China, not just in the government, but in the population at large resent or reject our advocacy of human rights as an intrusion on sovereignty. But as a founding member of the United Nations, China has committed to respecting the rights of all its citizens. These are universal rights recognized by the international community.").

“America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.”²¹⁵ President Barack Obama echoed these sentiments and reaffirmed America’s role in taking the lead in the fight for human rights in his 2009 speech to the United Nations:

And that is why we must champion those principles which ensure that governments reflect the will of the people. These principles cannot be afterthoughts—democracy and human rights are essential to achieving each of the goals that I’ve discussed today, because governments of the people and by the people are more likely to act in the broader interests of their own people, rather than narrow interests of those in power.²¹⁶

While government actors engaging in foreign policy may disagree as to the proportional value of vigorously asserting and advocating human rights in the face of economic or security concerns, the importance of human rights to the American experience is undisputed. Equally important is an up-front, clear understanding as to the costs involved in intervening in or engaging in nontraditional conflict—that is, the knowledge that to counter an insurgency, win or suppress a revolution, or engage in any other type of nontraditional war is a commitment to engage in a lengthy process of rescuing a fragile state, providing security, stability, democracy, and ultimately, human rights.

D. THE COST OF SUCCESS

Winning nontraditional war comes with a price.²¹⁷ Protecting America’s interests is expensive, yet government planners and foreign interveners have repeatedly underestimated the time, effort, and resources required for human rights and the rule of law to take root in a

²¹⁵ George W. Bush, President of the U.S., State of the Union Address (Jan. 29, 2002), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

²¹⁶ Barack Obama, President of the U.S., Speech to the United Nations General Assembly (Sept. 23, 2009), *available at* <http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html?pagewanted=all>.

²¹⁷ However, not intervening militarily, or intervening with insufficient force, also comes at a price. *See* BOOT, *supra* note 5, at 347. Two examples include the insufficient military intervention in Nicaragua in 1925 in which marines were withdrawn then ordered to return only a few months later in much greater numbers in order to restore peace, and the failed opportunity in revolutionary Russia in 1918 and 1919, when President Wilson and other Western states sent too little military assistance against the Bolsheviks. *See id.*

failed state.²¹⁸ The wars in Afghanistan and Iraq demonstrate the high price of nontraditional war, including the loss of human life.²¹⁹ From the time of the attacks on 9/11 to the end of 2010, more than \$1.078 trillion had been appropriated by the US government for the conflicts in Afghanistan and Iraq.²²⁰ According to one estimate, the total expenditures of these wars will total between \$4 and \$6 trillion, a figure which includes the long-term medical and disability costs of veterans.²²¹ Other costs of concern, which are more difficult to estimate, include decreases to military readiness and modernization.²²²

E. ESTABLISHING PROTECTIONS FOR HUMAN RIGHTS IN AFGHANISTAN

From the onset of the war in Afghanistan, US military planners understood the innate problem of “making the rubble bounce” in an “already destroyed and degraded country.”²²³ It soon became clear that the United States could not simply go to war in Afghanistan and leave the people in worse shape than they were under the Taliban.²²⁴ Human rights groups and humanitarian organizations—which had faced enormous obstacles and challenges in Afghanistan under the Taliban²²⁵—were quick to warn of the disastrous consequences of a US-led war and aerial

²¹⁸ STROMSETH ET AL., *supra* note 11, at 3–4.

²¹⁹ See generally U.S. Casualty Status, U.S. DEP’T DEF., <http://www.defense.gov/news/casualty.pdf> (last visited June 4, 2014). This website maintains a daily track of U.S. casualties from Operation Iraqi Freedom (OIF), Operation Enduring Freedom (OEF), and Operation New Dawn (OND), and as of January 14, 2011, total deaths of both U.S. military and DoD civilians were 4,421 in OIF, 14 in OND, and 1,449 in OEF. *Id.*

²²⁰ AMY BELASCO, CONG. RESEARCH SERV., RL 33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2011). Of this total spent on the two wars, about \$751 billion (66%) went to the Iraq war and \$336 billion (34%) went to Afghanistan. *Id.*

²²¹ See Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* (Mossavar-Rahmani Ctr. for Bus. & Gov’t, Faculty Working Paper No. 2013-01, 2013), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/publications/fwp/MRCBG_fwp_2013-01_Bilmes_financial_legacy.pdf.

²²² See, e.g., Otto Kreisher, *Industry Says War Has Hurt Military Modernization Efforts*, NAT’L J. (Apr. 16, 2008), http://nationaljournal.com/daily/industry-says-war-has-hurt-military-modernization-efforts-20080416?mrefid=site_search.

²²³ Memorandum from Holly J. Burkhalter, U.S. Policy Directory, Physicians for Human Rights, to Members of the ASIL-CFR Roundtable (Dec. 2, 2002), available at http://www.cfr.org/publication/5313/geneva_conventions.html?id=5313 [hereinafter Burkhalter Memo].

²²⁴ See *id.*

²²⁵ See RASHID, *supra* note 51, at 18, 50, 59, 74, 126, 207.

bombardment in a deeply impoverished country already suffering from a devastating famine.²²⁶

In Afghanistan, it eventually became clear that a successful resolution would only come after an extensive period of fighting and hundreds of billions of dollars in expenditures.²²⁷ “Rebuilding of the government and society of Afghanistan, as conceived by its planners, carried the hope that as a result of better education, democracy, political stability, tolerance, emancipation of women, protection of the rights of minorities, and more opportunities of employment, one can expect normalcy, political wisdom, rule of law and peace in that war torn country.”²²⁸ A plan encompassing such an extensive vision would necessarily have been made in view of past US and international failures in Afghanistan, failures that ultimately allowed the takeover by the Taliban and the suppression of human rights that accompanied it.²²⁹

Operations in Afghanistan and Iraq demonstrated that war planners must factor in that the cost of victory includes not only victory on the battlefield, the provision of security, and the foundation of a stable government—all daunting tasks in themselves—but also the costs of a plan for institutionalizing human rights. Without democracy and human rights, the newly established government established would lack legitimacy. This increases the risk that temporary success will soon lead to the “deadly cycle of repeated failure and recovery.”²³⁰

V. USING FUNDAMENTAL HUMAN RIGHTS STANDARDS TO EVALUATE THE OUTCOMES OF NONTRADITIONAL WAR

A. INTRODUCTION TO HUMAN RIGHTS

Human rights are those “freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human

²²⁶ Burkhalter Memo, *supra* note 223.

²²⁷ See generally BELASCO, *supra* note 220.

²²⁸ THE CHALLENGE OF REBUILDING AFGHANISTAN, *supra* note 61, intro.

²²⁹ *Id.* (“Probably, those who had initiated the process of rebuilding Afghanistan had in view the failure of the international community to help Afghans rebuild their country in the post-Soviet withdrawal period. As Afghanistan was ignored by Washington and those who had supported Jihad against the Soviet military occupation, the outcome was the worst form of bloodshed among the Mujahideen groups and the ultimate seizure of power by the Taliban.”).

²³⁰ FRAGILE STATES STRATEGY, *supra* note 16, at 4.

being should enjoy in the society in which he or she lives.”²³¹ Since World War II, there has been growing global recognition of human rights issues, giving rise to rapid development to a large number of international agreements on human rights.²³² However, nontraditional conflicts could not realistically be evaluated based on the numerous—and not universally accepted²³³—rights propounded in so many treaties. This is simply because treaties, which set forth protections for more aspirational human rights (such as access to health care or protections for the environment), require significant resources and would arguably be far beyond what could reasonably be provided by a newly-formed government emerging from a period of armed conflict or out of a failed state.²³⁴ In contrast, the UDHR and the International Covenant on Civil and Political Rights (ICCPR), include language respecting those fundamental human rights which would be of particular importance to a nation emerging from a conflict, such as the rights to freedom of speech, assembly, due process, and a fair trial. This article argues it is from these two documents that the fundamental rights and basic human liberties most closely aligned with success in a nontraditional conflict are found.

The UDHR and ICCPR, as well as human rights recognized as customary international law, encompass the primary, essential human liberties necessary to securing the lasting peace indispensable to the success of a nontraditional conflict. This is because the human rights embodied in this declaration and this convention are those that are most consistent with a military force’s mission of providing security, stability, and the rule of law.²³⁵ The rights regarded as customary international law

²³¹ 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, cmt. a (1987).

²³² See *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS OFF. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited June 4, 2014).

²³³ Of the treaties and resolutions listed, the United States, for example, is party to the UDHR, ICCPR, the CAT, the CERD, and the two optional protocols to the Convention on the Rights of the Child.

²³⁴ *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, UNITED NATIONS OFF. HIGH COMM’R FOR HUM. RTS. 11–13 (DEC. 2008), <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf> (recognizing that the ability of states to fully realize their economic, social and cultural rights may be hampered by a lack of resources, financial or otherwise).

²³⁵ This is not to suggest that those human rights set forth in the many other human rights treaties are of less importance, but merely a recognition that the provision of certain, more advanced, human rights would realistically be beyond the reach of a military force engaged in a nontraditional conflict or related post-conflict reconstruction effort to establish.

are simply those that are “such basic rights as to constitute peremptory norms of international law.”²³⁶

Adopted in 1948, the UDHR was the first internationally accepted document establishing human liberties and fundamental freedoms in detail, and it affirmed the existence of basic civil, social, political, and cultural rights.²³⁷ As observed in the commentary to the Restatement (Third) of the Foreign Relations Law of the United States, “Almost all states are parties to the United Nations Charter, which contains human rights obligations. There has been no authoritative determination of the full content of those obligations, but it is increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.”²³⁸ The UDHR, then, is a formal recognition of the “general acceptance that every individual should have rights in his or her society which the state should recognize, respect, and ensure.”²³⁹ These rights include fundamental affirmations against racial, ethnic, or sex discrimination,²⁴⁰ protections for life, liberty and security of person,²⁴¹ and prohibitions against torture and slavery.²⁴²

The rights detailed in the ICCPR have achieved near-universal acceptance as well, with seventy-two signatories and 167 parties, including the United States.²⁴³ In general, the ICCPR recognizes the right of self-determination, specifically, the right of people to “freely determine their political status and freely pursue their economic, social and cultural development.”²⁴⁴ Further, the treaty obligates the parties to enact legislation and adopt laws, where necessary, to give effect to the

²³⁶ Murphy, *supra* note 162, at 182. For a brief description of the human rights regarded as customary, see *infra* Part VI.C.

²³⁷ See generally UDHR, *supra* note 121.

²³⁸ 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, cmt. d (1987).

²³⁹ *Id.* Part VII, introductory note.

²⁴⁰ UDHR, *supra* note 121, art. 2.

²⁴¹ *Id.* art. 3.

²⁴² *Id.* arts. 4–5.

²⁴³ See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-4&chapter=4&lang=en (last visited Jun 4, 2014). Only a handful of countries have not signed or ratified (or in the case of North Korea, signed but then attempted to withdraw), including Saudi Arabia, Myanmar, Malaysia, Yemen, and the United Arab Emirates. Certain countries, including China, have signed but not ratified. See *id.*

²⁴⁴ International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

rights acknowledged in the covenant, and to provide an effective legal remedy for any violation of those rights.²⁴⁵

B. INTERNATIONALLY ACCEPTED HUMAN RIGHTS STANDARDS RELATING TO THE RULE OF LAW IN THE UDHR AND THE ICCPR

Establishing the rule of law is a precursor to the provision and protection of other human rights and providing a judicial safeguard, as well as a means for recourse and remedy for violations.²⁴⁶ At a minimum, the rule of law involves “due process, equality before law, and judicial checks on executive power.”²⁴⁷ These prerequisites are regarded by most human rights advocates as essential to the protection of substantive human rights.²⁴⁸

As described in section IV(B), above, many of the rights enumerated in the UDHR are directly associated with rule of law establishment. These rights include the right to equal protection before the law, prohibitions against *ex post facto* guilty findings, and protections against arbitrary interference in one’s privacy, home, family, and communication.²⁴⁹

The ICCPR also provides for basic rule of law protections. These begin with legal protections for the right to life, that a sentence of death may only be imposed following violations of the most serious crimes, and that such a sentence only be imposed by a “competent court.”²⁵⁰ The ICCPR provisions include protections for due process, requiring that detention or imprisonment may only be imposed following lawful procedures, that the accused be informed of the charges against him, that there be prompt judicial review of any arrest or detention, and that the accused has the right to expeditious judicial proceedings.²⁵¹

Like the UDHR, the ICCPR provisions afford equal rights for all persons before the law, the presumption of innocence, and the right to a fair and public hearing.²⁵² The rights relating to the rule of law in the

²⁴⁵ *Id.* art. 2, ¶¶ 2–3. The United States, however, has not enacted domestic legislation implementing the covenant. *See, e.g.,* *Sei Fujii v. State*, 38 Cal. 2d 718 (1952); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001).

²⁴⁶ *See* STROMSETH ET AL., *supra* note 11, at 59.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ UDHR, *supra* note 121, arts. 8, 11–12.

²⁵⁰ ICCPR, *supra* note 244, art. 6, ¶¶ 1–2.

²⁵¹ *Id.* art. 9.

²⁵² *Id.* *See also* UDHR, *supra* note 121, arts. 7, 10–11.

ICCPR go further than those in the UDHR, however, and include the right to legal assistance in the defense of the accused,²⁵³ the right of the accused to examine the witnesses against him, and the right against self-incrimination.²⁵⁴ The ICCPR also guarantees rights to judicial review and against double jeopardy.²⁵⁵

In sum, the implementation of the rule of law is significant both because of the human right protections inherent in the rule of law, as well as the enabling power of the rule of law to make possible the guarantees of other human rights. Without the rule of law, human rights violations would flourish, arrests and detentions would be arbitrary, there would be no effective mechanism for preventing torture or other cruel and unusual punishments, and individuals would likely be free to take the law into their own hands.²⁵⁶ In addition to guarding against human rights abuses, the established rule of law serves as a protective network for other rights such as freedom of expression and freedom of conscience.²⁵⁷ Thus, the commencement of the rule of law is “a critical component of protecting fundamental human rights.”²⁵⁸

C. FUNDAMENTAL HUMAN RIGHTS IN THE UDHR, THE ICCPR, AND GENERALLY ACCEPTED LAW

While it may be unsettled whether the rights in the UDHR are binding on states, the declaration has nevertheless become “the accepted general articulation of recognized rights,”²⁵⁹ leading to the assertion that the rights expressed in the UDHR have become customary international law.²⁶⁰ Similarly, the human rights provisions included in the ICCPR

²⁵³ ICCPR, *supra* note 244, art. 14, ¶ 2(d) (providing that the accused may “defend himself in person or through legal assistance of his own choosing” and that the accused may have legal assistance assigned to him in any such case “where the interests of justice so require”).

²⁵⁴ *Id.* art. 14.

²⁵⁵ *Id.* arts. 14, ¶¶ 5, 7 (stating that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law . . .”).

²⁵⁶ See STROMSETH ET AL., *supra* note 11, at 59.

²⁵⁷ See *id.*

²⁵⁸ *Id.*

²⁵⁹ 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters’ note 6 (1987).

²⁶⁰ *Id.* § 701, reporters’ note 1 (“Ordinarily, international law does not assume restrictions on state autonomy. But the universal acceptance of human rights in principle, and active international concern with human rights, has led to some readiness to conclude that states have assumed human rights obligations. There is a disposition to find legal obligation in indeterminate

have been accepted by a large majority of states, lending strength to the argument that the rights in the ICCPR (many of which closely resemble those rights in the UDHR) have also become customary international law.²⁶¹ Combined, these are the human rights that are so widely accepted and necessary to civilized society as to serve as the standards by which success in nontraditional conflict has been achieved.

In addition to the rights relating to the rule of law, the ICCPR and UDHR include basic social, economic, and political rights as well—rights that are basic to the progression and development of a society and democracy. These include the right to marry and found a family,²⁶² the right to own property,²⁶³ and the right to freedom of travel,²⁶⁴ the right of free exercise of religion,²⁶⁵ the right to free expression,²⁶⁶ the right to an education,²⁶⁷ the right to work,²⁶⁸ the right to rest and leisure,²⁶⁹ and the right to an adequate standard of living.²⁷⁰ The political rights include the right to freedom assembly and association²⁷¹ and the right to take part in one's government, including the right to free and open elections.²⁷²

The Restatement of the Law (Third), Foreign Relations Law of the United States sets forth six human rights recognized as generally accepted law.²⁷³ These are prohibitive in nature and include genocide, slavery, disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination.²⁷⁴ In addition, the restatement includes the provision that any “consistent pattern of gross

language about human rights in international agreements, *e.g.*, the United Nations Charter.”). *See also id.* § 701, reporters' note 4.

²⁶¹ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 230–31 (2d ed. 2000) (citing the inclusion of the rights expressed in the ICCPR in national law generally, as well as references to them in treaties and international instruments, as evidence that they are also customary law).

²⁶² *See UDHR, supra* note 121, art. 16 (including the right against forced marriage and equal rights during marriage).

²⁶³ *See id.* art. 17.

²⁶⁴ *See id.* art. 13. *See also ICCPR, supra* note 244, art. 12.

²⁶⁵ *See UDHR, supra* note 121, art. 18. *See also ICCPR, supra* note 244, art. 18.

²⁶⁶ *See UDHR, supra* note 121, art. 19. *See also ICCPR, supra* note 244, art. 19.

²⁶⁷ *See UDHR, supra* note 121, art. 26.

²⁶⁸ *See id.* art. 23.

²⁶⁹ *See id.* art. 24.

²⁷⁰ *See id.* art. 25.

²⁷¹ *See id.* art. 20. *See also ICCPR, supra* note 244, art. 21.

²⁷² *See UDHR, supra* note 121, art. 21. *See also ICCPR, supra* note 244, art. 25.

²⁷³ 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(a)–(f) (1987).

²⁷⁴ *Id.*

violations of internationally recognized human rights” would run afoul of international law.²⁷⁵ This broadly-drafted language refers to systemic violations of human rights, such as mass uprooting of a country’s population, denial of conscience and religion, or religious or racial discrimination.²⁷⁶

The human rights mentioned in this section are not exhaustive lists of those rights which could or should be used to evaluate the successful conclusion of a nontraditional war. Other human rights enumerated in the many other conventions and treaties may be appropriate as well, depending on the nature of the conflict and the goals of the states party to the conflict.²⁷⁷ However, these human rights listed here are a useful representation of those rights which must be established for a government to survive politically and economically and to establish cultural and social stability.

VI. CONCLUSIONS

A. HUMAN RIGHTS LAW FOR NONTRADITIONAL WAR: WHAT THIS MEANS FOR THE DOCTRINE OF LEX SPECIALIS

Under the Geneva Conventions, a distinction exists between non-international, Common Article 3 conflicts where the full body of LOAC generally does not apply, and international armed conflict under Common Article 2 where it does.²⁷⁸ It is generally agreed that international human rights law applies to non-international conflicts,²⁷⁹ “where the conflict is taking place within the territory of the State.”²⁸⁰ Human rights laws likewise apply in instances where the conflict has evolved into an occupation.²⁸¹

²⁷⁵ *Id.* § 702(g).

²⁷⁶ *Id.* § 702, cmt. m.

²⁷⁷ See generally *The Core International Human Rights Instruments and Their Monitoring Bodies*, *supra* note 232.

²⁷⁸ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 150–53 (2010).

²⁷⁹ *Id.* at 154 (“Generally speaking . . . common Article 3, and human rights law, apply in non-international armed conflicts.”).

²⁸⁰ Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 746 (2005).

²⁸¹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

The question of whether human rights law applies during armed conflict has been widely debated,²⁸² with the US position being that it does not, or should not, apply.²⁸³ The position of the US government has been that the law of armed conflict (LOAC) is the *lex specialis* of the battlefield,²⁸⁴ taking precedence over international human rights law.²⁸⁵

However, in a conflict where laying the groundwork for the protection of human rights is an objective, legal distinctions regarding the applicability or inapplicability of certain human rights laws are relatively unimportant. Where the strategy for victory includes establishing democracy and human rights, the military forces involved should give attention to both human rights law and LOAC. As is evident in the US-led conflicts in Iraq and Afghanistan, establishing respect for human rights and the rule of law were and are intrinsic to the overall US strategy for victory.²⁸⁶ Establishing this respect for human rights naturally requires that the forces engaged in the conflict show respect for the same principles they endorse.

B. MANAGING EXPECTATIONS, MEASURING PROGRESS, AND DEFINING VICTORY

The obstacles in the path of success are formidable. Nontraditional war and post-conflict reconstruction is slow, expensive, dangerous, and open-ended.²⁸⁷ The under-resourcing of nontraditional wars and subsequent transitions to stable government is common, yet hazardous.²⁸⁸ There also frequently exists the dilemma of whether to compromise with “spoilers” (such as the warlords in Afghanistan) who must be relied on because of expediency and lack of viable alternatives—concessions which “usually come back to haunt interveners a short way down the road.”²⁸⁹ Given the high cost of foreign intervention and nontraditional war, politicians and military planners cannot afford to

²⁸² Lubell, *supra* note 280, at 737.

²⁸³ See SOLIS, *supra* note 278, at 24.

²⁸⁴ *Id.* (noting that the International Committee of the Red Cross (ICRC), the International Court of Justice (ICJ), European countries in general, and human rights activists agree that human rights law always applies, and is employed together with the law of armed conflict on the battlefield).

²⁸⁵ See *id.* at 25. The view that human rights law and humanitarian law are separate legal regimes has eroded, with an overlap and intermingling of the two realms. See *id.* at 24–25.

²⁸⁶ See *supra* Part IV.

²⁸⁷ See STROMSETH ET AL., *supra* note 11, at 3–4.

²⁸⁸ See *id.* at 367–68.

²⁸⁹ *Id.* at 8.

sacrifice long-term commitments to human rights to short-term security concerns.²⁹⁰ Such sacrifice is unwise, as doing so ultimately results in a sacrifice of both security and human rights. With this understanding, “[i]t is important that expectations . . . are realistic and donor countries and agencies not become impatient with the pace of change or define progress in terms of their own short-term interests.”²⁹¹

Is it too much to expect a military force which has forcibly intervened in the affairs of another state to have the ability to establish human rights? Perhaps it is. But what is certain is that for the outcome of any military intervention to be successful, whether it is to counter an insurgency, for humanitarian reasons, or to curb human rights abuses, the ultimate success of the venture depends on the condition of the state after the armed conflict has concluded and the military troops depart. To evaluate success, the questions posed in the introduction must be answered in the affirmative. First, have the conditions been established for security? Second, has a true democratic government been instituted? And third, has advancement been made towards providing fundamental human rights? If not, then the risk of unrest and future conflict remains, and any successes achieved are likely to be short-lived.

Although the conditions for victory in a nontraditional war should be set forth early on, there is no pre-established timeline upon which success or failure can necessarily be achieved. An evaluation of success is an ongoing process; a single snapshot in time is not determinative. When measuring success in terms of human rights, “[i]t is more important to understand in which direction a state is moving along the framework and how quickly than it is to categorize a state as failed or not.”²⁹² Success is determined by progress, not necessarily by a foreign-imposed outcome on a preset timeline.²⁹³

Understanding what it takes to win a nontraditional war requires an understanding of what it means to succeed. If, in fighting a nontraditional war, a democratic nation such as the United States can

²⁹⁰ See *id.* at 60.

²⁹¹ Marvin Weinbaum, *The U.S. Involvement in Afghanistan Since 9/11: Strategic Objectives, Security and Reconstruction*, in *THE CHALLENGE OF REBUILDING AFGHANISTAN*, *supra* note 61, at 165, 179.

²⁹² COUNTERINSURGENCY OPERATIONS, *supra* note 42, at I-2

²⁹³ Syed Aamir Hameed, *The Challenge of Environmental Degradation in Afghanistan*, in *THE CHALLENGE OF REBUILDING AFGHANISTAN*, *supra* note 61, at 141, 153 (Human rights in Afghanistan, which are linked to notions of justice and religion, need to be advocated first and foremost by Afghans in order to avert a nationalist backlash against ‘foreign-imposed’ notions of human rights.).

establish those conditions that allow a people to “freely determine their own futures,” then that is the standard by which success should be judged—this freedom is the essence of human rights.²⁹⁴ As articulated by former President Harry Truman, “I believe that we must assist free peoples to work out their own destinies in their own way.”²⁹⁵

Whether in Kosovo, Iraq, or Afghanistan, it is ultimately the responsibility of the Kosovars, Iraqis, and Afghans to participate in the “development of a just and equitable society based on the rule of law, respect for human rights and fundamental freedom.”²⁹⁶ While the military, government, and non-government forces engaged in a nontraditional conflict have a responsibility to establish those conditions necessary for democracy and respect for human rights, the struggle for human rights ultimately rests with the people.

²⁹⁴ BEEBE & KALDOR, *supra* note 132, at 197.

²⁹⁵ Harry S. Truman, President of the U.S., Speech to a Joint Session of the U.S. Congress (Mar. 12, 1947), available at <http://www.ourdocuments.gov/doc.php?doc=81> (articulating what became known as the Truman Doctrine).

²⁹⁶ Rifae, *supra* note 107, at 237.